

**Title:**

Reinventing reasonableness: the adjudication of social and economic rights in South Africa,  
India and the United Kingdom

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**Declaration**

I, Anashri Pillay, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

## **Abstract**

In this thesis, the South African Constitutional Court's emerging model for the adjudication of social and economic (SE) rights is used as a starting point from which to consider how courts may give effect to these rights whilst respecting principles of democratic decision-making. The court has chosen to measure government action in this area against a standard of reasonableness. Reasonableness has historically been employed as a highly deferential standard of judicial review in South Africa and other common law jurisdictions. It is also a flexible standard. These features have given rise to charges that an approach based on reasonableness cannot but result in vagueness and weak enforcement of SE rights. The argument in this thesis is that these flaws are not an inevitable consequence of a reasonableness-centred model for SE rights adjudication.

The judges' approach is informed by evolving notions of judicial restraint. A range of factors impact on the intensity of review in SE rights cases. These factors will be relevant, whatever the approach adopted, because courts are bound to adjudicate SE rights within the limits of their constitutional mandate and institutional expertise. The most effective way of creating greater legal certainty and consistency in the judgments is for both judges and litigators to engage with these underlying factors.

This thesis draws on Indian and United Kingdom jurisprudence. Studies of both these jurisdictions show that political sensitivity is no longer an automatic bar to the justiciability of disputes. United Kingdom administrative law jurisprudence is used to show that reasonableness, as a standard of review, has the capacity to place onerous demands on government bodies. The Indian case-study serves as a warning against an *ad hoc* approach to judicial intervention and restraint in SE rights cases. Cases from this jurisdiction illustrate the importance of identifying and working with the factors that inform the intensity with which judges will interrogate government decision-making in SE rights disputes. This kind of engagement will allow courts to move towards a stronger, more principled approach to the rights.

## **TABLE OF CONTENTS**

1. Introduction *page 9*
2. Chapter One *page 19*
  - Social and economic rights and the courts: justiciability of politically sensitive issues
  - (1) Introduction *page 19*
  - (2) Social and economic rights in the South African Constitution: background to the adoption of the rights *page 21*
  - (3) Why justiciable social and economic rights? *page 29*
  - (4) A 'democratically justifiable' role for the courts *page 45*
  - (5) Limits on judicial review *page 54*
  - (6) Conclusion *page 62*
3. Chapter Two *page 64*
  - The Indian experience of social and economic rights adjudication
  - (1) Introduction *page 64*
  - (2) Directive principles of state policy, land reform and the judiciary *page 65*
  - (3) Post-emergency developments: the birth of public interest litigation *page 71*
  - (4) A retreat from judicial activism? *page 82*
  - (5) Conclusion *page 90*
4. Chapter Three *page 95*
  - Review for unreasonableness in administrative law
  - (1) Introduction *page 95*
  - (2) United Kingdom *page 98*
    - (a) From *Wednesbury* to the Human Rights Act *page 98*
    - (b) Requirements of reasonableness *page 104*
    - (c) The place of proportionality in English law *page 107*
    - (d) The scope of proportionality *page 109*
    - (e) The future of substantive review *page 115*

- (3) South Africa *page 117*
  - (a) Pre-1994 review for unreasonableness *page 117*
  - (b) Reasonableness and the Constitution *page 119*
  - (c) Rights, proportionality and the future of reasonableness under the Constitution *page 127*
- (4) Conclusion *page 129*
- 5. Chapter Four *page 132*

Using reasonableness to enforce social and economic guarantees in South Africa

  - (1) Introduction *page 132*
  - (2) Constructing an approach to social and economic rights adjudication: early cases before the Constitutional Court *page 137*
  - (3) Competing readings of the Constitutional Court's approach: criticism, praise and alternatives *page 145*
    - (a) Cass Sunstein's administrative law model *page 145*
    - (b) Criticisms of the Constitutional Court's approach, including the minimum core argument *page 147*
    - (c) An administrative law model? Alternative readings of the Constitutional Court's approach to social and economic rights *page 154*
  - (4) Developing the South African model for the adjudication of social and economic rights: implications of recent cases *page 162*
    - (a) Meaningful engagement *page 162*
    - (b) Flexibility and the fate of the minimum core argument *page 171*
  - (5) Conclusion *page 175*
- 6. Chapter Five *page 181*

Using reasonableness to enforce social and economic guarantees in the United Kingdom

  - (1) Introduction *page 181*
  - (2) Bill of Rights debates: implications for the protection of social and economic rights in the United Kingdom *page 183*

(3) Relevant United Kingdom cases	<i>page 189</i>
(4) Lessons from the United Kingdom jurisprudence	<i>page 198</i>
(5) Conclusion	<i>page 208</i>
7. Chapter Six	<i>page 209</i>
Factors influencing the intensity of review in social and economic rights adjudication	
(1) Introduction	<i>page 209</i>
(2) Principles guiding the intensity of review in South African and United Kingdom cases	<i>page 211</i>
(a) Relevant cases and the comparative framework: setting the terms of the analysis	<i>page 211</i>
(b) Constitutional balance of powers and relative institutional expertise in the cases	<i>page 212</i>
(c) The severity of the impact of the decision or policy on affected individuals and groups	<i>page 221</i>
(d) State conduct	<i>page 223</i>
(3) The relationship between the factors: relative weight and relevance	<i>page 226</i>
(a) Constitutional balance of powers	<i>page 227</i>
(b) Relative institutional expertise	<i>page 228</i>
(c) Severity of the consequences of government action or inaction	<i>page 230</i>
(d) State conduct	<i>page 232</i>
(4) The South African Constitutional Court's evolving approach: balancing the factors	<i>page 233</i>
(a) <i>Joe Slovo</i>	<i>page 233</i>
(b) <i>Mazibuko</i>	<i>page 237</i>
(5) Conclusion	<i>page 244</i>
8. Conclusion	<i>page 247</i>
9. Bibliography	<i>page 253</i>

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# **Reinventing reasonableness: the adjudication of social and economic rights in South Africa, India and the United Kingdom**

## **Introduction**

The enactment of the 1996 Constitution was a defining moment in South Africa's ongoing transition from apartheid state to rights-based democracy. The Constitution has a number of notable features. Amongst these, the inclusion of justiciable social and economic (SE) rights in the Bill of Rights has attracted perhaps the most attention. Justiciable SE rights are still something of a constitutional novelty. The South African Constitution has reinvigorated the debate about the capacity of judges to pronounce on these rights. Developments in this area of human rights in South Africa are being used by legal scholars, human rights practitioners and judges all over the world as a benchmark by which to measure the potential of SE rights adjudication to enhance equality and alleviate poverty. At the heart of this scholarship lies a concern that justiciable SE rights could place too much power in the hands of the judges. On one view, SE rights adjudication is a mistake because it inevitably involves judges in policy-making and resource allocation, areas in which they have no democratic mandate and relatively little institutional expertise.<sup>1</sup> In this thesis, I hope to contribute to the debate about whether, and how, justiciable SE rights may achieve their intended effect of facilitating a more equal society without threatening democratic values like participation and accountability.

As a starting point, it is important to note that South African judges have a constitutional duty to give effect to the SE rights in the Constitution. Whilst the question of justiciability dominated the SE rights discourse in the country for some time, the real question for South Africa is not whether judges should be pronouncing on these rights but how they should do so. Concerns that judges lack democratic legitimacy and institutional expertise cannot operate as a bar to justiciability in South Africa. But they are relevant in considering what the best judicial approach to the rights is, for South Africa and other

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<sup>1</sup> I draw on Jeffrey Jowell's classification of the limits on the judicial role here - see 'Judicial deference: servility, civility or institutional capacity?' (2003) *Public Law* 592. See also H Woolf, J Jowell and A Le Sueur (2007) *De Smith's Judicial Review* (Sweet and Maxwell) at 15-22.

jurisdictions in which SE rights could be adopted as part of a future constitutional design. Scepticism about justiciable SE rights cannot simply be dismissed – any model of SE rights adjudication must be responsive to the important issues raised by the critics.

My primary concern in this thesis is with the role of the judiciary in giving effect to SE rights. As with many others researching and writing in this field, this interest stems not from the conviction that judges are best placed to implement the rights but from the much more modest view that they have a useful role to play in the process. The emerging South African experience in this area demonstrates that the most effective campaigns for wider access to SE goods combine litigation and the threat of litigation with civil society mobilisation and engagement with government bodies at local, regional and national levels, outside the courts. This experience is borne out by that in other jurisdictions, India being the one most relevant to this thesis. One of the main arguments in this thesis, then, is that stakeholders – judges, litigators, scholars, civil society organisations and the people whose interests they represent – must consider the judicial approach to SE rights within the context of the broader attempt to make SE rights meaningful for people without access to water, food, housing, social security and other such goods. When judges interpret the rights and hand down remedies, they need to be sensitive to this wider context and to the limits of their role.

The South African Constitutional Court (CC) has adopted a reasonableness-based approach to the interpretation of SE rights. The judges' focus on reasonableness has attracted both praise and criticism. In this thesis, I argue that reasonableness is a valuable tool through which to develop a model of SE rights adjudication. Reasonableness has historically been employed as a highly deferential standard of judicial review of administrative action in South Africa and other common law jurisdictions. It is also a flexible standard. These features have given rise to charges that an approach based on reasonableness cannot but result in vagueness and weak enforcement of the rights. In this thesis, I argue that flaws in the CC's approach to the rights to date are not an inevitable consequence of the judges' decision to measure government's actions and omissions against a standard of reasonableness.

In recent years, courts in countries like South Africa and the United Kingdom (U.K.) have been more willing to interpret reasonableness in a way that places onerous requirements on government. But the process of detaching reasonableness from its deferent roots has been slow and inconsistent. In this thesis, I maintain that the variable nature of the reasonableness standard is one of its key strengths. Reasonableness has the capacity to accommodate concerns about the effectiveness of SE rights implementation alongside those about the appropriate role of the judiciary in a democratic state. Working with emerging theories of judicial intervention and restraint and applying these to SE rights adjudication, I argue that it is possible to develop guidelines for judicial action which would serve to enhance both legal certainty and judicial accountability.

My approach in this thesis is comparative and largely case-based. As noted above, justiciable SE rights are an unusual constitutional feature. However, courts in other jurisdictions have some experience of pronouncing on access to SE goods like housing, health and education through widely recognised constitutional rights to equality and dignity; social welfare legislation; SE directive principles of state policy and international human rights obligations which have been incorporated into domestic law. This experience could prove valuable for a South African audience. The main aim here is to suggest a means through which the South African CC's approach may be enhanced to most effectively protect SE rights in future cases. But lessons learned from South Africa and elsewhere could also be of some use to an international audience reflecting on calls for SE rights to be included in the constitutional structures of an increasing number of states.

The two jurisdictions I draw on in detail in this thesis are the U.K. and India. The development of reasonableness as a standard of review in South Africa may be traced to English law. The central role reasonableness plays in this thesis is, in itself, an important reason for using the U.K. as a comparative study. An analysis of U.K. law is instructive for a number of other reasons. In the U.K., scholars and practitioners have been engaged in intense debate about the constitutional role of judicial review.<sup>2</sup> For some time now, judges in the

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<sup>2</sup> See S Palmer 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' 2000 *Oxford Journal of Legal Studies* 63 at 63.

U.K. have exercised the power of review over social welfare legislation regulating access to housing and health care, for example. In such proceedings, the extent to which judges are willing to intervene has varied, but grounds of review like reasonableness and proportionality are increasingly applied to interrogate the substance of governmental decisions in judicial review proceedings that have significant SE implications. Thus, the debate about the limits of judicial review has been gaining momentum in this jurisdiction. The enactment of the HRA has led to a more explicit reconsideration of what is and is not justiciable before U.K. courts.

Although the HRA does not contain SE rights, courts in the U.K. have made decisions under other rights that have some impact on SE policy and resource allocation. Judges have interpreted provisions like Article 8, which protects the right to respect for family life, to include access to social welfare benefits. In doing so, they have engaged in a balancing exercise that focuses on proportionality when considering whether limitations of rights are legitimate. Increasingly, commentators in both South Africa and the U.K.<sup>3</sup> are calling for a real debate about the very nature and purposes of the judicial function<sup>4</sup> and for a ‘proper consideration of the role of a court in a constitutional democracy’,<sup>5</sup> instead of piecemeal critiques of particular judicial approaches as being too deferential or not deferential enough. This kind of deliberation will play a valuable role in informing the approach to SE rights adjudication that judges are developing in South Africa and elsewhere.

The Indian Constitution protects SE rights only indirectly. Government’s duties to ensure that all citizens have access to SE goods like shelter, education and health care are set out as directive principles of state policy. The drafters of the Constitution were of the view that the directive principles placed specific duties on the government. Supervising the implementation of those duties, however, was left up to the legislative and executive bodies rather than the judiciary. The directive principles were not intended to be enforced through

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<sup>3</sup> C Hoexter (2007) *The New Constitutional and Administrative Law Volume Two: Administrative Law* (Juta: Cape Town) at 132; T Allan ‘The constitutional foundations of judicial review: conceptual conundrum or interpretive inquiry?’ (2002) *Cambridge Law Journal* 87; and T Hickman ‘The courts and politics after the Human Rights Act: a comment’ (2008) *Public Law* 84. See also A Cockrell ‘“Can you Paradigm” – another perspective on the public law/private law divide’ (1993) *Acta Juridica* 227.

<sup>4</sup> Allan (note 3 above) at 112.

<sup>5</sup> D Davis ‘To defer and when? Administrative law and constitutional democracy’ (2006) *Acta Juridica* 23 at 40-1.

the courts. Despite this, following the 1975-77 state of emergency, the Supreme Court began to give effect to the directive principles in the process of interpreting justiciable civil and political (CP) rights like the rights to life and equality. In a series of cases brought via the court-developed public interest litigation (PIL) route, the judges adopted an expansive approach to the rights, particularly the right to life protected in Article 21 of the Constitution. Drawing on the directive principles, the Court held that Article 21 included a right to basic education, livelihood and health, for example. Commentators have praised the resulting jurisprudence as innovative and far-reaching. But the legacy of PIL and judicial activism in India is mixed. The Court's approach to SE rights adjudication is marred by inconsistency and there are few formal checks on the manner in which judges fulfill their constitutional obligations. Even the more successful examples of judicial involvement in widening access to SE goods, such as the right to food campaign, are plagued by the time-consuming, costly nature of litigation in Indian courts and non-implementation of court orders. There are valuable lessons to be learned about the benefits and limits of judicial involvement in the implementation of SE rights from this jurisdiction.

The argument in this thesis is set out in six chapters. In chapter 1, I engage with the debate about the justiciability of SE rights. As noted earlier, the South African Constitution already makes these rights justiciable and the argument in this thesis is mainly directed at developing an effective model of SE rights adjudication for South African courts. Furthermore, the issue of justiciability of SE rights has been canvassed at great length in the existing literature.<sup>6</sup> Consequently, I spend relatively little time on the question of whether SE rights are justiciable in the first place. Instead, I consider the relevance of arguments about justiciability in constructing an appropriate model of SE rights adjudication.

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<sup>6</sup> See, for example, H Steiner and P Alston (2007) *International Human Rights in Context: Law Politics Morals* (OUP: Oxford and New York) Chapter 4; N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *South African Journal on Human Rights* 451; E Murenik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464; and D M Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475; and N Jheelan 'The Enforceability of Socio-Economic Rights' (2007) 2 *European Human Rights Law Review* 146.

In her recent book, *Human rights transformed: positive rights and positive duties*,<sup>7</sup> Sandra Fredman recasts the justiciability debate as an argument about positive duties and their implications, rather than a dispute in which CP rights are set in opposition against SE rights. This conscious move away from the terms in which the arguments about justiciability have traditionally taken place is a powerful reminder that both ‘categories’ of rights are capable of giving rise to positive and negative duties.<sup>8</sup> There is support for this position in the work of many other scholars, international human rights law and the judgments of the South African CC. What this means is that concerns underlying arguments against justiciability of SE rights - that judicial attempts to enforce these rights are undemocratic and ineffective - are equally applicable to the adjudication of complex matters arising in CP rights cases and must be addressed with this in mind.

In chapter 1, I draw on the recent scholarship in this area to show that deficiencies in the functioning of all branches of government make the implementation of rights a complex task. There are instances in which judges should exercise a level of restraint – when a finding is likely to have wide-ranging and unpredictable consequences, for example. There are also cases in which it is possible, and important, that judges scrutinise government acts carefully and make orders upholding positive duties to protect rights. Decisions in such cases need not threaten principles of democratic decision-making. In such cases, courts could act to provide a forum for genuine democratic engagement between government and civil society or, at least, facilitate such engagement outside the courts. Rejecting approaches which suggest that policy implications always act as a bar to justiciability and those that insist upon a kind of CP rights-absolutism, some current understandings of rights adjudication emphasise the need for judges to strike a balance amongst a variety of interests. Thus, instead of basing her approach on the answer to the question ‘Does this case have policy implications?’ a judge would need to consider questions such as how many people are affected by the issue before her, the severity of the consequences of government action or inaction for the people

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<sup>7</sup> 2008 (OUP:Oxford).

<sup>8</sup> The impossibility of drawing sharp distinctions between CP and SE rights is a central part of the argument in chapter 1 and a theme running through this thesis. I have chosen to continue to refer to SE rights because, in the South African discourse at least, the term is used widely in both the literature and case-law on the subject. This thesis is not about the adjudication of positive rights generally. Instead, the argument is very much rooted to the CC’s approach to specific rights in the Constitution, for which the constitutional drafters, scholars and judges have accepted the ‘SE rights’ categorisation.

affected, and whether, in handing down judgment, she would be making policy or merely facilitating the implementation of policies that have been the subject of previous agreements between government and stakeholders. This kind of adjudicatory approach will always entail a level of uncertainty.<sup>9</sup> It is my view that an attempt to identify and understand the factors that make a case more or less amenable to strict judicial scrutiny will go some way toward containing this uncertainty. This would also promote that ‘culture of justification’, which a number of scholars and judges hoped would follow from the move to constitutionalism in South Africa and elsewhere.<sup>10</sup> The approach I outline in this thesis may place onerous demands on the legislature, executive and administrative bodies in government but it also demands more rigorous judicial reasoning.

Chapter 2 consists of a detailed study of relevant Indian jurisprudence. For commentators both inside the country and further afield, the Indian Supreme Court’s post-emergency development of PIL was a high watermark of judicial activism. There are three important points to be made here. First, whilst PIL was nothing short of a revolution in respect of who could bring cases to court and how such cases were brought, judicial expression of the content of rights was not as far-reaching. Second, even landmark judgments protecting rights to SE goods were flawed by insufficient grounding in legal principle. Institutional limitations on the court resulted in delays in getting final judgments, which were themselves often not implemented by government bodies. Third, since at least the early-1990’s the court has handed down a series of judgments in which SE rights claims have been superseded by governmental and corporate economic interests. Taken as a whole, the legacy of the Supreme Court in this area is ambiguous. Crucially, commentators do not locate the main problem with the court’s jurisprudence in a retreat from activism. Instead, it is the *ad hoc* nature of the court’s approach to SE rights that has attracted the most censure. The Indian Supreme Court’s judgments on SE rights have never been grounded in a cohesive theory about judicial restraint and intervention, either explicitly or implicitly. In this chapter, I argue that this legacy provides the most convincing argument for a more principled

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<sup>9</sup> Although arguably not much more than exists in the adjudication of claims in many other areas of the law, such as delict (tort) and family law, for example.

<sup>10</sup> E Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31 at 32; and De Smith (note 1 above) at 597-8.

approach to SE rights adjudication, responsive to concerns about rights enforcement and democratic legitimacy.

In chapter 3, I explore the concept of reasonableness further, with reference to South African and U.K. administrative law. The analysis of reasonableness, as it has developed through judicial review of administrative action, is necessary for two reasons. First, one of the main criticisms of the CC's focus on reasonableness is that it is grounded in review for reasonableness in administrative law. As a consequence of these administrative law origins, the approach encourages weak review by focusing on governmental fulfilment of process-related requirements. It is not an appropriate vehicle through which to develop the substantive content of SE rights. In order to properly evaluate this argument, a clear understanding of how the content of reasonableness has developed in administrative law is needed. The second reason for a close analysis of how courts have employed reasonableness in reviewing government action stems from my argument that variability of the intensity of review is an important tool for judges in giving effect to SE rights. The argument is built on the idea that reasonableness may be interpreted to demand more or less of government, depending on a range of factors. This view is supported by recent interpretations of reasonableness in South African and U.K. law.

In chapter 4, I analyse the most important judgments handed down by the South African CC on SE rights, with a focus on the role reasonableness has played in these judgments. A substantial part of the academic commentary on these cases examines the question of whether the CC's approach is an administrative law model. This is a question I discuss at some length in this chapter. My view is that, in the cases decided to date, the CC has drawn on an administrative law understanding of reasonableness. However, using reasonableness as a key concept in determining the content of the rights and identifying corresponding governmental duties does not tie the court to an outdated, overly deferential approach to judicial review. As with all other areas of the law, judicial review of administrative action in South Africa is changing in response to constitutional imperatives. Reasonableness no longer focuses only on the procedure through which decisions are made. It may also be interpreted to interrogate the substance of a decision. The CC has used

reasonableness to overturn governmental action in the area of SE rights implementation. Its later jurisprudence reveals a worrying tendency to defer to government in more complex cases but this caution is driven by the judge's understanding of their role rather than their reliance on a reasonableness-based approach.

In chapter 5, I examine selected U.K. cases, in which judges have been invited to pronounce on matters with resource and policy implications. These include cases in which judges have reviewed administrative action for unreasonableness and those in which the HRA is engaged. Cases in both categories show that judges are willing to use the concepts of reasonableness, proportionality and even minimum standards in their judgments; and the judgments provide a basis from which to discuss the factors that could legitimately influence judges in deciding on the level of scrutiny to apply in a particular case.

I use this comparative jurisprudence to argue that review for unreasonableness and the variable intensity of review with which it has become associated are valuable tools with which to approach SE rights adjudication. What is missing from the jurisprudence is clarity on the parameters within which variability works. Varying the intensity of review according to the individual circumstances of the case will never be an exact science but some attempt to identify and understand the factors that tend towards more or less intense scrutiny of government acts will make for increased certainty. The South African jurisprudence in this area is still in a formative stage. Attempts to work with the reasonableness paradigm and think about how it could be developed to give further substance to the rights is important for future cases.

Chapter 6 is an attempt to translate the ideas from earlier chapters into a more concrete model for SE rights adjudication. I draw on the material covered in chapters 4 and 5 to identify factors which judges use to decide the level of scrutiny applicable in a particular case. Decided South African and U.K. cases are a focal point of this chapter.<sup>11</sup> I have limited

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<sup>11</sup> I do not use the Indian jurisprudence in this chapter. The reasons for this flow from the conclusions reached in chapter 2. The Indian Supreme Court has not engaged with theories about judicial restraint in any serious way. Judgments often betray either minimal concern for the idea of deferring to the legislature and executive, or a tendency to translate deference into a non-justiciability doctrine

myself to cases decided by higher courts in which judges are called upon to pronounce on government SE rights policy in some way, or to give effect to positive duties on the state. I draw on these factors to suggest that there are four principal issues which affect the intensity of the review: the constitutional balance of powers; relative institutional expertise; the severity of the impact of the government action or inaction; and, to a limited extent at least, state conduct.

Identifying and categorising the factors referred to above is a useful step toward developing a model for SE rights adjudication. But it leaves several questions unanswered. I move on to consider these questions – how the factors interact with each other; and their relative importance in determining the intensity of review, in particular – in chapter 6. The main aim in this chapter is to find a course that is consistent with the theoretical basis for SE rights adjudication set out in chapter 1 and elaborated on throughout the thesis.

In concluding this thesis, I summarise the main points of my argument: SE rights need not present an insurmountable challenge to the institutional limits on courts and theories about democratic legitimacy; the South African CC's reasonableness-based approach to the rights may be developed into an effective model for SE rights adjudication; and the inherent flexibility of the approach means that it must be married with a principled approach to the intensity of review if concerns about legal certainty and judicial accountability are to be addressed. Adjudicating SE rights cannot be a formulaic exercise. The varied interests at stake demand a nuanced methodology. But, it is my argument that the classification described here may prove useful to judges and litigators not only in the context of South African courts grappling with these issues but in the context of other jurisdictions more sceptical of judicially enforceable SE rights.

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applicable in all politically sensitive matters. Neither approach is helpful in developing a model for the adjudication of SE rights.

## **Chapter One**

### **Social and economic rights and the courts: justiciability of politically sensitive issues**

#### **(1) Introduction**

In current legal discourse, the enforcement of social and economic (SE) rights is typically bound up with questions about the justiciability of these rights. A preoccupation with justiciability is ill-advised for two main reasons. First, it advances the perception that judges bear the primary responsibility for the implementation of these rights. Second, and this is especially relevant for a jurisdiction like South Africa in which SE rights are clearly justiciable, it shifts attention away from a detailed study of what the most effective judicial approach to the rights is. The result is an unhelpful polarisation of the debate. An attempt to seriously engage with the question of how judges should approach these rights demands an acknowledgement both that judges have a role to play in SE rights enforcement and that they are limited by institutional and constitutional factors in doing so. In defending their sides of the justiciability debate, neither those in favour of justiciable SE rights nor those against them, are keen to make these admissions.

Despite my reservations over the dominance of justiciability debates in the literature on SE rights thus far, I recognise that it is an issue I need to address in this thesis. SE rights are justiciable in South Africa but concerns about the capacity of judges to pronounce on them have an ongoing impact on how judges approach their task. These concerns are also significant for jurisdictions in which SE rights are not formally justiciable – because there is often indirect enforcement of the rights in their courts as well as growing domestic and international pressure for SE rights to be included in the constitutional fabric of these jurisdictions.

In this chapter, I begin by discussing the background to the adoption of SE rights in the South African constitutional drafting process. I address the justiciability debate in two stages. First, I argue that it is impossible to draw a bright line between SE and civil and

political (CP) rights. This argument has already been made by a number of commentators in the field and I draw on this literature, as well as the South African CC's approach in its early jurisprudence on SE rights in elaborating this point. Many of the influential arguments against justiciable SE rights are based on scepticism about judicial review in rights enforcement generally, however. Thus, in the second stage of the argument, I examine the underlying concerns of the sceptics, using Jeremy Waldron's work as the prime illustration of these concerns.

In the main, the criticisms are based on the view that judicial review is inherently undemocratic and therefore ill-suited to resolve disputes on complex moral issues. Courts may identify the issues in particular cases but resolution of these disputes should ultimately be left to legislatures. Waldron's harsh appraisal of the manner in which judges deal with cases is combined with an idealised view of the functioning of legislative bodies. The problem with this position is that neither of these views is a fair reflection of the reality in modern democracies. There are flaws in the manner in which both judicial and legislative institutions operate. Not only is the effectiveness of their respective decision-making processes in implementing rights questionable, the extent to which these bodies genuinely protect democratic values like public participation is also uncertain. The point is that these shortcomings are not unique to the processes of litigation and judicial reasoning. Once we accept that both legislative and judicial branches are limited in their capacity to give effect to constitutionally recognised rights, these issues cease to act as a categorical bar against justiciability and become relevant only in determining how judges should treat the rights.

In an attempt to reconcile judicial rights-protection with democratic legitimacy, many scholars are turning to 'dialogic' or 'social conversation' accounts of judicial review. Such accounts view the judiciary as one actor in a continual dialogue with other government branches, as well as civil society, about how best to protect rights. These accounts could allay worries about the democratic legitimacy of judicial pronouncements on politically sensitive matters – in the human rights sphere, these matters may be defined as those which 'require

difficult choices between the interests of the individual and the needs of society'.<sup>1</sup> In this chapter, I discuss these arguments and draw on aspects of dialogue theory as particularly relevant to the adjudication of the kind of SE rights protected in the South African Constitution. My argument is that SE rights adjudication in South Africa requires that judges reconsider their relationship with other arms of government. But the argument goes further. SE rights adjudication also demands that judges take into account considerations which have not explicitly come into play in the resolution of disputes over rights. Questions about whether government is taking action to progressively realise the rights within its available resources involve judges in a balancing exercise that gives weight to government's long-term policy objectives. As a result, re-thinking the judicial role in rights enforcement presents challenges not only to those generally suspicious of judicial review but also to commentators who support strong judicial review.

On a classic rights-based view of constitutionalism, rights act as trumps against government policies in which they come into conflict. Rights form part of a higher-order law, and judges are there to ensure that individual rights are not invaded as a side effect of government pursuing its long-term, broad policy goals. Adjudication of governmental duties to provide housing, health care, food, water and social security takes judges out of this conventional remit. It requires that judges go beyond the immediate impact of legislation and policies on individuals and consider their enduring effects on society as a whole. Classic rights-based constitutionalism envisages a strong review role for judges but in the much narrower realm of individual liberties. SE rights adjudication of the kind suggested in this thesis, then, requires concessions on both sides of the justiciability debate.

## **(2) Social and economic rights in the South African Constitution: background to the adoption of the rights**

The enactment of a post-apartheid Constitution in South Africa signalled a ground-breaking shift in the way people think about and use the law. For law students, legal professionals,

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<sup>1</sup> *A v Secretary of State for the Home Department* [2004] 2 WLR 87 (HL) at par. 38, as cited in S Fredman (2008) *Human rights transformed: positive rights and positive duties* (OUP:Oxford) at 95.

people and organisations affected by the law, the interim<sup>2</sup> and final Constitutions<sup>3</sup> fundamentally challenged received notions about the role of law in society. Post-1994 jurisprudence has focused on the immense task of teasing out the implications of the move from parliamentary supremacy, based on the English practice, to a system of constitutional supremacy<sup>4</sup> in all aspects of the law. The shift in our law is nowhere more apparent than in the reconsideration of the functions and limitations of judicial review, particularly in cases where fundamental rights are engaged.

The detailed and far-reaching Bill of Rights binds all organs of state, including the legislature, executive and the judiciary itself to its principles. Furthermore, private persons and bodies are also, in principle, bound to abide by the rights in the Bill of Rights.<sup>5</sup> Courts are required to apply or develop the common law so that it is compatible with the provisions of the Bill of Rights.<sup>6</sup> They are also given wide powers of interpretation in section 39 of the Constitution. The duties of courts in constitutional matters are elaborated in section 172 – amongst other things; courts are obliged to declare law or conduct inconsistent with the Constitution to be invalid to the extent of that inconsistency. Moreover, courts are empowered to make any order that is just and equitable.<sup>7</sup> Viewed in the abstract, these provisions do not give a clear idea of the enormity of the changes wrought to the judicial role – it is in the subject matter of potential disputes for adjudication that the full picture emerges. Amongst its unusual features, the Bill of Rights contains a right to equality that explicitly embraces a substantive model, concerned with the unequal impact of law and conduct, which may be applied against private parties as well as the state.<sup>8</sup> Under the Constitution, access to information<sup>9</sup> and just administrative action (defined as action which is lawful, reasonable and

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<sup>2</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>3</sup> Constitution of the Republic of South Africa, Act 108 of 1996. All references to ‘the Constitution’ hereafter will be to this document, the final Constitution.

<sup>4</sup> Provided for in sections 1(b) and 2, founding provisions of the Constitution.

<sup>5</sup> Sections 8 (1) and (2) of the Constitution.

<sup>6</sup> Section 8(3) of the Constitution.

<sup>7</sup> Section 172 (1) of the Constitution.

<sup>8</sup> Section 9 of the Constitution. On the substantive notion of equality, see P De Vos ‘Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence’ (2001) *Acta Juridica* 52; see also *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at pars. 50-52.

<sup>9</sup> Section 32 of the Constitution.

procedurally fair)<sup>10</sup> are embraced not just as good practice but as fundamental rights to which ‘everyone’ is entitled, in principle. Most importantly for the purposes of this thesis, the Constitution contains judicially enforceable SE rights such as the rights of access to adequate housing, health care services, food, water and social security.<sup>11</sup>

Whilst the fact that the Bill of Rights would contain CP rights was never in question, there was a significant amount of debate amongst academics, lawyers, constitutional negotiators and drafters about the constitutional status of SE goods.<sup>12</sup> Despite a measure of disagreement within the incumbent ruling party, the African National Congress (ANC), about the wisdom of giving judges the mandate to enforce SE rights, the ANC’s 1990 draft Bill of Rights included a number of SE rights. These guarantees ranged from directly enforceable minimum obligations - to ‘framework’ rights whose content was conditional upon the availability of resources and would be elaborated on through statutory amendment - to aspirational goals.<sup>13</sup> In a memorandum attached to the Bill, the ANC explained its decision to include the rights as arising from a wish to address the most compelling needs of ordinary South Africans in the Constitution, thereby securing a level of authenticity for the document.<sup>14</sup> The protracted negotiations leading up to South Africa’s first democratic elections in 1994 took place through a number of multi-party negotiating bodies: first, CODESA (the Convention for a Democratic South Africa), then CODESA II and, finally, the MPNF (the Multiparty Negotiating Forum). The MPNF-appointed technical committee on constitutional matters drafted a transitional or interim Constitution. The fundamental rights chapter of the interim Constitution protected certain SE rights of children in section 30. The document also contained rights with SE dimensions – the rights to equality, dignity and an environment that was not harmful to health or well-being, for example. However, the drafters stopped short of including generally applicable rights to housing, health, food, water and

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<sup>10</sup> Section 33 of the Constitution.

<sup>11</sup> Other constitutionally protected SE rights are access to land, education and certain children’s rights protected in sections 25(5), 29 and 28, respectively.

<sup>12</sup> See N Haysom ‘Constitutionalism, Majoritarian Democracy and Socio-Economic Rights’ (1992) 8 *South African Journal on Human Rights* 451; E Mureinik ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’ (1992) 8 *South African Journal on Human Rights* 464; and D Davis ‘The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles’ (1992) 8 *South African Journal on Human Rights* 475.

<sup>13</sup> Haysom (note 12 above) at 453.

<sup>14</sup> Haysom (note 12 above) at 453-4.

social security.<sup>15</sup>

After the 1994 elections, the task of drafting a new Constitution was left to the National Assembly and Senate, sitting together as the Constitutional Assembly (CA). In the drafting process, the CA had to follow the procedures and rules set out in chapter 5 of the interim Constitution. Most importantly, the text of the new Constitution had to be consistent with the 34 Constitutional Principles set out in Schedule 1 of the interim Constitution. As part of the constitutional drafting process, the CA initiated a public participation programme in which ordinary South Africans had the opportunity to write in, expressing their views about the content of a new Constitution. Requests for rights to jobs, houses and education loomed large in the responses received.<sup>16</sup> Ultimately, arguments in favour of constitutionally entrenched SE rights, directly enforceable by courts, carried the day and gave rise to the sections referred to earlier.

Sections 26 and 27, the two provisions on which much of this thesis is built, read as follows:

Section 26

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 27

- (1) Everyone has the right to have access to-
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

The sections are similarly structured. A first subsection sets out the content of the right in general terms. The CC has consistently interpreted the identically worded second subsection

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<sup>15</sup> See S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 at 375-7.

<sup>16</sup> E Christiansen 'Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321 at 339.

as an internal limitation on the rights to adequate housing; health care services; sufficient food and water; and social security. The subsection acts as an internal limitation in the sense that the scope of the rights in sections 26 and 27 is determined with reference to the questions of what is reasonable, whether the state is progressively realising its obligations and what resources are available to it. The third subsections are both negatively phrased rights prohibiting certain kinds of acts, which impact upon the rights to housing and health care, respectively.

The provisions owe much of their content to the International Covenant on Economic, Social and Cultural Rights (ICESCR). International law's treatment of SE rights has generated a huge amount of literature.<sup>17</sup> It is not of primary concern for this thesis. It suffices to say that, whilst the idea of an indivisible and universal set of rights encompassing both CP rights and SE rights was embraced in the Universal Declaration of Human Rights, the 1966 conventions cataloguing the rights took a different approach. CP rights, such as the right to vote and freedom of expression, were placed in the International Convention on Civil and Political rights (ICCPR), separate from rights to housing, health care, social security, education etc., which were contained in the ICESCR. In addition, whilst the ICCPR set up an individual complaints mechanism through a Human Rights Committee,<sup>18</sup> there is still no such mechanism under the ICESCR.<sup>19</sup> The ICESCR's Article 2 acknowledges certain limits to the domestic enforcement of the rights - that they may be progressively, rather than immediately

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<sup>17</sup> See H Steiner and P Alston (2007) *International Human Rights in Context: Law Politics Morals* (OUP: Oxford and New York) Chapter 4; D Brand and S Russell (2002) *Exploring the Core Content of Socio-economic Rights: South African and international perspectives* (Protea Book House: Pretoria); and M Craven (1995) *The International Covenant on Economic, Social and Cultural Rights* (Oxford and New York: Oxford University Press). For a summary of the development of economic, social and cultural rights in international law, see E Palmer (2007) *Judicial Review, Socio-economic rights and the Human Rights Act* (Hart Publishing: Oxford and Portland, Oregon) 11-26.

<sup>18</sup> See Articles 28-45 of the Convention.

<sup>19</sup> On 10 December 2008, the General Assembly unanimously adopted an Optional Protocol to the ICESCR, which provides for an individual complaints mechanism. The Protocol will enter into force three months after it has been ratified by 10 member states. It was opened for signature on 24 September 2009, see: [http://www.escr-net.org/resources\\_more/resources\\_more\\_show.htm?doc\\_id=421703](http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=421703), last accessed on 30 July 2010. The suggestion of an Optional Protocol setting up such a communications procedure has attracted little approval from states – see Steiner and Alston (note 19 above) at 364. How quickly the treaty enters into force remains to be seen. To date, only two states have ratified the Protocol – see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en), last accessed on 30 July 2010.

realised; and that their implementation is subject to the resources available to the state. It provides for a flexibility regarding the methods states may adopt in fulfilment of their obligations under the Convention in that it refers to legislative and any other ‘appropriate means’.<sup>20</sup> Finally, the ICCPR’s insistence that states party to the treaty provide an effective remedy for those whose rights have been violated including the development of judicial remedies where possible,<sup>21</sup> is not replicated in the ICESCR. In short, however strong the arguments about the indivisibility and interdependency<sup>22</sup> of the two sets of rights and the artificiality of sharp distinctions between them, there is no denying the fact that international law, largely in an effort at pragmatic accommodation of state attitudes, has historically treated them differently and assumed that the judicial enforcement of SE rights is generally more difficult to achieve.<sup>23</sup> The extent to which the text of the South African SE rights provisions challenges these ideas is ambiguous. The notion of the indivisibility of rights is significantly advanced by the fact that the Constitution sets out judicial remedies for violations of SE rights, alongside its protection of CP rights. But the internally limiting, common subsection (2) mentioned above mirrors the ICESCR’s distinctive treatment of the rights. As a result, the judicial approach to the SE rights provisions is a more revealing gauge of the status of these rights.

Section 71 of the interim Constitution required that the CC certify the text of the new

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<sup>20</sup> The general flexibility of the ICESCR regarding the approach of state parties to the rights is somewhat mitigated by the Committee on Economic, Social and Cultural Rights’ General Comments. General Comment 3, for example, elaborates on the terms ‘progressive realization’, ‘to the maximum of its available resources’ and ‘all appropriate means’. See also General Comment 9 on the domestic application of the Convention, which fleshes out the concept of ‘all appropriate means’. The General Comments fulfil an interpretive role but are non-binding and have not elicited widespread state acceptance.

<sup>21</sup> Article 2.

<sup>22</sup> See, for example, A Sen ‘Freedoms and Needs’ *The New Republic* (January 10 and 17, 1994) 31 at 32, as cited in Steiner and Alston (note 17 above) at 371-2.

<sup>23</sup> This attitude is reflected in the European and Inter-American systems for the protection and promotion of human rights. All European states are required to ratify the European Convention on Human Rights (ECHR), a catalogue of CP rights. No such requirement applies in respect of the European Social Charter. The Additional Protocol to the Inter-American Convention on Human Rights, setting out economic, social and cultural rights has been ratified by 14 states whereas the Convention itself has attracted 24 ratifications. See Steiner and Alston (note 17 above) at 280. Whilst the African Convention on Human and Peoples’ Rights contains SE rights alongside CP rights, enforcement of the rights has been generally problematic and it is, as yet, difficult to measure the system’s commitment to these rights. See, generally, K Acheampong ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: civil and political rights and socio-economic rights’ (2001) *African Human Rights Law Journal* 185.

Constitution before it came into effect. In the *Certification of the Constitution of the Republic of South Africa (First Certification case)*,<sup>24</sup> one of the arguments raised against certification was the inclusion of SE rights in the Bill of Rights. The objectors raised three arguments against the inclusion of these rights. First, they proposed that the rights should not have been included as they were not universally acknowledged to be fundamental rights.<sup>25</sup> Second, they claimed that the rights clashed with the separation of governmental powers required by Constitutional Principle VI, in that their enforcement would demand judicial invasion of the legislative and executive spheres, particularly when it came to determining budgetary allocation.<sup>26</sup> And finally, the detractors made the somewhat different argument that judicial enforcement of SE rights was impossible because of the budgetary issues the cases were likely to raise – as constitutional entrenchment and justiciability were necessary conditions of the recognition of SE rights *as rights*, they could not be recognised as such.<sup>27</sup>

On the first objection, the CC noted simply that Constitutional Principle II<sup>28</sup> allowed the CA to include rights beyond those universally accepted as rights.<sup>29</sup> The CC accepted that orders handed down by courts in the enforcement of SE rights could well have budgetary implications. However, the same concern applied to the enforcement of relatively uncontroversial CP rights to a fair trial, equality and freedom of expression, for example. Thus, enforcement of the right to a fair trial could require that resources be spent on legal aid and the right to equality could demand extension of state-provided benefits to previously excluded categories of people.<sup>30</sup> The duties to enforce CP rights and SE rights were not so different as to lead one to conclude that protection of the latter always leads to a violation of

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<sup>24</sup> 1996 (10) BCLR 1253 (CC). The CC did not certify the Constitution in this first certification case. The Constitution came into effect after the second certification decision *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1; 1997 (2) SA 97 (CC).

<sup>25</sup> *First Certification case* (note 24 above) at par. 76.

<sup>26</sup> *First Certification case* (note 24 above) at par.77.

<sup>27</sup> *First Certification case* (note 24 above) at par. 78.

<sup>28</sup> 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by and entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of the Constitution'.

<sup>29</sup> *First Certification case* (note 24 above) at par. 76.

<sup>30</sup> As occurred in *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC), discussed in chapter 4.

the separation of powers principle.<sup>31</sup> On the argument that enforcement of SE rights demanded that courts deal with budgetary issues, the CC held first, that Constitutional Principle II required only that *universally recognised* fundamental rights be constitutionally entrenched and judicially enforceable. As SE rights were not so recognised, they did not have to be enforced in the same way. Moreover, any budgetary implications arising from SE rights cases, did not rule out their justiciability – at the very least, the rights were negatively enforceable that is, capable of being protected against improper invasion.<sup>32</sup>

The *First Certification case* is commonly referred to as authority for the proposition that SE rights are justiciable before South African courts.<sup>33</sup> Certainly, the 1996 Constitution and the *First Certification case* put to rest the argument that SE rights are, in principle, non-justiciable.<sup>34</sup> They are an indication that South African courts are required to adjudicate SE rights. But the case left a number of questions unanswered. The judges gave no indication of whether SE rights are fundamental and enforceable in much the same way as civil and political rights. Moreover, the CC left the question of whether the rights could be interpreted to require positive action from the state open. This could well have been a consequence of judicial avoidance,<sup>35</sup> arguably appropriate in the first case touching on the enforcement of SE rights,<sup>36</sup> in which the court had simply to determine whether the Constitution met the conditions in chapter 5 of the interim Constitution. Nevertheless, the case points to an unresolved tension. On the one hand, the Constitution upholds the principle of a separation of

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<sup>31</sup> *First Certification case* (note 24 above) at par. 77.

<sup>32</sup> *First Certification case* (note 24 above) at par.78.

<sup>33</sup> See, for example, M Pieterse ‘Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience’ (2004) 26 *Human Rights Quarterly* 882 at 885; K Iles ‘Limiting socio-economic rights: beyond the internal limitations clauses’ (2004) 20 *South African Journal on Human Rights* 448 at 449; and *Minister of Health and Others v Treatment Action Campaign and Others* (No. 2) 2002 (10) BCLR 1033 (CC) at par. 25.

<sup>34</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 at par.20.

<sup>35</sup> The merits of this practice in South African constitutional analysis have been canvassed in some detail. See, for example I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138 and C Roederer ‘Judicious Engagement: Theory, Attitude and Community’ (1999) 15 *South African Journal on Human Rights* 486.

<sup>36</sup> But see G van Bueren ‘Including the excluded: the case for an economic, social and cultural Human Rights Act (2002) *Public Law* 456 at 459 in which she describes the CC’s approach in this case as a ‘very cautious, toe-dipping’ one which ‘drew heavily upon civil and political rights jurisprudence’.

governmental powers,<sup>37</sup> on the other it embraces a much wider, more ambitious role for the judiciary than previously existed in South African law and practice.<sup>38</sup>

SE rights adjudication occupies an extremely complicated position within this debate. South African courts are required to give effect to the SE rights in the Constitution. At the same time, the complexities of a comprehensive transformation agenda demand that the legislative, executive and administrative bodies be given a certain amount of freedom in which to set priorities and make long-term decisions about economic policy. The SE transformation of South African society is no less pressing a goal today than it was in 1994. Against the background of the vast disparities in wealth, health and education inherited from the apartheid regime, one of government's stated priorities at the first general election was large-scale redistribution of SE goods. Sixteen years on, whilst the country's track record on protection of CP rights is good, delivery of SE goods guaranteed in the Constitution has been considerably slower and less effective.<sup>39</sup> The question is how best to go about effecting urgent SE transformation today. Consequently, whilst the controversy over whether SE rights are, in principle, justiciable in South Africa is at an end, concerns about the constitutional role and institutional competence of judges impact on an ongoing debate about *how* judges should interpret and apply the rights.

### (3) Why justiciable SE rights?

Rights such as the right to health, housing and education have traditionally been considered to be beyond the realm of adjudication by courts on the basis that they are imprecise and vague, have considerable resource implications and demand positive action by the state.<sup>40</sup> Some commentators argue that the idea of SE rights undermines the very nature

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<sup>37</sup> See, generally, *First Certification case* (note 24 above) at pars. 106-113.

<sup>38</sup> See C Hoexter (2007) *Administrative Law in South Africa* (Juta: Cape Town) at 137.

<sup>39</sup> See, for example, L Berat 'The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3(1) *International Journal of Constitutional Law* 39; and R Calland and P Graham (eds.) (2005) *Democracy in the Time of Mbeki: IDASA's Democracy Index* (IDASA: Cape Town). See also D Hemson & M O'Donovan 'Putting numbers to the scorecard: presidential targets and the state of the delivery' in S Buhlungu, J Daniel, J Lutchman & R Southall (eds.) (2006) *State of the Nation: South Africa 2005-6* (HSRC Press: Pretoria).

<sup>40</sup> See, for example, M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 at 389.

of rights, defined as classical liberties (freedom of action) rather than goods,<sup>41</sup> as individual guarantees against state interference, which are immediately enforceable. However, these ideas about the nature of rights are consistent only with a very limited conception of what freedom entails. On this limited view, freedom is defined as the absence of interference – as Isaiah Berlin put it:

But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility, or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty *from*, absence of interference beyond the shifting, but always recognisable, frontier.<sup>42</sup>

This view of freedom has been steadily eroded in moral and political philosophy.<sup>43</sup>

Commentators have argued, instead, for a version of freedom that concentrates on increasing individual opportunities, capabilities or choices.<sup>44</sup>

Critics of freedom as non-interference attack as myths two fundamental assumptions underlying the traditional liberal notion. First, the sceptics point out that a person may be prevented from exercising her rights by factors such as ‘poverty, poor health, a lack of education’ as well as positive state interference with those rights.<sup>45</sup> Second, the idea of the state as occupying a neutral space between competing value positions, on which the notion of freedom as non-interference depends, is a fiction. Rather than being neutral, the state, on this conception of freedom, prioritises the individual over the collective, and ignores the fact that some people are better able to access social goods than others.<sup>46</sup> Freedom as the absence of state interference may be experiencing something of a re-birth in modern neo-liberalist thought<sup>47</sup> but the fundamental point for this thesis is that this is a version of freedom which the South African Constitution firmly rejects. The constitutional goals set out in the Preamble

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<sup>41</sup> D Kelly (1998) *A Life of One's Own: Individual Rights and the Welfare State* at 1, as cited in Steiner and Alston (note 17 above) 285-7.

<sup>42</sup> I Berlin ‘Two concepts of liberty’ in Isaiah Berlin (1969) *Four Essays on Liberty* (OUP: Oxford) at 126-7. See also R Dworkin (1978) *Taking Rights Seriously* (Harvard University Press: Cambridge, Massachusetts) at 267.

<sup>43</sup> The literature on this issue is vast and I do not attempt to summarise it here. As the South African Constitution already takes a clear position against a restraint-based model of freedom, the debate is not one I wish to spend too much time on. For a recent analysis, see Fredman (note 1 above), chapter 1.

<sup>44</sup> See Fredman (note 1 above) at 10-11.

<sup>45</sup> Fredman (note 1 above) at 11.

<sup>46</sup> Fredman (note 1 above) at 20-21.

<sup>47</sup> Fredman (note 1 above) at 10. On arguments against recognising positive duties on the state, based on globalisation and privatisation, see Fredman (note 1 above) at 40-62.

include a commitment to equal protection of the law and fundamental human rights, as well as social justice and the improvement of the quality of life of all citizens. Most significantly, the Preamble refers to the need to ‘free the potential of each person’. These themes flow through the Bill of Rights – most obviously in the SE rights provisions themselves but also in the equality provision. Amongst other things, the latter provision states that equality ‘includes the full and equal enjoyment of all rights and freedoms’ and that measures aimed at advancing those who were previously disadvantaged may be taken in fulfilling this aim.<sup>48</sup>

Once we move away from the view of freedom as non-interference, an argument that SE rights are, in principle, non-justiciable because they entail positive duties is impossible to sustain. This is because the ‘richer conception of freedom reveals that political rights can also entail positive duties’.<sup>49</sup> Moreover, this richer view of freedom also undermines other bases on which commentators usually attempt to draw a bright line between traditional CP rights and SE rights.<sup>50</sup> The problem of vagueness, for example, also applies to duties of restraint or negative duties. This is because most such duties are subject to limitation and institutions, whether legislative or judicial, need to find some means of deciding what those limitations are.<sup>51</sup>

In some, more nuanced non-justiciability arguments, commentators acknowledge that enforcement of CP rights may also have budgetary implications but believe that these do not compare to the widespread economic implications of enforcing SE rights.<sup>52</sup>

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<sup>48</sup> Section 9(2) of the Constitution.

<sup>49</sup> Fredman (note 1 above) at 67. Drawing on Sen’s ‘capability theory’, Fredman supports a view of freedom as agency (at 11).

<sup>50</sup> Pieterse (note 40 above) at 389 - 90. For a recent, detailed examination of the arguments for and against judicial enforcement of SE rights, see N Jheelan ‘The enforceability of socio-economic rights’ (2007) 2 *European Human Rights Law Review* 146. See also, van Bueren (note 36 above); Pieterse (note 40 above) at 389-99 especially; A Neier ‘Social and economic rights: a critique’ (2006) 13/2 *Human Rights Brief*, as cited in Steiner and Alston (note 17 above) at 283-4; Haysom, Mureinik and Davis (note 12 above).

<sup>51</sup> Fredman (note 1 above) at 71.

<sup>52</sup> See A Neier (note 50 above) at 283; M Tushnet ‘Social Welfare Rights and the Forms of Judicial Review’ (2004) 82 *Texas Law Review* 1895 at 1896 – 7. See also Cass Sunstein’s argument, made in the context of eastern European states going through a transition from communism to a market economy – ‘Against Positive Rights’ (1993) 2/1 *East European Constitutional Review* 35, as cited in Steiner and Alston (note 17 above) at 317-8. Compare Sunstein (2001) *Designing Democracy* (OUP: Oxford and New York) at 222 –5.

However, as pointed out by Marius Pieterse, there are aspects of SE rights which are easier to define and less expensive to enforce.<sup>53</sup> Furthermore, courts may play a variety of roles in the enforcement of these rights: the duty may be one of directing and overseeing implementation of government SE policy, rather than designing that policy itself.<sup>54</sup> The South African CC's approach to the question of justiciability of SE rights in the *First Certification* decision, discussed above, was premised on exactly this kind of rejection of sharp distinctions between the two categories of rights. In short, the arguments against justiciability described above cannot provide a principled basis from which to claim that these rights are inherently non-justiciable when they are based on a demonstrably unsound strict divide between categories of rights.<sup>55</sup>

But, as noted by Sandra Fredman, some scholars present a more fundamental challenge to SE rights adjudication.<sup>56</sup> Their argument is not that judges are ill-suited to adjudicate particular kinds of rights claims but that all rights claims are, by their nature, so important that it cannot be left up to judges to resolve them. To do so would be inherently undemocratic. Prominent commentators from a 'left' tradition<sup>57</sup> are returning to a Benthamite or neo-Benthamite vision of democracy, in which fundamental questions of law are resolved through parliamentary, rather than judicial, processes.<sup>58</sup> A large part of the work on political constitutionalism within the left tradition in the U.K. draws on the

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<sup>53</sup> See General Comment 3 of the *ICESCR* at par 5.

<sup>54</sup> C Fabre 'Constitutionalizing social rights' (1998) 6 *Journal of Political Philosophy* 263, as cited in Steiner and Alston (note 17 above) at 316 and Neier (note 50 above).

<sup>55</sup> As Neier (note 50 above) himself acknowledges when he clarifies that his objection is to broad constitutional promises of access to SE goods. He accepts that constitutional provisions with a 'level of legislative specificity' may be enforced through the courts. As I will argue below, this kind of constitutional and legislative specificity is unusual, as drafters cannot predict all the circumstances in which the provision concerned may be applied. A certain amount of interpretation is, of necessity, left to the courts – with respect to CP as well as SE rights. It is impossible to escape the need for judges to play some part in defining and limiting their own role in these circumstances.

<sup>56</sup> Note 1 above at 100.

<sup>57</sup> David Dyzenhaus makes this point and identifies a commitment to social justice and a conception of democracy which the legislature plays the principal political role as important features of a 'left' tradition. D Dyzenhaus 'The left and the question of law' (2004) 17 *Canadian Journal of Law and Jurisprudence* 7 at 24.

<sup>58</sup> Dyzenhaus (note 57 above) at 7, 11 and 29.

theory of U.S. constitutional theorist, Jeremy Waldron.<sup>59</sup> His work has become influential in South African constitutional theory as well.<sup>60</sup> Waldron set out his argument against the judicial review of primary legislation in a recent article.<sup>61</sup> It is worth considering the main points of that argument in some detail here.

Waldron's scholarship is rooted in the idea that each person is a 'thinking agent' endowed with an ability to deliberate morally, to see things from others' point of view, and to transcend a preoccupation with his own particular or sectional interests' and that, principal amongst all rights, is the right to participation.<sup>62</sup> Waldron argues that there is no necessary correlation between a belief in rights and an insistence on rights-based judicial review.<sup>63</sup> He objects to the judicial review of primary legislation for two main reasons. First, he suggests that there is little support for the view that rights are more effectively protected by judicial review than they would be through the political procedures of democratically elected legislatures. This argument is connected to the relative outcomes of courts as opposed to legislatures when it comes to rights protection. Waldron's second argument is that, irrespective of whether courts produce rights-enhancing outcomes, they lack democratic legitimacy.<sup>64</sup> His argument is against strong judicial review – which allows courts to refuse to apply legislation in the case at hand, modify that legislation to make it consistent with human rights norms or even strike down a statute.<sup>65</sup> The argument is conditional on four assumptions:

We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative

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<sup>59</sup> T Poole 'Legitimacy, rights and judicial review' (2005) 25(4) *Oxford Journal of Legal Studies* 697 at 720. Waldron's best known work in this area is (1999) *Law and Disagreement* (Clarendon Press: Oxford).

<sup>60</sup> See, for example, P Lenta 'Democracy, rights, disagreements and judicial review' (2004) 20 *South African Journal on Human Rights* 1; 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544.

<sup>61</sup> 'The core of the case against judicial review' (2005-2006) 115 *Yale Law Journal* 1346.

<sup>62</sup> Waldron (note 59 above) at 250, and chapter 11 on participation generally.

<sup>63</sup> Note 59 above at 212.

<sup>64</sup> Waldron (note 61 above) at 1351, 1353. In the U.S., this problem tends to be referred to as the 'counter-majoritarian difficulty', in Alexander Bickel's terminology. According to Bickel, the Supreme Court frustrates the will of the people's representatives when it declares a statute to be unconstitutional - *The Least Dangerous Branch* (1986), as cited in Waldron (note 61 above) at 1349, note 7.

<sup>65</sup> Waldron (note 61 above) at 1354.

basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what commitment to rights actually amounts to and what its implications are) amongst the members of society who are committed to the idea of rights.<sup>66</sup> Some further explanation of these assumptions is necessary. As Waldron points out, by reasonably well-functioning legislative bodies, he is imagining, not perfect institutions which habitually hand down legislation everyone agrees to be just, but ones in which the usual safeguards apply. These include deliberation within a large group of people, debate, voting, intense committee scrutiny, and the consideration of matters at a number of different levels. More importantly, there are ongoing deliberations about how these processes could be improved. These deliberations are rooted in a ‘culture of democracy’ which prizes ‘responsible deliberation’ and political equality.<sup>67</sup> Waldron also assumes that the legislative procedures are the subject of sustained review, that members of the society understand that if they consider there to be inequalities of representation in the system, this is a legitimate criticism to make. Parliament has the capacity to make changes to electoral and legislative procedures if these are considered necessary to remedy the inequalities.<sup>68</sup>

On judicial institutions, Waldron argues that they ‘respond to particular claims brought by particular litigants’, handle these matters within the framework of ‘binary, adversarial presentation, and ‘refer to and elaborate their own past decisions on matters that seem relevant to the case at hand’.<sup>69</sup> The society’s commitment to rights, one of Waldron’s assumptions referred to above, is expanded upon as a commitment to individual and minority rights. There may well be people in the society who reject the notion of rights altogether but this does not detract from the general consensus on respect for rights. Where respect for rights in a society is actually ‘tenuous and fragile’, the case is a non-core one in which Waldron’s main arguments do not apply.<sup>70</sup> This consensus about respect for rights exists alongside considerable and serious disagreement about what these rights are and what they mean.<sup>71</sup> There might be a Bill of Rights relevant to the disagreement and each side to the

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<sup>66</sup> Waldron (note 61 above) at 1360.

<sup>67</sup> Waldron (note 61 above) at 1361, 1362.

<sup>68</sup> Waldron (note 61 above) at 1362.

<sup>69</sup> Waldron (note 61 above) at 1363.

<sup>70</sup> Waldron (note 61 above) at 1366.

<sup>71</sup> Waldron (note 61 above) at 1366-7.

disagreement will use the text to support its view but such a document will not, of itself, provide a resolution, as in Waldron's terms 'the bland rhetoric of the Bill of Rights was designed simply to finesse the real and reasonable disagreements that are inevitable among people who take rights seriously for long enough to see such a Bill enacted'.<sup>72</sup>

Waldron accepts that when a statute is enacted, its potential impact on rights may not be immediately obvious to legislators but argues that this supports weak, not strong, review. Courts may identify the rights issues but not settle them – the position in the U.K. where powers of courts extend only to declarations of incompatibility with the HRA is an example here.<sup>73</sup> Rather than simply empowering the majority, legislatures, Waldron argues, are institutionally designed to take account of the outcomes of their decisions for different groups of people. Information about the acceptability of 'various options to different sections of the society is fed into the decision-process'.<sup>74</sup>

As to why judicial review is less suited to produce just outcomes, Waldron claims that, contrary to common belief, by the time cases get to the higher courts, they are decided in the abstract, rather than the particular – they revolve around the dispute, not the litigants. In fact, advocacy groups tend to choose particular individuals as test case plaintiffs because they represent a larger, more abstract group of people. By comparison, legislatures are able to take particular cases into account – through lobbying, hearings and debate.<sup>75</sup> As to the established Bills of Rights through which courts pronounce on legislation, they tend to give rise to a rigid textual formalism – judges make decisions based on theories of interpretation, rather than direct argument about the moral issues involved.<sup>76</sup> This is partly because judges need to be concerned about the courts' legitimacy in settling disputes on complex moral questions.<sup>77</sup> Similarly, Waldron makes a point about the quality of judicial reason-giving – he argues that reasons will be adjusted to the text of the Bill of Rights, which is a particular problem when that document no longer represents the outcomes of political deliberations

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<sup>72</sup> Waldron (note 61 above) at 1369.

<sup>73</sup> Waldron (note 61 above) at 1370.

<sup>74</sup> Waldron (note 61 above) at 1378.

<sup>75</sup> Waldron (note 61 above) at 1380.

<sup>76</sup> Waldron (note 61 above) at 1381.

<sup>77</sup> Waldron (note 61 above) at 1382.

within the society.<sup>78</sup> A related concern is that, when the rights are entrenched in a Constitution, they attain ‘immunity from legislative change’ – it is made impossible or, at least, difficult to change the legal status of the rights-holders.<sup>79</sup> On the other hand, the kind of consideration that takes place in legislative processes is more directly connected to the moral issues at hand and the reasons given arise from full deliberative discussion.<sup>80</sup> Whilst these legislative deliberations may suffer from defects and distortions, these defects arise from irregularities or ‘pathologies’ in the process. With courts, the defects are inherent in the way they are expected to perform.<sup>81</sup>

Waldron’s process-related arguments against judicial review are more familiar. He points out that legitimacy is relative and that it is much more difficult for judges to provide satisfactory answers to legitimacy concerns than it is for legislators. Legislators acquire their authority to make decisions from fair elections in which people are equally entitled to determine who their representatives should be. The system of majority decision-making used by legislators is justified on the basis that it is a ‘reasonable approximation of the use of majority decision-making among citizens as a whole’, recognising the moral equality of each citizen.<sup>82</sup> Although judges are appointed by officials with some ‘elective credentials’, [l]egislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making. None of this is true of Justices.<sup>83</sup> Furthermore, judges would find it much more difficult to justify their use of majority decision-making. This mechanism may be a ‘simple technical device’ for reaching a decision but, as judges are not representative of citizens in the way that legislators are (through fair elections), there is no moral support for it.<sup>84</sup>

It is important to recognise that Waldron is not absolutely opposed to judicial review in all circumstances. He defines societies in which there exists ‘prejudice against discrete and

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<sup>78</sup> Waldron (note 61 above) at 1383.

<sup>79</sup> Waldron (note 59 above) at 221.

<sup>80</sup> Waldron (note 61 above) at 1382-1384.

<sup>81</sup> Waldron (note 61 above) at 1386.

<sup>82</sup> Waldron (note 61 above) at 1387.

<sup>83</sup> Waldron (note 61 above) at 1391.

<sup>84</sup> Waldron (note 61 above) at 1392.

insular minorities’ as non core-cases in which judicial review *may* have some credibility.<sup>85</sup> However, this is not the same as an argument that judicial review is needed to protect all minorities against the ‘tyranny of the majority’. Tyranny, Waldron argues, can only be said to exist where topical minorities are aligned with decisional minorities. By this he means that those who voted for the losing side in the debate (decisional minority) coincide with those whose rights and interests were adversely affected by the decision (topical minority). But, if the third and fourth assumptions of Waldron’s argument - that most people in the society care about rights and that there is real, not self-interested, disagreement about the meaning of those rights – this state of affairs would only exist in non-core cases.<sup>86</sup> Finally, even in such cases, judicial review may not come to the assistance of the minorities concerned – it is possible that judicial majorities suffer from the same prejudices as legislative majorities in these dysfunctional societies.<sup>87</sup>

Waldron is right to be concerned about whether courts are equipped to exercise strong powers of review over legislation in a way that enhances, rather than diminishes, democratic principles of participation, equality and legitimacy. But, whilst he claims that he is simply setting out the way legislatures usually operate,<sup>88</sup> the picture he presents is unrealistic. It displays a faith in electoral processes and legislation-making that is not always easy to justify. As he admits:

‘Opponents of judicial review are often accused of adopting a naively optimistic view of legislatures. But sometimes we do this deliberately, matching one optimistic picture with another in the face of the refusal of the defenders of courts to give a realistic account of what happens there’.<sup>89</sup>

Even in a democracy that functions reasonably well, governments are very often elected by a minority of voters and an even smaller minority of people who are eligible to vote.<sup>90</sup> The processes through which legislatures and judiciaries reach decisions may be democratic or undemocratic but this depends less on the fact that one is voted in and the other appointed, and more on the philosophy that operates within particular institutions.<sup>91</sup> Rather than

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<sup>85</sup> Waldron (note 61 above) at 1403.

<sup>86</sup> Waldron (note 61 above) at 1397-8.

<sup>87</sup> Waldron (note 61 above) at 1404.

<sup>88</sup> Waldron (note 61 above) at 1361.

<sup>89</sup> Waldron (note 61 above) at 1379.

<sup>90</sup> A Lever ‘Is judicial review democratic?’ (2007) *Public Law* 280 at 285.

<sup>91</sup> Lever (note 90 above) at 286.

protecting the equal dignity of every individual in a society, ‘electoral and legislative politics’<sup>92</sup> often depend on how well-organised, wealthy and influential particular groups of people are.<sup>93</sup>

Once in power, there are no absolute guarantees that legislators will live up to their election promises and, even with the benefit of a strong civil society, groups who are more powerful financially or more vocal are more likely to have their interests protected than those who are most vulnerable. Legislatures are directly accountable to the public but, far from being the most powerful of the three branches, they play a secondary role to an ever-growing, increasingly dominant, and only indirectly accountable executive body in most jurisdictions. Whilst members of the executive do build up a body of expertise on policy formulation, there are fewer checks on how they exercise that expertise.<sup>94</sup> Thus, as pointed out by Fredman, Waldron is on shaky ground when he claims that ‘the right of participation is alive and well in the political system’.<sup>95</sup>

The extent to which democratic values are realised through legislative politics is contingent on a number of factors. Furthermore, decision-making processes in legislative bodies are prone to certain shortcomings. In a helpful categorisation, Rosalind Dixon has suggested that these flaws arise from the potential for ‘blind spots’ and ‘burdens of inertia’ in legislative processes.<sup>96</sup> Blind spots may arise from a legislative inability to foresee the impact of statutes on the rights of a range of people from different backgrounds and with differing viewpoints (‘blind spots of perspective’). Legislators may not realise that laws could be applied in a way that limits rights, due to time pressures on them or a simple lack of foresight. Finally, legislators, concerned as they are with a particular legislative goal in enacting a statute, may find themselves unable to find ways to more fully accommodate a

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<sup>92</sup> Mounting a legislative lobby, for example. See Lever (note 90 above) at 289-90.

<sup>93</sup> Lever (note 90 above) at 290-2.

<sup>94</sup> Pieterse (note 40 above) at 387-8.

<sup>95</sup> Note 1 above at 101.

<sup>96</sup> R Dixon ‘Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited’ (2007) 5 *International Journal of Constitutional Law* 391 at 402.

rights claim whilst sacrificing little of that legislative objective ('blind spots of accommodation').<sup>97</sup>

There are also likely to be 'burdens of inertia' in the legislative process. Legislators are required to act within the time and capacity limits of a particular legislative session and may deem other legislative priorities more urgent than protection of rights. Where a political party is divided on a matter, legislators may consider party integrity to be more important than a 'more responsive legislative outcome'. And, where the fulfilment of a rights-based claim involves a long-term, complex process involving the administration and executive, delays in these bodies could act to compound the legislative inertia described above.<sup>98</sup>

It is important not to fall into the trap of assuming that flaws in the legislative decision-making process are a sufficient argument for judicial review. As John Hart Ely observed, '[t]he conventional wisdom here, that courts are markedly worse than legislatures at determining legislative facts, surely can stand significant qualification – but at the same time there isn't any reason to suppose they are better at it'.<sup>99</sup> But, the argument in this chapter is based on the contention that the question of which institution is better at resolving complex moral and political disagreements is the wrong question to be asking. In analysing Alexander Bickel's work, Ely argued that Bickel failed to heed his own warning that 'No answer is what the wrong question begets...'<sup>100</sup> by assuming that the question was which values courts should be defining and imposing.<sup>101</sup> The criticism may be as easily applied to the assumption that, in a democracy, one institution must do the work of defining and applying these values. The question is whether courts have a positive contribution to make here. Similarly, in assuming justiciability means that judges have the final word on a matter, Waldron forces a choice between the institutions but the assumption is itself problematic.<sup>102</sup> Waldron's argument is based on the idea that disagreement is a permanent feature of deliberations about

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<sup>97</sup> Dixon (note 96 above) at 402.

<sup>98</sup> Dixon (note 96 above) at 402-3.

<sup>99</sup> (1980) *Democracy and Distrust* (Harvard University Press: Cambridge, Massachusetts and London, England) at 53.

<sup>100</sup> Note 64 above at 55, as cited in Ely (note 99 above) at 43.

<sup>101</sup> Ely (note 99 above) at 72.

<sup>102</sup> Fredman (note 1 above) 101.

the common good and that there is no point in trying to wish it away.<sup>103</sup> As a result, he is strongly against the idea of any kind of pre-commitment through a Bill of Rights – even where such a document has been chosen by the people through their elected representatives.<sup>104</sup> His claim, discussed above, that judicial reasoning focuses on an out-dated set of fixed values follows from this argument. But the judicial striking down of legislation is not a necessary consequence of the judicial review of rights claims. A declaration of incompatibility, such as occurs in respect of the U.K.’s HRA, is one alternative.<sup>105</sup> Even where judges have the power to strike down legislation, as in South Africa, those judgments are open to subsequent revision – through judicial interpretation itself as well as constitutional amendments, which are often not that difficult to pass.<sup>106</sup> As Waldron appears to admit when he refers to the ‘bland rhetoric’ of Bills of Rights, these documents only represent a pre-commitment to very basic goals. Rights are capable of limitation and Bills of Rights are more of a ‘living tree’<sup>107</sup> than a set of immutable principles.

To summarise then, both legislative and judicial decision-making are imperfect tools for realising rights. Courts bring certain strengths to the enforcement of rights. They act to fill gaps in the legislative and executive processes. But there is much in current judicial theory and method that is simply not responsive to valid concerns about elitism and a lack of legitimacy. For those interested in the realisation of fundamental rights alongside the protection of democratic norms, the solution must be found, not in an uncompromising curtailment of judicial powers in rights cases but in the reconsideration of the judicial role. Fundamental rights and democratic values may best be protected by accepting that the nature and extent of judicial intervention need not be the same in every rights dispute. As Sandra Fredman puts it, ‘the real challenge is to formulate a democratically justifiable role for the courts’<sup>108</sup>

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<sup>103</sup> Waldron (note 59 above) at 93.

<sup>104</sup> Waldron (note 59 above) at 257, and see chapter 12 on disagreement and pre-commitment generally.

<sup>105</sup> Fredman (note 1 above) at 101.

<sup>106</sup> Fredman (note 1 above) at 102.

<sup>107</sup> Fredman note 1 above) at 102.

<sup>108</sup> Fredman (note 1 above) at 100.

But this kind of reconsideration of the judicial role attracts criticism of another kind. Requiring courts to pay attention to the democratic legitimacy of their approach to rights adjudication does not sit easily within a classic view of rights-based constitutionalism. Thomas Poole describes the ‘paradigmatic features’ of classic rights-based constitutionalism as comprising the following beliefs:

- (1) Rights-bearers are always individuals;
- (2) There is a common core of human nature from which it is possible to ‘extract’ a set of natural rights. Denial of these rights entails a denial of what it means to be human;
- (3) The fundamental rights above are a form of ‘higher-order’ law. They act as trumps against government policies with which they conflict;<sup>109</sup>
- (4) The main goal of public law is to protect citizens’ rights;
- (5) Protection of citizens’ rights, the ‘higher-order’ law, justifies judicial review; and
- (6) Rights should provide the driving force or main ‘juridical tools’ through which argument in judicial review is structured.<sup>110</sup>

It is exactly this kind approach that scholars like Waldron most strongly object to. A classic rights-based conception of constitutionalism accords judicial review the central role in the protection of rights. On this view, there is ‘often a single right answer to complex questions of law and political morality’<sup>111</sup> and it is the judges’ duty to discover it. This view is based on an unrealistic faith in the capacity of judges to implement rights. The approach also insists on a view of adjudication as somehow abstracted from what other branches of government do, and from broad societal interests. As Ely put it:

Thus the list of values the [U.S. Supreme] Court and the commentators have tended to enshrine as fundamental is a list with which most readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of a home, personal autonomy, even the right not to be locked in a stereotypically female sex role and supported by one’s husband. But watch most fundamental rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren’t *fundamental*.<sup>112</sup>

The notion that rights-bearers are always individuals is also problematic as even widely accepted CP rights like the rights to equality, freedom of religion and dignity often have a communal aspect. These aspects - that rights attach to individuals and act as trumps - allow little room for engagement with the democratic legitimacy of judgments. On a traditional rights-based approach to constitutionalism, when it comes to the limitation of rights, it is not enough to strike a balance between the rights of the individual and broader societal

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<sup>109</sup> Waldron puts it thus: ‘The theorist of rights, by contrast, is supposed to be the one who can produce the trump card, the peremptory argument-stopper...’ (note 59 above at 224).

<sup>110</sup> Poole (note 59 above) at 698-700.

<sup>111</sup> Dworkin (note 42 above) at 278.

<sup>112</sup> Ely (note 99 above) at 59.

interests.<sup>113</sup> Because rights exist to protect the human dignity and political equality of every individual in a society, any infringement of them is to be taken very seriously.<sup>114</sup> Government must provide ‘some compelling reason’ for the invasion of the right, a reason ‘consistent with the supposition on which the original right must be based’.<sup>115</sup>

Furthermore, the account presented above does not reflect what actually happens in courts. In a study of a number of rights-based cases decided by U.K. courts both before and after the enactment of the HRA, Poole concluded that much of the argument focused on what he referred to as ‘intermediate’ or ‘second-order’ concerns: ‘issues relating to constitutional structure and administrative decency rather than basic or primary issues of justice and morality’.<sup>116</sup> The intermediate concerns Poole refers to range from claims regarding policy, expediency and necessity to democratic choices regarding education, health and defence, for example.<sup>117</sup> In a rights-absolutist approach to adjudication, two routes are possible. First, the scope of the right is defined in the absence of any consideration of ‘intermediate’ matters and the court decides whether the right has been infringed on the basis of that definition. The state then bears the burden of justifying any infringement by reference to intermediate concerns.<sup>118</sup> Second, some rights-absolutist accounts suggest that intermediate concerns are relevant to rights themselves but draw a distinction between rights that are fundamental (negative liberties) and intermediate concerns which are positive rights and, therefore, merely aspirational.<sup>119</sup> But neither of these routes presents a fair reflection of how courts in common law jurisdictions approach rights. Judges do not adhere to this kind of clear two-stage process. There is no ‘pure’ rights analysis, abstracted from intermediate concerns. Also, rights are meant to act as trumps, with the burden of proof on the state to justify their actions but, in fact, rights are quite easily outweighed by the intermediate concerns.<sup>120</sup> Furthermore,

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<sup>113</sup> Dworkin (note 42 above) at 197-8.

<sup>114</sup> Dworkin (note 42 above) at 198-9.

<sup>115</sup> Dworkin (note 42 above) at 200.

<sup>116</sup> Poole (note 59 above) at 697.

<sup>117</sup> Poole (note 59 above) at 710.

<sup>118</sup> Poole (note 59 above) at 710-11. J Rivers ‘Proportionality and Variable Intensity of Review’ (2006) 65 (1) *Cambridge Law Journal* 65(1) 174 at 190.

<sup>119</sup> Poole (note 59 above) at 711.

<sup>120</sup> Poole (note 59 above) at 710-11; Rivers (note 118 above) at 190.

intermediate concerns are not simply dismissed as aspirational, positive rights in the jurisprudence.<sup>121</sup>

Poole suggests an alternative legitimacy theory of judicial review, as practised in U.K. courts. Legitimacy revolves around the practice of justifying government action.<sup>122</sup> The practice of justification acts to control and structure governmental power.<sup>123</sup> The legitimacy conception provides a more satisfactory account of the importance of second-order considerations in judicial review. It is also consistent with the ‘self-referential’ nature of the practice – courts are required to determine the limits of their own power.<sup>124</sup> As a result, concerns about their own legitimacy play an important role in judicial decision-making. Poole is quick to clarify that a legitimacy conception does not imply that procedural issues describe the only appropriate territory of judicial review.<sup>125</sup> Instead, protection of rights is one of the indicators of legitimate governance and rights must be recognised and weighed into the process of determining legitimacy.<sup>126</sup>

This last point is extremely important as it signals an attempt to combine first and second-order considerations in a way that satisfies both procedural and substantive concerns. Moreover, rather than viewing the two (procedure and substance) to be in constant tension, legitimacy theory, as set out by Poole, acknowledges that questions of legitimacy have a significant impact on the extent to which rights are protected in a society. The protection of individual rights cannot be separated from a broader societal interest in good governance, efficient administration, and public participation.

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<sup>121</sup> Poole (note 59 above) at 711-12.

<sup>122</sup> This notion coheres with the increasing popularity of the notion of a ‘culture of justification’ in South Africa and the U.K. See E Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31 at 32; H Woolf, J Jowell and A Le Sueur (2007) *De Smith’s Judicial Review* (Sweet and Maxwell: London) at 17; C Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *South African Law Journal* 484 at 500; and H Corder ‘Administrative justice: a cornerstone of South Africa’s democracy’ (1998) 14 *South African Journal on Human Rights* 38 at 41.

<sup>123</sup> Poole (note 59 above) at 714.

<sup>124</sup> Poole (note 59 above) at 713, 719.

<sup>125</sup> Poole (note 59 above) at 721.

<sup>126</sup> Poole (note 59 above) at 722, 725.

The problem with Poole's analysis lies with his definition of what intermediate concerns are. He draws a distinction between 'issues relating to constitutional structure and administrative decency' and 'primary issues of justice and morality'<sup>127</sup> and places democratic choices regarding goods like education and health in the former category. Drawing on Charles Taylor's distinction between convergent goods (public goods that are secured collectively but which are aimed at benefitting the individual citizen) and common goods (which are aimed at the political community as a unit), Poole likens rights to convergent goods. He suggests that second-order considerations such as constitutional balance, expertise, and margin of appreciation aimed at the 'general well-being of the political community' are common goods, incapable of being broken down into rights.<sup>128</sup>

The idea that the extent to which rights are protected is an indicator of legitimate governance is useful but it still rests on a limited conception of rights as negative liberties. SE rights to health care and education, for instance, fundamentally challenge this kind of strict delineation of individual and common goods. This point is most clearly made with respect to the South African Constitution because, in it, SE rights are explicitly protected and made justiciable before the courts, and because the internal limitations in sections 26 (2) and 27 (2) require that courts take what Poole refers to as the 'general well-being of the political community' into account. But the same holds true for U.K. courts enforcing positive duties arising from CP rights such as equality and dignity or exercising the power of judicial review over governmental decisions made in terms of social welfare legislation.<sup>129</sup> Furthermore, whereas Poole's account sees rights enforcement as one indicator of legitimate governance, a more integrated conception of rights and democracy would consider legitimate governance to be an important aspect of rights enforcement. Considerations of legitimacy, then, should not be seen as a pragmatic compromise of rights in favour of broader societal considerations or even as a balancing of rights with legitimacy concerns. Instead, legitimacy considerations related to things like relative expertise are an integral part of rights implementation.

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<sup>127</sup> Poole (note 59 above) at 697.

<sup>128</sup> Poole (note 59 above) at 712.

<sup>129</sup> This jurisprudence is discussed in chapters 4 and 5.

Like Fredman, Poole appears to be searching for a ‘democratically justifiable’ role for the courts, a way in which legitimacy concerns may be accommodated in the discourse around the adjudication of rights. He sees justification of all governmental action, including judicial decision-making, as the focal point of this new conception of the judicial role. In this thesis, my aim is to set out a model of adjudication in which the effective implementation of SE rights takes centre stage. The model of adjudication I wish to suggest departs from both a classic rights-based view of constitutionalism and Poole’s legitimacy theory in taking a broader view of how rights may be defined. The argument in this thesis is that choices about goods like health care, housing and education *are* ‘basic or primary issues of justice and morality’.<sup>130</sup> On this view, it is not possible to argue simply that these goods are common goods, incapable of giving rise to individual rights. On the other hand, it is essential to take legitimacy concerns into account in the adjudication of rights - not merely because of the instrumental value of justification or because these concerns impact on the effective implementation of rights as a whole but because they are relevant to the question of whether people in a society are accorded equal dignity and respect. I have argued above that Waldron is too categorical in dismissing judicial decision-making as inherently contradictory to principles of democracy. But the source of his concern is valid:

For surely, the people have a right to participate in all aspects of the democratic governance of their community, a right which is quite deeply connected to the values of autonomy and responsibility that are celebrated in our commitment to other basic liberties.’

It would be foolish to ignore this concern. Consequently, in considering what an appropriate model of SE rights adjudication should look like, we must engage with the question of what a ‘democratically justifiable’<sup>131</sup> role for the courts in this area is.

#### **(4) A ‘democratically justifiable’ role for the courts**

Waldron’s rejection of strong review in all but what he views as extreme cases where the assumptions of free and fair elections, well-functioning judicial institutions, general societal commitment to individual and minority rights and genuine disagreement about the meaning and content of those rights do not apply resonates with certain aspects of a dialogic

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<sup>130</sup> Poole (note 59 above).

<sup>131</sup> Fredman (note 1 above) at 100.

theory of judicial review. Writing in the Canadian context, Kent Roach has described the operation of this dialogue between governmental institutions thus:

The Supreme Court has recognized that the structure of the *Charter* means that its decision need not be the final word in democratic debates about how society will treat rights and freedoms. It has acknowledged that its most controversial decisions “can be reacted to by the legislature in the passing of new legislation... This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.”<sup>132</sup>

In an article considering the relevance of a dialogic account of judicial review for the adjudication of SE rights in South Africa, Rosalind Dixon points out that, as with other theories of cooperative constitutionalism, a dialogic theory recognises that ‘both judicial competence and responsiveness in the process of constitutional rights adjudication’ are limited. This view excludes the ‘pure strong form approach’ to SE rights adjudication which many South African scholars favour and in terms of which judicial decisions have final effect. At the same time, dialogic theories ascribe to courts extensive powers and responsibilities for tackling shortcomings in legislative processes.<sup>133</sup>

There are different versions of dialogue theory but, in general, they allow courts a more expansive role in giving meaning to rights and handing down strong remedies.<sup>134</sup> In that respect, the theory is a rejection of the idea that legislatures are always best placed to resolve fundamental disputes about rights. But, in an attempt to cater for legitimacy concerns, dialogue theory also holds that courts must defer to subsequent legislative pronouncements on the issue concerned.<sup>135</sup>

Dialogue theory may be distinguished from other theories of cooperative constitutionalism because of its strong emphasis on judicial responsibility for mitigating legislative blind spots and burdens of inertia, discussed in section 3 above. In a departmentalist version of cooperative theories, courts exist only to settle particular constitutional disputes between an individual and the state. Blind spots or burdens of

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<sup>132</sup> K Roach ‘Dialogic judicial review and its critics’ (2004) 23 *Supreme Court Law Review* 49; and (2001) *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law: Toronto) at 175-6, citing *Vriend v Alberta* [1998] 1 SCR 493 at par. 139. This theory of judicial review has its provenance in Canadian constitutional theory. Kent Roach is one of its strongest proponents.

<sup>133</sup> Dixon (note 96 above) at 393.

<sup>134</sup> See Roach *The Supreme Court on Trial* (note 132 above) at 248-9.

<sup>135</sup> Dixon (note 96 above) at 393; and Roach *The Supreme Court on Trial* (note 132 above) at 176; 253-4.

inertia must be dealt with through popular mobilisation.<sup>136</sup> A conversationalist model, associated with judicial review in terms of the HRA in the U.K, envisages courts playing a significant role in countering legislative blind spots by pointing them out. However, in this system, courts are not expected to deal with legislative burdens of inertia.<sup>137</sup> Conversationalist and departmentalist versions of cooperative constitutionalism are both more consistent with Waldron's approach to judicial review than dialogue theories.

With dialogic theories, courts bear responsibility for countering the defects described above. They are required to use both conversational (communicative) and coercive powers as far as possible to do this. If they fail to do so (say by taking a democratic minimalist approach and directing a question to the legislature)<sup>138</sup> they become 'directly implicated' in 'illegitimate state coercion', contribute to legislative blockages and make it 'more difficult for individuals and social movements in the broader constitutional culture to contest the illegitimacy of the status quo'.<sup>139</sup> Furthermore, the basis on which courts may intervene is not limited to extreme grounds like irrationality or patent errors. Rather, courts may intervene whenever there are potential 'failures of foresight, perspective, accommodation, or responsiveness'.<sup>140</sup> This wide judicial role is not a threat to democratic values, however, because, in a dialogic understanding, the legislature retains the power to limit the effect of judicial pronouncements through subsequent legislative action.<sup>141</sup> This caveat exists not only to protect constitutional, democratic values but as an acknowledgement of the institutional limits on the exercise of judicial power.

The theory is attractive because it attempts to marry an expansive role for courts with respect for democratic decision-making through legislatures. It acknowledges weaknesses in both legislative and judicial institutions and suggests an approach responsive to these

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<sup>136</sup> Dixon (note 96 above) at 404.

<sup>137</sup> Dixon (note 96 above) at 404.

<sup>138</sup> It should be noted that some versions of dialogue theory emphasise the need for courts to avoid resolving questions of principle until there is a greater level of societal agreement on the issue concerned - by turning to procedural bases for a decision, for example, T Hickman 'The courts and politics after the Human Rights Act: a comment' (2008) *Public Law* 84 at 85.

<sup>139</sup> Dixon (note 96 above) at 405-406.

<sup>140</sup> Dixon (note 96 above) at 407.

<sup>141</sup> Dixon (note 96 above) at 407.

weaknesses. However, the theory retains all the judicial responsibility of a strong-review approach whilst removing a large part of judicial authority. Dixon notes that courts are expected, in a dialogic understanding, to exercise both communicative and coercive powers. She explains that judicial decision-making is inherently coercive in any jurisdiction where judicial decisions are considered decisive in disputes between specific parties that are brought to courts.<sup>142</sup> But it is difficult to see how the coercive element can be sustained where legislatures are entitled to alter the effect of judicial decisions after they are made.<sup>143</sup>

One could argue that this version of dialogue theory relies on the fact that courts still hand down binding orders in respect of particular matters brought to them by individual claimants and only give up the element of coercion when it comes to broader questions of legislative policy. Still, if courts must defer to subsequent legislative pronouncements on these broader questions, the impact will be felt in particular disputes as well. Courts may well play a significant role in engaging the legislature in a dialogue about the most effective means to protect rights but, ultimately, dialogue theory suggests that it is up to the legislators to decide the conclusion of such a dialogue. On an approach like Waldron's, this is exactly where such a decision belongs. But, if dialogue theorists rely on judicial coercion as well as communication to counter blind spots and burdens of inertia, it is hard to see where they expect that coercion to come from. Even in the context of the U.K., where this kind of weak review arguably exists, Tom Hickman has noted:

Of course, it has always been open to Parliament to overrule a decision of the courts, and this power remains. But the important point is that the government and Parliament should not treat court decisions as if they are contestable opinions to be disregarded, overruled or excluded whenever the government or Parliament would have applied or interpreted the law differently.<sup>144</sup>

If the version of dialogue theory described above appears to jar with the approach of courts, legislatures, the executive and administration in the U.K., then it is even less consistent with the approach in South African constitutional law.

As noted at the beginning of this chapter, South African courts have a duty to overturn legislation that they find to be inconsistent with the Constitution. The CC has done

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<sup>142</sup> Dixon (note 96 above) at 406.

<sup>143</sup> See Hickman (note 138 above) at 94-95.

<sup>144</sup> Note 138 above at 95.

so on a number of occasions,<sup>145</sup> including ones where politically sensitive matters were involved.<sup>146</sup> Two provisions of the Charter on Rights and Freedoms are key to an understanding of dialogic theories of judicial review in the Canadian context.<sup>147</sup> Section 1 makes it clear that all rights in the Charter are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. This acknowledgement that rights may be limited is common to a number of constitutional democracies, including South Africa. But this kind of provision leaves the decision about whether limitations are justifiable to the courts. More significantly, section 33 (1) of the Canadian Charter provides:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. This section acts as an override, allowing the legislature to pass ‘overarching laws’<sup>148</sup> that conflict with the rights protect in the Charter. The tenor of the South African Bill of Rights is completely different. Section 2 states that the ‘Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.

The question for this thesis, however, is whether the critiques of judicial review have any bearing on the adjudication of SE rights. Where the positive dimension<sup>149</sup> of enforcing SE rights is concerned, dialogue theory suggests an even weaker approach. A dialogic approach demands that courts adopt either weak rights that is, interpret rights narrowly, or hand down weak remedies, depending on the particular circumstances of the case and country concerned.<sup>150</sup> Again, this does not capture the position of SE rights in the South African Constitution.

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<sup>145</sup> See, for example, *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC); *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC).

<sup>146</sup> For example: *National Coalition for Gay and Lesbian Equality v Minister of Justice and another* 1999 (1) SA 6 (CC); 1998 (1) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); and *S v Makwanyane and another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

<sup>147</sup> See Roach *The Supreme Court on Trial* (note 132 above) at 175-6.

<sup>148</sup> Roach *The Supreme Court on Trial* (note 132 above) at 175-6; 249-50.

<sup>149</sup> That is, enforcing rights of access to certain goods like housing and health care, as opposed to merely preventing state interference with rights and interests in such goods.

<sup>150</sup> Dixon (note 96 above) at 393.

The main problem with dialogue theory, then, is that its insistence that the adjudication of rights be formally subject to subsequent legislative revision deprives judicial review of all coercive power, thereby undermining its very rationale. In certain jurisdictions, legislative bodies may treat the judicial pronouncements on these issues as strong signals that they should legislate in a particular way. The extent to which they act accordingly is, however, contingent on the legal and political culture of the jurisdiction concerned. The effect of subsequent legislative revision over a period of time is likely to be a legal and political culture in which judicial decisions are simply not taken seriously. As noted earlier, it is unrealistic to suggest that judicial decisions are immutable, despite the tendency of critics of judicial review to resist judicial review on this basis. But to make the decisions formally subject to amendment by the legislature deprives every judgment of any authoritative force. Judicial review cannot act as a check on governmental power when its consequences are so minimal. Moreover, respect for democratic legitimacy does not require this level of deference to legislative powers in all cases. And how strong or weak a judicial approach should be cannot be determined solely by the question of whether positive or negative duties are involved. For example, from a democratic legitimacy perspective, there is a substantial difference between a judgment that orders government to implement previously agreed upon positive duties and one that consists of an original determination of the content of those duties.

Fredman argues that a democratically defensible role for the courts might be possible if judges ‘fulfil an auxiliary role in respect of three key values underlying the democratic ideal: accountability, participation and equality’.<sup>151</sup> Courts may act to enhance accountability by enforcing the duty on government to justify its actions to the electorate. The judicial process is particularly suited to this kind of role and it is a role that presents no serious challenge to democratic values because it does not entail judges prescribing to government what it ought to do.<sup>152</sup> We get onto more difficult terrain, however, when we consider what standard of justification a court should apply in ensuring governmental accountability. A bare requirement to explain, no matter the merits of that explanation, keeps concerns about

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<sup>151</sup> Fredman (note 1 above) at 103.

<sup>152</sup> Fredman (note 1 above) at 103.

democratic legitimacy at bay but weakens judicial authority and the ultimate rationale of protecting human rights.<sup>153</sup>

Fredman's route out of this dilemma is to suggest that, in order to be convincing, a justification must be connected to the democratic values of participation and equality.<sup>154</sup> Her account of participation draws from the notion of deliberative democracy. Scholars in this area tend to view participation in a democracy as aimed either at interest bargaining or consensus. With interest bargaining, deliberation exists as a platform from which people may put forward and protect their own interests – the aim is to convince others of the worth of one's own position. Such an approach is problematic because ultimately, the loudest and most powerful voices tend to prevail. The equality aspect of democratic theory is consequently sacrificed.<sup>155</sup> Waldron, on the other hand, objects to a 'dewy-eyed' version of deliberative democracy in which consensus provides the 'internal logic of deliberation'.<sup>156</sup> This is because the logic of consensus goes against his fundamental theory that disagreement is not an evil to be cured but an important aspect of the political process. But on a different conception of deliberative democracy, the aim is not consensus but the resolution of disagreements through a value-based continuous process of reasoned persuasion.<sup>157</sup> In respect of what this means for the courts, Fredman suggests an approach in terms of which judicial decisions are considered binding vis-à-vis the issues in a particular case, but subject to long-term revision 'through the dynamic forum of deliberative democracy':

At the point of decision-making, the duty is fixed, and the State is required to take action or is absolved from action, as the case may be. But on the broader scale, the decision remains part of a process of continuing revisability whether through Parliament, case law or public discourse. This does not differ from the court's role in common law disputes in general.<sup>158</sup>

The obvious criticism here is that the constant possibility of revision leaves too much room for uncertainty. But Fredman's model is based on the idea of gradual revision. More importantly, she does not view stability as an absolute requirement in any governmental decision-making process. Stability may sometimes be displaced by another principle. Such

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<sup>153</sup> Fredman (note 1 above) at 103-4.

<sup>154</sup> Fredman (note 1 above) at 105.

<sup>155</sup> Fredman (note 1 above) at 36. See also Ely (note 99 above) at 135-6.

<sup>156</sup> Waldron (note 59 above) at 91.

<sup>157</sup> Fredman (note 1 above) at 36.

<sup>158</sup> Fredman note 1 above) at 108-9.

displacement would have to be justified by the decision-making body.<sup>159</sup> For human rights adjudication, then, this means that legal certainty is just one of the factors a court must take into account in fulfilling its duties.

On the question of how judicial decisions might play a role in enhancing equality, Fredman<sup>160</sup> relies, to some extent, on John Hart Ely's representation reinforcing theory of judicial review.<sup>161</sup> Writing in the context of the American Constitution, Ely argued that, in a representative democracy, the protection of the many did not necessarily mean the protection of all.<sup>162</sup> He believed that judicial review could serve to reinforce representation and participation in a malfunctioning political 'market'<sup>163</sup> but that, ultimately, policy or value-based decisions should be left up to elected officials.<sup>164</sup> Fredman is attracted to Ely's theory because, in it, justiciable human rights reinforce, rather than detract from, democracy.<sup>165</sup> But his insistence on a model of judicial review that is procedural rather than substantive is problematic.<sup>166</sup> In order to act as representation reinforcing agents, courts, according to Ely, must address themselves to 'procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large - with ensuring broad participation in the processes and distributions of government'.<sup>167</sup> Fredman argues that the capacity of individuals for this kind of participation depends on their access to resources. As a result, it is not possible to draw a bright line between process concerns, especially in the 'process writ large' sense used by Ely above, and substantive concerns.<sup>168</sup> More significantly, Ely's theory provides no real sense of how minority exclusion from democratic decision-making processes should be addressed.<sup>169</sup> In short then, whilst Fredman is sympathetic to the idea that judicial review can and should act

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<sup>159</sup> Fredman (note 1 above) at 73 and 109.

<sup>160</sup> Fredman (note 1 above) at 109-13.

<sup>161</sup> Ely (note 99 above) chapters 4 and 6, especially.

<sup>162</sup> Ely (note 99 above) at 81.

<sup>163</sup> Ely (note 99 above) at 103 and 117.

<sup>164</sup> Ely (note 99 above) at 133.

<sup>165</sup> Fredman (note 1 above) at 110; Ely (note 99 above) at 105.

<sup>166</sup> Fredman (note 1 above) at 110.

<sup>167</sup> Ely (note 99 above) at 87.

<sup>168</sup> Fredman (note 1 above) at 106.

<sup>169</sup> Fredman (note 1 above) at 107.

as a representation reinforcing mechanism in modern democracies, she sees the goal of judicial review as more value-based than Ely's theory allows:

[T]he aim of judicial review is to enable excluded groups to play an equal part in the deliberative, through taking minority arguments as seriously as majority perspectives and coming to a deliberative resolution based on the power to convince rather than the power to overwhelm.<sup>170</sup>

Fredman also suggests various ways in which the adversarial approach to adjudication, of which sceptics of judicial review are so critical, should change if judicial review is to provide a means through which even the weakest voices may be heard and given equal powers of persuasion.<sup>171</sup> For the purposes of this thesis, though, the implications of her approach for the judicial interpretation of SE rights in South Africa are most important. Fredman's approach provides a valuable theoretical basis for the adjudication of positive duties. It suggests that any model of adjudication must be measured by the extent to which it enhances the democratic values of accountability, participation and equality. The approach integrates rights protection and concerns about democratic legitimacy. What does it mean for constitutional interpretation in SE rights cases?

As indicated above, the South African CC has chosen to anchor its approach to SE rights in the concept of reasonableness, referred to in sections 26 (2) and 27 (2). Criticisms of this approach are discussed in chapter 4. Fredman herself argues that 'reasonableness on its own is too diffuse a standard to capture the power to override other principles which attach to a minimum core principle'.<sup>172</sup> Ely is also highly critical of the kind of 'flabby balancing tests' associated with reasonableness.<sup>173</sup> Despite these concerns, I argue in this thesis that reasonableness is a useful tool for courts in the adjudication of SE rights. The charges that it is ultimately a weak and vague standard, fundamentally bound up with procedure-driven administrative law and therefore not helpful in the adjudication of rights are based on a limited conception of administrative law. Concerns about justiciability, judicial deference or respect and judicial activism have, for some time, been at the very heart of administrative

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<sup>170</sup> Fredman (note 1 above) at 113.

<sup>171</sup> Fredman (note 1 above) at 107, 112 and 122 (where she discusses the shortcomings of the South African CC's approach).

<sup>172</sup> Fredman (note 1 above) at 86-7.

<sup>173</sup> Ely (note 99 above) at 115-6.

law. This is due to what Cora Hoexter refers to as ‘the continuous tension between the two essential aims’ of this branch of the law: ‘to empower officials and give them the necessary freedom to do their jobs... and to control these powers and limit that freedom in order to protect rights’.<sup>174</sup> The democratic values of participation and accountability have played an important role in the development of South African administrative law. Whilst administrative law has historically been more concerned with process values than the substance of decisions, this need not continue to be the case in a constitutional system. The perennial debate over the limits of judicial review in administrative law could be an especially useful tool for a model of SE rights adjudication in which courts must respond to concerns about the democratic legitimacy of their judgments and protect rights. I explore this idea further in the next section.

### **(5) Limits on judicial review**

The criticisms of judicial review remain relevant because they necessitate a thorough consideration of the values we hope to promote and protect through the mechanism of judicial review. These values will have an impact, not on whether judges intervene in politically sensitive cases, but on the extent to which they do so. It is in light of this point that many scholars and judges have begun to confront and engage with the notion of deference,<sup>175</sup> not in its much-maligned incarnation as judicial subservience<sup>176</sup> to the legislature and executive, but as a means by which to separate cases appropriate for full and thorough judicial consideration from those which are not. Recent scholarship in South Africa<sup>177</sup> and the U.K.<sup>178</sup> is littered with calls for a more thorough debate about judicial role and purpose,

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<sup>174</sup> Hoexter (note 38 above) at 128. See also A Pillay ‘Reviewing reasonableness: an appropriate standard for evaluating state action and inaction?’ (2005) 122 *South African Law Journal* 419 at 439.

<sup>175</sup> Hoexter (note 38 above) at 130. See also K O’Regan (2004) 121 ‘Breaking ground: some thoughts on the seismic shift in our administrative law’ *South African Law Journal* 424.; and H Corder ‘Without deference, with respect: a response to Justice O’Regan’ (2004) 121 *South African Law Journal* 438.

<sup>176</sup> See J Jowell ‘Judicial deference: servility, civility or institutional capacity?’ (2003) *Public Law* 592 at 592; and Hoexter (note 122 above) at 501.

<sup>177</sup> Hoexter (note 38 above) at 132. See also A Cockrell “‘Can you Paradigm’ – another perspective on the public law/private law divide’ (1993) *Acta Juridica* 227.

<sup>178</sup> T Allan ‘The constitutional foundations of judicial review: conceptual conundrum or interpretive inquiry?’ (2002) *Cambridge Law Journal* 87 at 112; and Hickman (note 138 above).

particularly in the context of a constitutional democracy.<sup>179</sup> At the same time, commentators acknowledge that the question of the appropriate extent of judicial control over other branches of government is so fascinating precisely because it admits no definitive answer.<sup>180</sup> Allan argues that the search for an independent theory of deference is both foolish and futile – that any such theory must be linked to the context in which a case arises.<sup>181</sup>

Many commentators agree that there are degrees of justiciability.<sup>182</sup> Once we acknowledge that cases are more or less amenable to judicial scrutiny and decision, the variability of standards of review becomes extremely important: ‘variability informs the entire enterprise of constructing a theory of judicial intervention and non-intervention’.<sup>183</sup> Ideas about changing constitutional values provide a worthwhile basis from which to consider which types or categories of cases should attract a higher level of judicial scrutiny and intervention. Although much will, of necessity, depend on the sensitivity and self-restraint of judges,<sup>184</sup> sustained consideration of the kinds of judicial interventions calculated to promote values like participation and accountability or justification<sup>185</sup> may result in general guidelines useful to judges, lawyers, potential litigators and legal scholars. These general guidelines may be further finessed in the context of particular areas of the law (such as the enforcement of SE rights).

Jeffrey Jowell’s characterisation of limits on the judicial role<sup>186</sup> is a useful analytical tool through which to consider theories and arguments about the appropriate role of judges in protecting rights. The argument combines conceptual and normative reasoning.<sup>187</sup> In Poole’s

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<sup>179</sup> D Davis ‘To defer and when? Administrative law and constitutional democracy’ (2006) *Acta Juridica* 23 at 40-1.

<sup>180</sup> Hoexter (note 38 above) at 128.

<sup>181</sup> T Allan ‘Constitutional dialogue and the justification of judicial review’ (2003) 23 *Oxford Journal of Legal Studies* 563 at 672.

<sup>182</sup> De Smith (note 122 above) at 15; Hoexter (note 38 above) at 130; P Craig (2003) *Administrative Law* (Sweet and Maxwell: London) at 613-14; and Rivers (note 118 above) at 190.

<sup>183</sup> Hoexter (note 122 above) at 502. See also Rivers (note 118 above) at 178; and Craig (note 182 above) at 612-17.

<sup>184</sup> H Arthurs ‘Rethinking administrative law: a slightly Dicey business’ (1979) *Osgoode Hall Law Review* 1 at 33, as cited in Allan (note 178 above) at 116.

<sup>185</sup> Mureinik (note 122 above) at 32; De Smith (note 122 above) at 17.

<sup>186</sup> Note 184 above; De Smith (note 122 above) at 15-22.

<sup>187</sup> Allan (note 178 above) at 93. Allan has noted elsewhere that ‘the search for descriptive accuracy, as regards the nature of judicial review, is inseparable from normative justification: the practice must be

terms, the argument addresses itself to first and second order concerns. It builds on the notion of variability of the intensity of review so crucial to any discussion of judicial deference or restraint. Furthermore, rather than embarking on what Allan suggests is a futile attempt to carve out an independent theory of deference Jowell's classification is driven by an analysis of the cases and is context sensitive. Jowell argues that judges may exercise restraint for reasons related to their constitutional role as well as their institutional capacity.<sup>188</sup> In other words, even where the constitutional paradigm clearly allows for judicial intervention in politically sensitive areas, there may be good reasons for judges to exercise caution.

Limitations inherent in the constitutional role of courts stem from the notion of a separation of powers. In terms of this principle, the formulation of social or economic policy, such as whether the state should embark on a plan for nuclear disarmament, is a matter for the legislative body or its appointees. However, this does not mean that such decisions are insulated from judicial scrutiny.<sup>189</sup> Courts are required to test these exercises of public power to determine whether they are 'within the scope of the relevant power or duty, and arrived at by the standards of procedural fairness'. Although courts will not easily enquire into the substance of these kinds of 'high-policy' decisions, they may intervene if the decisions lack a rational basis or are not adequately justified.<sup>190</sup> If the matter touches on rights protected in terms of the ECHR, the courts' constitutional role, in terms of the HRA is to test for the legitimacy of the interference with rights using a structured proportionality test. In these circumstances, deference to the executive or legislature is not constitutionally required but is prudent due to the courts' institutional incapacity.<sup>191</sup>

Where there are no formal, constitutional limits on courts' powers to intervene, there could well be institutional reasons for them to opt for restraint. These relate to the

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interpreted in light of its purpose or rationale, reflecting settled principles and shared assumptions'.

Note 181 above at 563.

<sup>188</sup> Note 176 above.

<sup>189</sup> De Smith (note 122 above) at 15-17.

<sup>190</sup> De Smith (note 122 above) at 17.

<sup>191</sup> De Smith (note 122 above) at 17-18.

institutional strengths and weaknesses of the judiciary. Thus, judges are ‘ill-equipped’ to pronounce on issues which are, in effect, purely matters of preference; issues on which they have little knowledge or expertise; and polycentric matters.<sup>192</sup> Where a body other than the court is acknowledged to have specialist knowledge in a particular area, problems arising in that area are best resolved by those experts.<sup>193</sup> Even here, though, courts will intervene where the ‘decision is based on a material mistake of fact, or is otherwise illegal or irrational’.<sup>194</sup> Importantly, for the purposes of this thesis, decisions involving the allocation of limited resources are polycentric in nature.<sup>195</sup>

In attempting to address fundamental questions about the appropriate scope of judicial review in South Africa and the U.K. today, judges and scholars are considerably influenced by the notion of polycentric problems and, in particular, Lon Fuller’s essay on the subject.<sup>196</sup> This essay continues to hold sway in the public law traditions of common law jurisdictions because of the validity of its central concerns, however tenuous its conclusions. It is worth discussing Fuller’s argument in some detail here.

Fuller argued that, as a form of social ordering, the defining hallmark of adjudication is in the particular kind of participation it provides to an affected party – ‘that of presenting proofs and reasoned arguments for a decision in his favour’.<sup>197</sup> The limits of adjudication are reached in circumstances where this kind of participation cannot be meaningfully provided.<sup>198</sup> Fuller drew on Michael Polanyi’s work *The Logic of Liberty*<sup>199</sup> to set out his conception of the polycentric problem.<sup>200</sup> He used the analogy of a spider-web to describe such a problem as ‘many-centred’. When one pulls on a strand in a web, the repercussions may be felt at any point on that web because each intersecting strand ‘is a distinct center for

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<sup>192</sup> De Smith (note 122 above) at 18-22.

<sup>193</sup> De Smith (note 122 above) at 19.

<sup>194</sup> De Smith (note 122 above) at 20.

<sup>195</sup> De Smith (note 122 above) at 20.

<sup>196</sup> See J King ‘The pervasiveness of polycentricity’ 2008 *Public Law* 101; and D Davis ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22 *South African Journal on Human Rights* 301.

<sup>197</sup> L Fuller ‘The forms and limits of adjudication’ [1978] 92 *Harvard Law Journal* 353 at 364.

<sup>198</sup> Fuller (note 197 above) at 382, 393, and 398.

<sup>199</sup> (1951) *The Logic of liberty: reflections and rejoinders* (Routledge and Keegan Paul), as cited in Fuller (note 197 above) at 394, note 26.

<sup>200</sup> Fuller (note 197 above) at 394.

distributing tension'.<sup>201</sup> Similarly, a polycentric task or problem is one which has many strands – an adjudicator who chooses to tamper with any of these strands cannot predict the repercussions of his or her action. Thus, Fuller states by way of example:

Courts move too slowly to keep up with a rapidly changing economic scene. The more fundamental point is that the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages.<sup>202</sup> In dealing with such a matter, a court would not be able to guarantee affected parties meaningful participation, not only because the matter would, in all likelihood,<sup>203</sup> involve a large number of people but also because the widespread repercussions make it impossible to say who would be affected.<sup>204</sup> Fuller acknowledged polycentricity to be a matter of degree – the subject matter of any dispute is likely to contain polycentric features – but a significant level of polycentricity would make a matter unsuitable for adjudication.<sup>205</sup> As a general rule, however, the allocation of economic resources is a significantly polycentric task and should not be undertaken by courts.<sup>206</sup>

As to how such matters should be resolved, Fuller favoured managerial direction or contract.<sup>207</sup> He suggested that the complicated tasks of resource allocation, ‘“costing production”, and pricing goods’ may be solved by an economic market, which makes use of principles of reciprocity and contract.<sup>208</sup> Whilst elections are not an appropriate vehicle through which to respond to polycentric tasks (for much the same reasons he argues courts are not), parliamentary procedures, again having contractual features, may provide a solution.<sup>209</sup> Where courts do attempt to deal with polycentric problems, the adjudicative approach usually fails. The widespread and unforeseen consequences of the judicial decision make it ineffectual and ‘it is ignored, withdrawn or modified, sometimes repeatedly’. Alternatively, the adjudicator might choose to abandon ‘judicial proprieties’ by taking consideration of facts not properly proven or consulting parties who did not take part and were not represented in the hearing. Finally, the adjudicator could decide to ‘reformulate the

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<sup>201</sup> Fuller (note 197 above) at 395.

<sup>202</sup> Fuller (note 197 above) at 394.

<sup>203</sup> But not necessarily – see Fuller (note 197 above) at 397.

<sup>204</sup> Fuller (note 197 above) 394-5.

<sup>205</sup> Fuller (note 197 above) at 397-8.

<sup>206</sup> Fuller (note 197 above) at 400.

<sup>207</sup> Fuller (note 197 above) at 398.

<sup>208</sup> Fuller (note 197 above) at 399.

<sup>209</sup> Fuller was not uncritical of parliamentary processes like the ‘political deal’. See note 197 above at 400.

problem to make it amenable to solution through adjudicative procedures'. These consequences could also occur in combination with each other.<sup>210</sup>

Fuller's thesis has been the subject of interrogation and critique for a large number of scholars.<sup>211</sup> Perhaps most importantly, writers have questioned his faith in legislation, contract, mediation, and managerial or administrative direction as alternatives to adjudication in solving polycentric problems. Legislation is, by nature, quite general and relies on extensive judicial interpretation. Mediation assumes that the interests of all affected parties may be accommodated and contract is driven by the unequal bargaining power of the parties involved.<sup>212</sup> Furthermore, polycentric problems confront managers, administrators, legislators and the executive with the same set of difficulties they pose for courts.<sup>213</sup>

In 'The Forms and Limits of Adjudication' Fuller placed huge emphasis on the importance of a certain kind of participation but it is unclear whether that participation is an 'optimum' or 'essential' condition of adjudication. Thus, he argued that anything which enhances the impact of this participation 'lifts adjudication toward its optimum expression'.<sup>214</sup> This implies that adjudication may be carried out in a more or less optimum way. But, despite this and other concessions to polycentricity as a matter of degree, Fuller offered no practical assistance to the adjudicator trying to decide whether and how to intervene.<sup>215</sup> This fact, combined with Fuller's insistence that any matter touching on the allocation of resources falls outside the scope of adjudication, means that his argument tends to act as a non-justiciability doctrine rather than a basis from which to determine justiciability.

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<sup>210</sup> Fuller (note 197 above) at 401.

<sup>211</sup> See, for example, J Allison 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53(2) *Cambridge Law Journal* 367 and the literature he refers to at note 2; King (note 208 above); and Pieterse (note 40 above) at 392-6.

<sup>212</sup> Allison (note 211 above) at 373.

<sup>213</sup> King (note 196 above) at 102-3.

<sup>214</sup> Fuller (note 197 above) at 364.

<sup>215</sup> Allison (note 211 above) at 371.

Fuller viewed the adjudicative role as extremely limited. This was, in part, a consequence of his concentration on the Anglo-American adversarial version of this role,<sup>216</sup> a preoccupation he later regretted.<sup>217</sup> He did not acknowledge the ‘expert investigative role’ adjudicators can play, and demanded an unrealistic level of neutrality<sup>218</sup> to ensure an impartiality that is at least as effectively protected by the judicial appointment and accountability procedures that are part of most modern democracies.<sup>219</sup> Although Fuller recognised that ‘... a court is not an inert mirror reflecting current mores but an active participant in the enterprise of articulating the implications of shared purposes’,<sup>220</sup> his essay indicates that he viewed this as a reason to carve out a discrete and limited role for judges. In discussing Fuller’s later emphasis on the collaborative and responsible interaction between ‘lawyer and subject’,<sup>221</sup> Allison suggests that this idea may be developed such that adjudication is defined by ‘responsible and purposive interaction between the adjudicator and the parties’.<sup>222</sup> This would allow for a more nuanced judicial role, in which responsibility and responsiveness are emphasised.<sup>223</sup>

As with the critiques of judicial review discussed earlier, Fuller’s arguments are a valuable reminder of the limitations of judicial review – this time in the context of polycentric matters. The continued engagement with his argument, in South Africa and the U.K., is evidence of the enduring and complex nature of his concerns. But the problems with his argument described above are a strong indication that it should act as a limit, not a bar, to justiciability. This approach is supported by the discussion of the institutional limits of

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<sup>216</sup> Allison (note 211 above) at 376-7.

<sup>217</sup> Allison (note 211 above) at 377.

<sup>218</sup> See his discussion of the abandonment of ‘judicial proprieties’, Fuller (note 197 above) at 401.

<sup>219</sup> Allison (note 211 above) at 375-6.

<sup>220</sup> Fuller (note 197 above) at 378.

<sup>221</sup> *The Morality of Law* (1969) at 176-7, as cited in Allison (note 211 above) at 380-1.

<sup>222</sup> Allison (note 211 above) at 381.

<sup>223</sup> In practice, certain of Fuller’s fears about judicial engagement with polycentric matters have turned out to be well-founded. Indian Supreme Court judgments discussed in chapter 2 provide examples of this. However, at the same time, that court has sometimes made use of socio-legal commissions to fill informational gaps to some effect – a procedure that appears to contradict Fuller’s view of what is judicially acceptable. Furthermore, the South African CC has used a range of mechanisms – stopping proceedings to call for further evidence or argument, ordering parties to engage in negotiation and avoidance of matters they are not required to pronounce on in order to decide the issue at hand – in dealing with complex matters. These are indications of a shift in the way we think about the judicial role. See, for example, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC), discussed in chapter 4.

judicial review in De Smith. Defining matters as polycentric does not completely insulate them from judicial scrutiny. The question of whether judges should intervene is entirely dependent on context and the legislative requirements. One should avoid general assumptions about the greater capacity of the legislature for considering a wide range of interests<sup>224</sup> for, as noted above, the nature of the legislature as an institution has greatly altered over time.

The argument regarding constitutional and institutional limitations on judicial review strikes similar chords as that recently made by Jeff King in the context of cases dealing with resource allocation. King distinguishes between ‘discretionary allocative decision-making’ and ‘allocative impact’. The latter category recognises that a court’s judgment may necessitate a ‘financial or distributional adjustment’. In a smaller number of cases, courts are requested to review discretionary governmental decisions, made in terms of statute, delegated or prerogative powers, about how scarce resources are allocated.<sup>225</sup> It is this category of cases, involving the review of discretionary allocative decision-making that is subject to the non-justiciability doctrine. According to that doctrine, the case cannot be reviewed for *Wednesbury*<sup>226</sup> unreasonableness or irrationality.<sup>227</sup> According to King, ‘[a]llocative impact, on the other hand, remains a justiciable matter, but one which may continue to function as a policy ground influencing judicial discretion’.<sup>228</sup> Most importantly, King remarks that, with discretionary allocative decision-making, courts defer because they have been ordered by Parliament to do so. With allocative impact cases, courts choose to exercise restraint ‘for reasons of the decision-maker’s competency’.<sup>229</sup> In Jowell’s framework of constitutional and institutional limits on judicial review set out above then, allocative impact describes an institutional reason for judges to exercise restraint. With discretionary allocative decision-making, courts are constitutionally required to defer. King’s analysis is useful

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<sup>224</sup> De Smith (note 122 above) at 21.

<sup>225</sup> ‘The justiciability of resource allocation’ (2007) 70 (2) *Modern Law Review* 197 at 197 and 198.

<sup>226</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. In terms of this case, a decision had to be ‘so unreasonable that no reasonable authority could ever have come to it’ in order to be overturned. This and other interpretations of the ‘reasonableness’ ground of review, are discussed in chapter 3.

<sup>227</sup> King (note 225 above) at 199.

<sup>228</sup> King (note 225 above) at 198.

<sup>229</sup> King (note 225 above) at 205.

because it indicates that resource implications are not themselves a barrier to review for rationality. Such a blanket rule may be appropriate in respect of discretionary allocative decisions but, with allocative impact, the extent of the deference owed must depend on the competency of the particular decision-maker and the context.<sup>230</sup>

## **(6) Conclusion**

Intricate debates about the nature and purpose of the judicial role occupy a central place in current public law scholarship in South Africa and the U.K. Commentators in these jurisdictions share a common concern with how fundamental rights may best be protected in the context of a constitutional democracy. But there are vast disagreements about which governmental institutions should have the power and, therefore, the responsibility for enforcing these rights.

The critiques discussed in this chapter indicate that the debate is highly polarised. Those, like Jeremy Waldron, who are against strong judicial review, adopt a very restrictive view of how courts function. Similarly, scholars who press for a more robust role for the judiciary find it difficult to acknowledge the limitations within which courts tend to operate. Waldron suggests that the limitations he describes are inherent in the judicial role but this does not adequately account for the creativity with which judges in different jurisdictions are approaching politically sensitive matters. Judicial approaches in South Africa and the U.K. indicate that many judges take seriously the constitutional and institutional limits of their role.<sup>231</sup> Increasingly, judgements display sensitivity to legitimacy concerns and relative expertise.

Adjudication of rights has, for some time now, challenged the traditional notion that courts exist to protect individual liberties from state interference. Rights such as equality, dignity and access to justice have been interpreted by courts to demand positive action from the state. Furthermore, rights to equality and freedom of religion, for example, also present a

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<sup>230</sup> King (note 225 above) at 205.

<sup>231</sup> Discussed in chapters 4 and 5.

challenge to the notion that rights-bearers are always individuals as individuals. SE rights present a more obvious challenge to a conventional conception of rights adjudication. In the South African context, sections 26 (2) and 27 (2) demand that courts consider wider societal values in pronouncing on SE rights. The specificities of particular rights, cases and jurisdictions will always be relevant.

The classification of institutional and constitutional limitations on judicial review, discussed above, provides a means through which to consider how intensely courts should scrutinise executive and legislative action. It is neither possible nor desirable to put forward a general theory of judicial deference or restraint. It is possible, however, to use the classification to make sense of emerging judicial approaches to cases in which SE rights are directly or indirectly protected. Moreover, building on the classification and the cases, we may be able to go beyond a descriptively satisfactory account of judicial review in these cases to one that is also normatively justifiable. Most importantly, a model of SE rights adjudication must be responsive to concerns about democratic legitimacy. Drawing on Fredman's argument above, an effective way of assessing whether it does so is by asking whether it enhances the values of participation, accountability and equality. It is my thesis that a reasonableness-based approach has the potential to do this – an argument I explore in chapters 3 to 6.

First, I examine the Indian experience of SE rights adjudication. The Indian case-study is an argument for a more considered approach to SE rights adjudication, one that locates the court's role within the broader dialogue taking place between various interested parties and that attempts to determine the intensity of review on a more principled basis.

## Chapter Two

### The Indian experience of social and economic rights adjudication

#### (1) Introduction

India has a long and rich jurisprudence on SE rights, despite the fact that the Indian Constitution protects interests in social and economic (SE) goods only as directive principles of state policy.<sup>1</sup> The Supreme Court has, for some time now, used the directive principles dealing with SE rights, to interpret civil and political (CP) rights – mainly the right to life, protected in Article 21. In doing so, the court has measured state action and policy against the standard ‘fair, just and reasonable’, the content of which is not fixed but varies according to the demands and context of the case. The court has made some far-reaching judgments protecting health, livelihood and education, for example, and has enjoyed a significant amount of public support. At the same time, however, there have been concerns about the efficacy and consistency of the court’s judgments in protecting the poor and vulnerable:

The country still struggles with debilitating poverty and economic hardship. Over 50% of the population belongs to the lower castes – which, while not always, often seriously hinders the academic, political, and socio-economic opportunities of these individuals.<sup>2</sup>

The study of India raises concerns about a particular brand of judicial activism and is useful in coming to grips with concerns about the legitimacy and capacity of the judiciary.

This year marks the 60<sup>th</sup> anniversary of the year the Indian Constitution came into operation.<sup>3</sup> During a large part of this period, constitutional lawyers at home and abroad saw the Indian Supreme Court as a fiercely independent guardian of constitutional principles from governmental misuse. The court developed a reputation as both a protector of individual rights and an engine for SE reform. To some extent, this received wisdom continues to exert a strong influence on perceptions of Indian constitutional law today.<sup>4</sup> But recent scholarship

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<sup>1</sup> See Article 37 of the Constitution.

<sup>2</sup> J Krishnan 'Scholarly discourse, public perceptions and the cementing of norms: the case of the Indian Supreme Court and a plea for research' (2007) William Mitchell Legal Studies Research Paper Series Working Paper No. 77, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003811), last accessed on 1 August 2010.

<sup>3</sup> The Constitution came into effect on 26 January 1950.

<sup>4</sup> See, for example, V Sripati 'Human rights in India – fifty years after independence' (1997-98) 26 *Denver Journal of International Law and Policy* 93; B De Villiers 'Directive principles of state policy and fundamental rights: the Indian experience' (1992) 8 *South African Journal on Human Rights* 29; S Meer 'Litigating fundamental rights: rights litigation and social action litigation in India: a lesson for

increasingly points to a more ambiguous relationship between the court and the other branches of government and a much more tenuous link between its jurisprudence and the advancement of India's poor. This scholarship acknowledges the achievements of the court in some of its watershed rulings on SE equality<sup>5</sup> but seriously questions the extent to which the jurisprudence has had an impact in the transformation of Indian society. More than this, many of those writing in this field today trace the marginal impact of the jurisprudence not just to a lack of political will to implement judgments but to flaws in judicial reasoning and a judicial failure to fully appreciate the institutional limitations of the courts themselves.<sup>6</sup> In the following section, I begin by briefly examining the historical background in which the Indian Constitution was drafted as well as some of its most important provisions. I move on to consider early constitutional jurisprudence before examining the public interest litigation (PIL) movement in some detail. My primary interest in all these areas lies in the evolution of the judicial role in India and the implications of this evolution for SE rights adjudication.

## (2) Directive principles of state policy, land reform and the judiciary

Drawing from the Irish Constitution, members of the Indian Constituent Assembly<sup>7</sup> decided

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South Africa' (1993) 9 *South African Journal on Human Rights* 358; M Kirby 'Judicial Activism' (1997) 23 *Commonwealth Law Bulletin* 1224. For some examples of later commentary, see G Subramanian 'Contribution of Indian Judiciary to social justice principles underlying the Universal Declaration of Human Rights' (2008) 50(4) *Journal of the Indian Law Institute* 593; and B Neuborne 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476. These writers are not uncritical of the Supreme Court's record but they are overwhelmingly positive about the court's independence and creativity.

<sup>5</sup> See *Paschim Banga Ket Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37; *Consumer Education and Research Centre v India* (1995) 3 SCC 42; *Bandhua Mukti Morcha v Union of India and others* 1984 SCR (2) 67; *Olga Tellis and others v Bombay Municipal Corporation and others* 1985 SCR Supl. (2) 51; *Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi and others* 1992 SCR (1) 565 and *Mohini Jain v State of Kerala and others* (1992) 3 SCC 666 are some commonly cited cases.

<sup>6</sup> See S Shankar and P Mehta 'Courts and Socioeconomic rights in India' in V Gauri and D Brink (eds.) (2008) *Courting social justice: judicial enforcement of social and economic rights in the developing world* (Cambridge University Press: New York) 146; Krishnan (note 2 above); 'Social policy advocacy and the role of the courts in India' (2003) 21 *American Asian Review* 91, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=682326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682326), last accessed on 14 May 2009; 'The rights of the new untouchables: a constitutional analysis of HIV jurisprudence in India' (2003) 25 *Human Rights Quarterly* 719-819; S Muralidhar 'Economic, social and cultural rights: an Indian response to the justiciability debate' in Y Ghai and J Cottrell (eds.) (2004) *Economic, social and cultural rights in practice: the role of judges in implementing economic, social and cultural rights* (Interights: London) 23; and U Ramanathan 'Demolition drive' *Economic and Political Weekly*, 2 July 2005, 2908.

<sup>7</sup> For a summary of the Constitutional drafting process, See O. Reddy (2008) *The Court and the Constitution of India: summits and shallows* (OUP: New Delhi) at 10- 23. See also Sripathi (note 4 above) at 95-104.

to set out the SE duties on the state<sup>8</sup> as directive principles of state policy in Part 4 of the Constitution, separate from the fundamental rights detailed in Part 3. Article 13 of Part 4 imposes an obligation on the state to refrain from enacting laws which are inconsistent with fundamental rights. Any such laws will be void. The courts are given wide remedial powers for the enforcement of these rights.<sup>9</sup> By contrast, Article 37 of the Constitution, dealing with the application of the directive principles states:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Thus, the directive principles were not intended to be enforceable by courts.<sup>10</sup> Instead, the drafters of the Constitution saw them as guiding principles for the central and state governments in the development of their policies. This is clear from Article 37 itself, as well as terms such as ‘the State shall regard’, ‘the State shall endeavour to secure’, ‘the State shall, within the limits of its economic capacity and development, make effective provision for securing’, and ‘the State shall, in particular, direct its policy towards securing’ used in the subsequent Articles of the chapter on directive principles.

For the drafters, whilst there was some disagreement about whether the directive principles should have been included in the Constitution at all and, if so, in which part of the text they belonged, there was no ambiguity about the centrality of the goals they enumerated.<sup>11</sup> Chairperson of the Constitution drafting committee, B.R. Ambedkar, noted that the intention of the Constituent Assembly was that the principles be made the ‘basis of all executive and legislative action’.<sup>12</sup> In presenting the Fourth Constitutional Amendment Bill before Parliament in 1954, India’s first Prime Minister and one of the most important figures in the drafting process, Jawaharlal Nehru observed:

We stress greatly and argue in Courts of Law about the Fundamental Rights. Rightly so, but there is such a thing also as the Directive Principles of Constitution... Those are, as the Constitution says, the fundamentals in the governance of the Country... if... there is an

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<sup>8</sup> Such as securing the right to an ‘adequate means of livelihood’ for all citizens (Article 39(a)); securing the right to work, education and certain forms of social security’ (Article 41); and raising the levels of nutrition and public health (Article 47).

<sup>9</sup> See Article 32 of the Constitution.

<sup>10</sup> See G Austin (1966) *The Indian Constitution: Cornerstone of a Nation* (OUP: Oxford), Chapter 3, on the drafting history and background to the fundamental rights and Directive Principles of State Policy.

<sup>11</sup> De Villiers (note 4 above) at 31-2.

<sup>12</sup> Shankar and Mehta (note 6 above) at 148.

inherent contradiction in the Constitution between the Fundamental Rights and the Directive Principles of State Policy,...it is up to this Parliament to remove the contradiction and make the Fundamental Rights subserve the Directive Principles of the State Policy.<sup>13</sup>

The directive principles are more expansive than the SE rights provisions in the South African Constitution in that they set out a wide-ranging SE programme for the state.<sup>14</sup> As was the case in the South African constitutional drafting process, the architects of the Indian Constitution were very aware of the vast inequalities that existed in wealth, education, health care, access to land and so on in Indian society. The urgent need for reform in these areas was recognised in the text of Chapter 4.<sup>15</sup> The fact that they did not give rise to fundamental rights enforceable by courts signalled a concern with the relative institutional incapacity of judges to pronounce on these matters. It was not a sign of the relative lack of importance of the directive principles. This drafting choice was an indication that decisions about SE policy belonged in the legislative and executive domains. By contrast, and for reasons discussed earlier in this thesis, the South African drafters' recognition of the urgent need to realise a more equitable distribution of SE goods such as health care and land resulted in a set of carefully delineated SE fundamental rights. Compared to the Indian Constitution's directive principles, the South African Constitution's SE rights are a less detailed, more functional spelling out of the SE goods enforceable by courts - less a vision of the state's programme for socio-economic reform and more a guide to courts about to implement these rights through their judgments.

When the Indian Constitution was enacted, the political leaders who came to the fore were those who had fought in the struggle for India's independence whereas the judges were colonial appointees, drawn from the elite in Indian society.<sup>16</sup> One of the concerns of the members of the Indian Constituent Assembly was that an unelected judicial body could thwart attempts at reform by using the fundamental rights sections to protect established economic interests – land interests, in particular.<sup>17</sup> This was another reason for keeping the

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<sup>13</sup> Reddy (note 7 above) at 75.

<sup>14</sup> De Villiers (note 4 above) at 32-3.

<sup>15</sup> De Villiers (note 4 above) at 33.

<sup>16</sup> S Sathe (2002) *Judicial activism in India: transgressing borders and enforcing limits* (OUP: New Delhi) at 20-1.

<sup>17</sup> S Sathe (note 16 above) at 36.

programme for socio-economic reform set out in the directive principles outside the ambit of judicial review. In fact, the general view of politicians and judges at the time was that judicial review should be closely defined and very limited.<sup>18</sup> So, if in 1949 ‘maximum care was taken to prevent the courts in India from being more than auditors of legality’,<sup>19</sup> what explains the expansion of judicial review the country has witnessed over the intervening decades?<sup>20</sup>

The legislators’ fears over judicial antagonism toward land reform, in particular, proved to be well-founded. Relying on their rights to property and equality, landholders used the courts to resist governmental attempts at land reform.<sup>21</sup> This precipitated a lengthy battle between legislature and judiciary with the legislature passing a series of Constitutional Amendments designed to bolster its capacity to undertake speedy land redistribution and landholders challenging these amendments before the Supreme Court.<sup>22</sup> This battle ultimately resulted in the Supreme Court’s adoption of the basic features doctrine in the *Kesavananda* case.<sup>23</sup> In terms of this doctrine, Parliament does not have the power to amend the Constitution in a manner which abrogates or changes its basic features or identity. The courts have only used the basic structure doctrine to overturn amendments in a handful of cases.<sup>24</sup> In *Kesavananda* itself, the judges tested each of the previous amendments against the newly set out doctrine and found them to be valid.<sup>25</sup> But the *Kesavananda* decision is a constitutional landmark. The case is an indication that the court’s view of its role as quite narrowly circumscribed had changed dramatically.<sup>26</sup>

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<sup>18</sup> Sathe (note 16 above) at 2-3, 6 and 20. See also N Robinson ‘Expanding judiciaries: India and the rise of the good governance court’ 2009 8(1) *Washington University Global Studies Law Review* 1 at 4.

<sup>19</sup> Sathe (note 16 above) at 3.

<sup>20</sup> Sathe (note 16 above) at xxxvii (Introduction to the paperback edition). See also P Bhushan ‘The lack of judicial accountability in India’, talk delivered at the Department of South Asian studies at Princeton University, 10 March 2009, text available at [www.judicialreforms.org/files/the\\_lack\\_of\\_judicial\\_accountability\\_in\\_india.pdf](http://www.judicialreforms.org/files/the_lack_of_judicial_accountability_in_india.pdf), last accessed on 24 April 2009 on the extensive powers of the judiciary.

<sup>21</sup> Neuborne (note 4 above) at 487, Sathe (note 16 above) at 46-7 and Reddy (note 7 above) at 44.

<sup>22</sup> Some of the most important cases on the judicial review of land reform at the time were: *State of West Bengal v Mrs Bela Banerjee and others* 1954 SCR 558 at 563-4; *Karimbil Kunhikoman v State of Kerala* 1961 AIR 723; and *Golaknath and others v State of Punjab and another* 1967 SCR (2) 762.

<sup>23</sup> *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and another* AIR 1973 SC 1461.

<sup>24</sup> Sathe (note 16 above) at 87-9.

<sup>25</sup> See the judgment of Jaganmohan Reddy J in *Kesavananda* (note 23 above) at par. 1227.

<sup>26</sup> Much has been written about the basic structure or basic features doctrine. I do not canvass that scholarship in any detail here as the doctrine is not one of the central concerns of this thesis. I refer to it in this chapter because of its relevance in defining the Indian Supreme Court’s role generally and because it arose in response to state attempts at SE reform. The focus of the discussion is the role of

Most importantly, what *Kesavananda* and subsequent cases have made clear is that it is for the court to determine whether an amendment is valid, testing it against a judicially constructed and evolving basic structure doctrine.<sup>27</sup> As a result, the doctrine has always been controversial. The decision was, at the time, an exercise of extreme judicial activism. Furthermore, although the court has exercised restraint in its application of the doctrine,<sup>28</sup> the context in which it was originally developed bolstered fears over the capacity of the judges to act as a conservative social force, insulating vested private property interests from a legislative programme of major SE reform.

Despite initial resistance,<sup>29</sup> the basic structure doctrine gained both academic approval and acceptance from government over the years.<sup>30</sup> This change in attitude may be attributed, at least in part, to the effects of the state of emergency in India which lasted from 1975 to 1977. The emergency was precipitated by a legal challenge to Indira Gandhi's election to Parliament, based on allegations that she had practised election fraud.<sup>31</sup> The challenge succeeded before the Allahabad High Court and her election was set aside.<sup>32</sup> The Supreme Court granted Mrs Gandhi leave to appeal and stayed the execution of part of the High Court's order<sup>33</sup> but, before the Supreme Court decided on the merits of the case, the executive declared a presidential emergency.<sup>34</sup> Government then passed a series of constitutional amendments barring the judiciary from enquiring into the declaration of emergency itself, any laws enacted during the emergency that conflicted with fundamental

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the courts in implementing SE rights. For a recent critical analysis of the doctrine, see S Krishnaswamy (2009) *Democracy and constitutionalism in India: a study of the basic structure doctrine* (OUP: New Delhi).

<sup>27</sup> For a discussion of the evolution of the doctrine, see Reddy (note 7 above) at 61-4. See also Krishnaswamy (note 26 above).

<sup>28</sup> See Sathe (note 16 above) at 87-94 but compare Krishnaswamy (note 26 above), Chapter 2.

<sup>29</sup> For a description of governmental attempts to suppress the doctrine, see Sathe (note 16 above) at 77-87.

<sup>30</sup> See Krishnaswamy (note 26 above) at xx of the Introduction. Recent years have seen a resurgence of criticism of judicial activism in India generally – this is discussed later in this chapter.

<sup>31</sup> Sathe (note 16 above) at 73-4.

<sup>32</sup> Reddy (note 7 above) at 66.

<sup>33</sup> *Indira Nehru Gandhi v Raj Narain and another* 1975 AIR 1590 at par. 31.

<sup>34</sup> The emergency was declared just two days after Krishna Ayer J's decision in *Indira Nehru Gandhi* (note 33 above) – Neuborne (note 4 above) at 493. Many commentators view the executive's declaration of the emergency as an attempt to shield Mrs Gandhi from the judicial process – see Neuborne (note 4 above) at 492.

rights, the election of a Prime Minister and speaker of the lower house, and censorship laws.<sup>35</sup> Raj Narain, the opposition leader who had challenged Mrs Gandhi's election in the first place, challenged the validity of the Thirty-Ninth Amendment as it had effectively put an end to his original case.<sup>36</sup>

In *Indira Gandhi v Raj Narain* (known as the *Election case*),<sup>37</sup> a majority of the judges, although they applied different reasoning, held that the Thirty-Ninth Amendment was void on the basis that it abrogated the basic structure of the Constitution.<sup>38</sup> Whilst the decision has been criticised for a lack of conceptual clarity,<sup>39</sup> its 'cumulative effect' was 'to reassert *Kesavananda* in the teeth of the emergency'.<sup>40</sup> Commentators saw the basic structure doctrine in a new light – as a judicial tool through which government excesses could be curbed.<sup>41</sup> But the decision in the *Election case* was soon followed by *Additional District Magistrate, Jabalpur v SS Shukla*,<sup>42</sup> a case commentators agree was one of the chief low points in the Supreme Court's history.<sup>43</sup> In this case, the court held that the government's wide powers of detention were beyond judicial review because the emergency laws prevented access to the courts,<sup>44</sup> despite the fact that there were widespread reports of various atrocities, including police torture.<sup>45</sup>

The court's post-emergency 'doctrinal effervescence'<sup>46</sup> in interpreting the directive principles, in particular may be attributed to two main factors. First, the political landscape

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<sup>35</sup> Neuborne (note 4 above) at 493. The Thirty-Eighth, Thirty-Ninth and Fortieth Amendment Acts are available at <http://indiacode.nic.in/coiweb/coifiles/amendment.htm>, last accessed on 30 April 2009.

<sup>36</sup> Neuborne (note 4 above) at 493; Sathe (note 16 above) at 96; and Reddy (note 7 above) at 56.

<sup>37</sup> Note 33 above.

<sup>38</sup> Sathe (note 16 above) at 76. For a more detailed analysis of the reasoning of the various judges, see Krishnaswamy (note 26 above) at 58-60.

<sup>39</sup> Krishnaswamy (note 26 above) at 41; 59-60.

<sup>40</sup> Neuborne (note 4 above) at 493. See also Sathe (note 16 above) at 73.

<sup>41</sup> Sathe (note 16 above) at 76-7.

<sup>42</sup> 1976 SCR 172.

<sup>43</sup> Neuborne (note 4 above) at 494; see also Krishnan (note 2 above) at 13; Reddy (note 7 above) at 68-9; Sathe (note 16 above) at 104.

<sup>44</sup> At 176-7 of the judgment (note 42 above). But, see the dissenting opinion of Khanna J at 246-304. Khanna J held that Article 21 was not the 'sole repository' of the right to life and liberty. This right was an essential feature of the rule of law, a higher value which pre-dated the enactment of the Constitution (see pages 266-70). His conclusions are summarised at 302-4.

<sup>45</sup> See Sathe (note 16 above) at 104-5.

<sup>46</sup> Sathe (note 16 above) at 104.

had changed significantly. As noted by former Justice of the Supreme Court, O. Chinnappa Reddy,

The year 1973 was indeed a watershed in the constitutional history of India. Until then, it looked as if Parliament was asserting and consolidating its power as a democratic institution committed to the goals of abolition of all semblance of feudalism, introduction of land reforms, and the pursuit of the Directive Principles of State Policy...[w]hile the earlier constitutional amendments, that is amendments up to 1973, were aimed at securing to Parliament the power to legislate without question in regard to the goals just mentioned, the amendments made subsequently appear...to be aimed at securing more and more power to the executive. The road signposts clearly changed from democracy to authoritarianism.<sup>47</sup>

The repressive measures government took against the Indian population created a gap in legitimacy which the court attempted to fill by holding the government accountable for its constitutional promises of liberty and socio-economic reform. Sathe attributes the post-emergency judicial activism to the court's realisation that its reputation as a site of social privilege would not protect it against future attacks by a 'powerful political establishment'<sup>48</sup> – in short, the court needed the people of India on its side. Second, writers in this field also tend to see the court's development of PIL as an attempt to atone for having so blatantly failed the people of India in the *Jabalpur* case.<sup>49</sup>

In 1977, Mrs Gandhi called for fresh elections, in which her Congress Party suffered an overwhelming defeat to the Janata party, a conglomeration of non-Congress national parties and some regional parties.<sup>50</sup> The emergency had ended but would continue to have an impact on Indian politics – most importantly, for the purposes of this thesis, the stage had been set for the judiciary to reinvent both itself and the manner in which social causes were litigated in the country.

### **(3) Post-emergency developments: the birth of public interest litigation**

In the years following the end of the state of emergency in India, a small group of judges and

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<sup>47</sup> Reddy (note 7 above) at 65-6.

<sup>48</sup> Sathe (note 16 above) at 107. The Thirty-Eighth, Thirty-Ninth and Fortieth Amendments mentioned above were not the only governmental assaults on judicial powers and independence during the emergency period. See Sathe (note 16 above) at 85-7; and Reddy (note 7 above) at 67-8. See also *Minerva Mills Ltd and others v Union of India and others* 1981 SCR (1) 206.

<sup>49</sup> B Rajagopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective' (2007) 18 *Human Rights Review* 157 at 159; Krishnan (note 2 above) at 13-14; and S Dam 'Venet Narain v Union of India: "a court of law and not justice" – is the Indian Supreme Court beyond the Indian Constitution?' (2005) *Public Law* 239 at 239, note 1.

<sup>50</sup> Sathe (note 16 above) at 105.

lawyers<sup>51</sup> developed the model of public interest or social action litigation,<sup>52</sup> which has become such a hallmark of the country's jurisprudence. The movement began as an attempt to make the courts more accessible to ordinary people by relaxing strict procedural rules. Thus, for example, the Supreme Court accepted a letter written to a judge, complaining of the violation of fundamental rights, as a legitimate means through which an individual could bring a matter before the court.<sup>53</sup> This relaxation of procedural rules arose from the court's recognition that it would be close to impossible for people unaware of their rights or lacking material resources to engage a lawyer for the purpose of submitting a standard writ petition to the court.<sup>54</sup> But PIL was not limited to new understandings of how cases could be brought to a court and who had a right to bring them. The movement also had an impact on the court's approach to constitutional interpretation.

The Supreme Court has used those directive principles dealing with SE rights to give meaning and content to certain fundamental rights in the Constitution, most prominently the right to life and personal liberty protected in Article 21. For example, the court has found that Article 21 encompasses a right to adequate medical facilities or health care,<sup>55</sup> and a right to livelihood.<sup>56</sup> The court has also interpreted other fundamental rights in light of directive principles. It has held, for instance, that the right to equality before the law in Article 14

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<sup>51</sup> M Galanter and J Krishnan "Bread for the Poor": access to justice and the rights of the needy in India' 2004 (55) *Hastings Law Journal* 789 at 795.

<sup>52</sup> Some scholars prefer the term 'social action litigation' to 'public interest litigation' in the Indian context as the former includes 'many attributes of a social movement, such as mobilizing community activists and the press as well as courts' – F Munger 'Inquiry and Activism in Law and Society' (2001) 35 *Law and Society Review* 7 at 12. See also *M.C. Mehta and Anr. v Union of India* and Ors. 1987 SCR (1) 819 at 828-30. I use the term 'public interest litigation' in this thesis as it is the term used by the courts and the more familiar of the two – see Sathe (note 16 above) at 203.

<sup>53</sup> *Sunil Batra v Delhi Administration and others* 1979 SCR (1) 392.

<sup>54</sup> As I am mainly concerned with standards of review used in the implementation of the directive principles, I will not discuss the procedural aspects of the PIL movement in India in any detail. For a summary, see Neuborne (note 4 above) at 501-2; M Jain 'The Supreme Court and fundamental rights' in SK Verma and Kusum (eds.) (2000) *Fifty years of the Supreme Court of India: its grasp and reach* (OUP: New Delhi) at 76-86; and A Desai and S Muralidhar 'Public interest litigation: potential and problems' in B Kirpal *et al* (eds.) (2000) *Supreme but not infallible: essays in honour of the Supreme Court of India* (OUP: New Delhi) 159. For a recent description and critique of the public interest phenomenon in India, see Sathe (note 16 above), Chapter 6.

<sup>55</sup> See *Paschim Banga; Consumer Education and Research Centre*; and *Bandhua Mukti Morcha* (note 5 above).

<sup>56</sup> See *Olga Tellis* (note 5 above) and *Delhi Development Horticulture Employee's Union* (note 5 above).

includes a right to education.<sup>57</sup> The court has a long history of activism on behalf of the poor and vulnerable and certain Supreme Court judgments have elicited praise, at least in academic and media circles,<sup>58</sup> for their legal creativity<sup>59</sup> and the clear demands they make of government.

I focus on two major developments in Indian jurisprudence in this section. Both relate to the interpretation of Article 21 of the Indian Constitution, which states: ‘[n]o person shall be deprived of his life or personal liberty except according to procedure established by law’. For some time, this Article was interpreted very restrictively as a guarantee only that any interference with the right was carried out through the mechanism of law. Provided there was some piece of legislation in place, the court would not enquire further into the soundness of that law and its effect on the individuals concerned.<sup>60</sup> This changed with the case of *Maneka Gandhi v Union of India and Another*.<sup>61</sup> Justice Bhagwati, in whose opinion all the judges but one<sup>62</sup> concurred, held that the procedure by which the Article 21 right is impinged on ‘cannot be arbitrary, unfair or unreasonable’.<sup>63</sup> In addition, the majority gave a generous meaning to the *content* of the right protected in Article 21:

The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court ... that ‘personal liberty’ within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law.<sup>64</sup>

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<sup>57</sup> See *Mohini Jain* (note 5 above). Later, the court clarified the position in *Mohini Jain* by holding that Article 14 gave rise to a right to primary education – see *Unnikrishnan v. State of Andhra Pradesh* 1993 (1) SCC 645. See also *Jain* (note 54 above) at 32-3.

<sup>58</sup> The attitude of ordinary citizens to the Indian Supreme Court is far less clear. See *Krishnan* (note 2 above). This is discussed further below.

<sup>59</sup> *Jain* (note 54 above) at 16.

<sup>60</sup> See *AK Gopalan v State of Madras (Union of India: Intervener)* 1950 SCR 88; and *Jabalpur* (note 42 above), both cited in *Maneka Gandhi v Union of India and another* (1978) 1 SCC 248 – see the judgment of Beg CJ (at 643-657).

<sup>61</sup> Note 60 above. The case dealt with the government’s power to impound passports without affording the affected individual a hearing. See page 273 of the judgment. Although the change in the interpretation of the term ‘prescribed by law’ is usually attributed to this case, Bhagwati J was, in fact, clarifying the position by approving the earlier judgment of *Rustom Cavasjee Cooper v Union of India* 1970 SCR (3) 530: ‘the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual’s rights’ (at 576).

<sup>62</sup> Kailasam J wrote a dissenting judgment (at 735 – 76, note 60 above).

<sup>63</sup> *Maneka Gandhi* (note 60 above) at 671.

<sup>64</sup> *Maneka Gandhi* (note 60 above) at 670-1.

Finally, Bhagwati J expressed approval for the English notion that the application of the *audi alteram partem* rule demands a level of 'circumstantial flexibility'.<sup>65</sup> Taking this line of reasoning further, Bhagwati J, for the majority, held that provided the government gave the petitioner a post-decision hearing, the executive decision to impound the passport and the procedure set out in the relevant legislation<sup>66</sup> need not be struck down.<sup>67</sup> He expressed a different view about the validity of government's refusal to provide reasons for its decision to impound the passport. As government had decided to reveal these reasons during the legal proceedings, Bhagwati J's comments are not part of the *ratio*, but they shed some light on the court's thinking on reasonableness. First, the judge noted that 'no reasonable person could possibly have taken the view that the interests of the general public would be prejudiced by the disclosure of the reasons'. Second, the reasons given had to be relevant. And, third, there had to be a 'nexus between the reasons and the ground on which the passport has been impounded'.<sup>68</sup> Whilst the majority in *Maneka Gandhi* did not favour the petitioner's request that government's decision to impound her passport be quashed and the pronouncements on what reasonableness requires were quite limited, the case marked a turning point in that a majority of the judges acknowledged context and purpose, rather than a literal reading of the text, to be the driving forces of constitutional interpretation.<sup>69</sup>

In the later case of *Francis Mullin*,<sup>70</sup> the Supreme Court relied on *Maneka Gandhi* for a generous interpretation of Article 21. In this case, the petitioner, a British national was arrested and detained on the charge of attempting to smuggle hashish out of the country. While the criminal proceedings were pending, she had great difficulty in getting access to her legal counsel and members of her family.<sup>71</sup> The court held that the right to life included the protection of '[e] very limb or faculty through which life is enjoyed' and by necessary extension 'the faculties of thinking and feeling'.<sup>72</sup> Most importantly, this meant protection of

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<sup>65</sup> *Maneka Gandhi* (note 60 above) at 682.

<sup>66</sup> Passports Act, 1967.

<sup>67</sup> *Maneka Gandhi* (note 60 above) at 681-3. Chief Justice Beg disagreed, holding that the government's decision was unconstitutional and had to be struck down – at 656-7.

<sup>68</sup> *Maneka Gandhi* (note 60 above) at 666.

<sup>69</sup> See Sathe (note 16 above) at 111-2.

<sup>70</sup> *Francis Coralie Mullin v The Administrator, Union Territory of India and others* 1981 SCR (2) 516.

<sup>71</sup> *Francis Mullin* (note 70 above) at 520.

<sup>72</sup> *Francis Mullin* (note 70 above) at 528.

human dignity and all that is attached to that: ‘namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms’.<sup>73</sup> The court acknowledged that economic considerations would play a role in determining the full content of the right but that, in any event, the right must include the ‘the right to carry on such functions and activities as constitute the bare minimum expression of the human self’.<sup>74</sup> This reference to minimum standards, below which the government cannot go, was a useful addition to the jurisprudence and has been taken up in later cases.

The court went on to emphasise, following *Maneka Gandhi*, that the right to life and all that it entailed could only be limited by a reasonable, fair and just procedure.<sup>75</sup> But the judges, per Bhagwati J, also held that the prison regulations setting out the rules regarding detainees’ access to family and legal counsel had themselves to meet the standard of ‘fair, just and reasonable’.<sup>76</sup> Thus, it was not merely the procedure by which the regulations were drafted, but also their substance, that came under judicial scrutiny. On the issues in this case, the court held, first, that a detainee is entitled to two family visits a week, reasoning that, as under-trial prisoners are entitled to two such visits a week and convicted prisoners are entitled to weekly visits, there was no reason why visits to detainees should be limited to one a month. A detainee stood on a ‘higher pedestal’ than either an under-trial prisoner or someone who has already been convicted. Furthermore, the court had previously held that restrictions placed on a detainee must, as a general rule, be minimal.<sup>77</sup> In effect, the court found the rule regarding family visits to be arbitrary or irrational<sup>78</sup> and went on to consider the right to interviews with one’s legal advisor. Noting that the legal advisor was likely to be someone with a busy practice, the court referred to the onerous nature of the existing rule - that the legal advisor must have made an appointment to see the detainee, after having obtained the permission of the District Magistrate in Delhi. Bhagwati J held that the advisor should be able to see the detainee at any time during the day, after making an appointment

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<sup>73</sup> *Francis Mullin* (note 70 above) at 529.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Francis Mullin* (note 70 above) at 530.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Francis Mullin* (note 70 above) at 530.

with the Superintendent of the prison in question.<sup>79</sup> This consideration of how onerous the rule put in place by the legislation was goes to the question of proportionality, a far weightier standard than that of rationality. As the government had provided no explanation of the need for the rule,<sup>80</sup> there were no competing considerations against which to balance the burden on the detainees. The court's new approach to constitutional interpretation was based on a wide and purposive understanding of the text and a concomitant willingness to subject governmental action and inaction to more robust judicial scrutiny. *Maneka Gandhi* and *Francis Mullin* were concerned with the protection of traditional negative liberties, requiring that the state refrain from interference with rights rather than take positive action to protect them. But given the interpretation of Article 21 favoured in these cases, with the judges' emphasis on human dignity and the 'bare necessities of life', it was not long until the directive principles on state policy began to make their way into the jurisprudence.

In *Olga Tellis*,<sup>81</sup> the petitioners were pavement and slum dwellers in the then city of Bombay. The state had demolished their shelters and, in certain cases, transported them out of the city but they had returned and rebuilt their homes.<sup>82</sup> They needed to be close to their places of work and had no option but to reside on the pavements and in the slums of Bombay.<sup>83</sup> The pavement and slum dwellers made up nearly half of the city's population at the time.<sup>84</sup> Both groups of petitioners lived in deplorable conditions – a fact cited by the government as a reason for their removal.<sup>85</sup> They claimed that their right to life, as well as their right to settle and reside in any part of the country, protected in Articles 21 and 19 (1) (e), respectively, would be violated by their eviction unless government offered them alternative accommodation.<sup>86</sup> In its unanimous judgment, per Chandrachud CJ, the court reasoned that the right to livelihood was an 'important facet' of the right to life protected in Article 21. Depriving a person of his or her livelihood would have the effect of making life

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<sup>79</sup> *Francis Mullin* (note 70 above) at 531.

<sup>80</sup> *Francis Mullin* (note 70 above) at 532.

<sup>81</sup> Note 5 above.

<sup>82</sup> *Olga Tellis* (note 5 above) at 63-4.

<sup>83</sup> *Olga Tellis* (note 5 above) at 73 and 83.

<sup>84</sup> *Olga Tellis* (note 5 above) at 61-2.

<sup>85</sup> *Olga Tellis* (note 5 above) at 63.

<sup>86</sup> *Olga Tellis* (note 5 above) at 62.

impossible to live and was, thus, a violation of the right to life.<sup>87</sup> Chief Justice Chandrachud held that the rights to an adequate means of livelihood and to work, protected as directive principles of state policy in Articles 39 (a) and 41, respectively, were, ‘equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights’.<sup>88</sup> The obligation on the state to provide its citizens with an adequate means of livelihood and a right to work, articulated in the directive principles, meant that the right to life could not but be interpreted to include a right to livelihood.<sup>89</sup> However, this did not mean that a citizen could force the state to take positive action to provide him or her with an adequate means of livelihood or work. Rather, the obligation on the state was not to deprive someone of the right to a livelihood or work without following a fair, just and reasonable procedure established by law.<sup>90</sup>

Importantly, the court indicated in this case that unreasonableness would invalidate not just the procedure through which a law is implemented but the substance of the law itself.<sup>91</sup> As to what unreasonableness means, the court stated that all exercises of executive power ‘must be informed with reason and should be free from arbitrariness’.<sup>92</sup> However, this was only the ‘bare minimal requirement’ of the rule of law. What reasonableness required varied according to the circumstances of the case.<sup>93</sup> In deciding on whether government action in this case was reasonable, the court noted that the pavement dwellings were, without doubt, a nuisance to the public and a threat to their safety because it forced them to use busy roads as thoroughfares.<sup>94</sup> The court interpreted the relevant legislation as allowing, but not compelling, government to evict people living in ‘encroachments’ without giving them any notice.<sup>95</sup> This preserved the validity of the section. The court also indicated that any departure from the rules of natural justice which would, in the ordinary course, require that

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<sup>87</sup> *Olga Tellis* (note 5 above) at 79-80.

<sup>88</sup> *Olga Tellis* (note 5 above) at 80.

<sup>89</sup> *Olga Tellis* (note 5 above) at 80.

<sup>90</sup> *Olga Tellis* (note 5 above) at 80-1; and 85.

<sup>91</sup> *Olga Tellis* (note 5 above) at 85-6.

<sup>92</sup> *Olga Tellis* (note 5 above) at 86.

<sup>93</sup> *Olga Tellis* (note 5 above) at 86-7.

<sup>94</sup> *Olga Tellis* (note 5 above) at 87-8.

<sup>95</sup> *Olga Tellis* (note 5 above) at 88-9. Section 314 (a) of the Bombay Municipal Corporation Act provided that ‘the Commissioner may, without notice, take steps for the removal of encroachments in or upon any street, channel, drain, etc’ – see page 88 of the judgment.

the affected parties be given a hearing before the adverse action is taken, is only acceptable in exceptional cases.<sup>96</sup> The petitioners in this case should have been given a hearing but this opportunity had, in any event, been provided to them in the course of the hearings before the Supreme Court. In light of the impact of the dwellings on pedestrians, the court held that the governmental decision to remove the dwellers and their dwellings was, in fact, reasonable.<sup>97</sup> Chief Justice Chandrachud directed that none of the dwellers be removed until a month after the monsoon season.<sup>98</sup> The court held that government's undertaking to provide alternative pitches for those pavement dwellers that had been given census cards in the 1976 census should be met, but did not make this a condition of the evictions.<sup>99</sup> Slum dwellers that had been given identity cards in the census had to be offered alternative accommodation before they could be removed.<sup>100</sup> Those slums which had existed for more than twenty years and in which improvements had been made could not be demolished unless the land was required for a public purpose. And, where the land was required for such a purpose, the state had to move the affected individuals on to an alternative site before it could proceed with any demolition.<sup>101</sup>

Although *Olga Tellis* has come to be regarded by some as ground-breaking judicial confirmation that the right to life includes a right to shelter,<sup>102</sup> the discussion above indicates that the court's findings were much more limited than that implies. The court held, on an abstract level, that the right to life included the right to a livelihood. The judges were also able to draw a link between livelihood and the place where a person resides,<sup>103</sup> noting that the petitioners were drawn back to the pavements and slums near Bombay out of sheer economic necessity.<sup>104</sup> But the court was quite clear that there was no positive obligation on the state to provide people with shelter or an adequate means of livelihood.<sup>105</sup> In respect of the pavement

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<sup>96</sup> *Olga Tellis* (note 5 above) at 89.

<sup>97</sup> *Olga Tellis* (note 5 above) at 86-7.

<sup>98</sup> *Olga Tellis* (note 5 above) at 94.

<sup>99</sup> *Olga Tellis* (note 5 above) at 95-6. The undertaking was that the pavement dwellers would be moved to a particular site or somewhere a similar distance away from where they currently resided.

<sup>100</sup> *Olga Tellis* (note 5 above) at 96.

<sup>101</sup> *Olga Tellis* (note 5 above) at 98.

<sup>102</sup> See Robinson (note 18 above) at 43; Sathe (note 16 above) at 118.

<sup>103</sup> Ramanathan (note 6 above) at 2908.

<sup>104</sup> *Olga Tellis* (note 5 above) at 69 and 75.

<sup>105</sup> See Sathe (note 16 above) at 118.

dwellers, their eviction was not even made conditional on the provision of alternative accommodation.

Some commentators view the level of restraint displayed by the judges in *Olga Tellis* as a necessary acknowledgement of judicial limitations.<sup>106</sup> Scott and Macklem argue that Chandrachud CJ actually went quite far in that he ‘fashioned a remedy replete with positive duties on the Government’.<sup>107</sup> In their view, those aspects of the court order dealing with provision of alternative sites for the pavement dwellers and the need for existing government shelter and slum improvement programmes to be pursued in earnest were intended to get government to address the broad, systemic problems with provision of housing or, at least, to ‘engender political dialogue’ about the issues involved.<sup>108</sup> This argument recognises that there is a value attached to judicial intervention aimed at encouraging government to implement its own programmes. But it is important to recognise that the judges did not devise positive obligations stemming from the right to livelihood to be fulfilled by the state. Furthermore, even the procedural safeguards available to those in the position of the petitioners were tenuous. For one thing, the court upheld the procedure for the removal of encroachments in the legislation, recognising that the state could demolish dwellings without notice to affected parties in urgent cases.<sup>109</sup> It is difficult to conceive of a situation so urgent that an ‘encroachment’ in which a person or family was living would need to be demolished without notice. The leeway left to the state here is worrying. The court held that an opportunity to be heard should have been provided to the affected parties here but the finding that this requirement had been made good by the representations made during the case itself meant that there was little deliberation on the purpose behind the provision of an opportunity to be heard. The court’s comments on this issue indicate that there would be a burden on the pavement dwellers to show that their dwellings were not actually encroachments on a footpath or that they needed more time to prepare for their removal.<sup>110</sup> The focus then, was

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<sup>106</sup> See N Jheelan ‘The enforceability of socio-economic rights’ (2007) 2 *European Human Rights Law Review* 146 at 153.

<sup>107</sup> C Scott and P Macklem ‘Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution’ (1992) 141(1) *University of Pennsylvania Law Review* 1 at 121.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Olga Tellis* (note 5 above) at 89.

<sup>110</sup> *Olga Tellis* (note 5 above) at 90.

not on engagement between the parties to find a solution to the housing problems.<sup>111</sup> Rehabilitation and resettlement of the pavement dwellers took a definite backseat to the need to keep pavements clear for pedestrian use.<sup>112</sup>

The legacy of the *Olga Tellis* decision is, thus, contested. This is discussed further below. But, what is clear is that, in the three cases discussed above, the court had moved constitutional interpretation up a gear, applying a significant amount of judicial creativity to the cases before them. Furthermore, policy considerations were no longer a bar to justiciability in cases dealing with fundamental rights and directive principles. In *Sachidananda Pandey and Another v State of West Bengal and others*,<sup>113</sup> the court stated:

When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that a court may do is to examine whether appropriate considerations are borne in mind and irrelevances excluded. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case.<sup>114</sup>

The court did go further – to a consideration of proportionality – in later cases. In *Delhi Development Horticulture Employees' Union*,<sup>115</sup> for example, the court upheld the government's policy because to frustrate its scheme would do more harm than good.<sup>116</sup> This kind of balancing of interests is part of a proportionality enquiry.<sup>117</sup> In *Saudan Singh and others v New Delhi Municipal Committee and others*,<sup>118</sup> the Supreme Court upheld the

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<sup>111</sup> In this sense, the case is quite different from the decisions of the South African CC in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) – these cases are discussed in detail in Chapter 4.

<sup>112</sup> Reddy (note 7 above) at 132. See also Rajagopal (note 49 above) at 161-2.

<sup>113</sup> 1987 SCR (2) 223.

<sup>114</sup> *Pandey* (note 113 above) at 242.

<sup>115</sup> Note 5 above.

<sup>116</sup> The petitioners were workers employed on a daily basis who wanted to be absorbed into the regular workforce. They were employed under certain government work schemes, designed to provide an income to those who lived below the poverty line (*Delhi Development Horticulture Employees' Union*, note 5 above, at 570-2). If the resources were shifted to provide more regular employment, fewer people could benefit from the scheme. See note 5 above at 578-9.

<sup>117</sup> Discussed in detail in Chapter 3 of this thesis.

<sup>118</sup> 1992 SCR (2) 243. The case dealt with state removal of people trading on the street who had not been granted a stall or a kiosk. The government granted stalls or kiosks on the basis of priority to those who had been there the longest and required proof of this in the form of original receipts or other documents issued by the police (at 255). The Court upheld the government action but ordered that the government review cases if claimants were able to provide proof in the form of original documents after further notification of the process through public advertisement (at 258).

government policy because it was not 'unduly harsh'.<sup>119</sup> Again, the court's consideration of how restrictive the policy or law is, brings elements of proportionality into the analysis.

A final aspect of constitutional interpretation worth mentioning here is the court's use of the notion of a minimum standard for the protection of the right to life. This idea was most clearly expressed in the *Francis Mullin* case discussed above and in the later case of *Bandhua Mukti Morcha v Union of India and others*.<sup>120</sup> In the latter case, the court, using Articles 39 (e) and (f), 41 and 42 of the directive principles to give content and meaning to the right to life, held that Article 21 included certain minimum requirements to enable a person to live with human dignity.<sup>121</sup> No state was permitted to take measures that would deprive a person of that minimum essential level of the right. Thus, the court upheld the notion of a minimum standard but limited the duty it imposed to a negative one.<sup>122</sup> As with *Olga Tellis*, the case may be viewed as a disappointment, in certain respects. In *Olga Tellis* the ideal of a right to shelter in the court's interpretation of Article 21 was whittled down to a guarantee of an opportunity for affected parties to be heard before they were evicted from their homes in the remedy handed down by the court. In *Bandhua Mukti Morcha*, the desire for more robust judicial protection of the values underlying the directive principles was fulfilled in the most limited sense – the state was prohibited from acting in a way which would remove the right to live with dignity. But in this case the court, per Bhagwati J, also held:

Since the Directive Principles of State Policy contained in clauses (e) and (f) of Article 39, Article 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21...<sup>123</sup>

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<sup>119</sup> *Saudan Singh* (note 118 above) at 256.

<sup>120</sup> Note 5 above. The case dealt with the problem of bonded labour and government's duties in this area.

<sup>121</sup> These were 'protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief' – *Bandhua Mukti Morcha* (note 5 above) at 103.

<sup>122</sup> *Ibid.* On minimum essential levels, see also *Paschim Banga* (note 5 above) at 47 – 8.

<sup>123</sup> *Bandhua Mukti Morcha* (note 5 above) at 103.

A large part of the order in the case, thus, focused on compelling government to implement its own legislative scheme by, for example, setting up vigilance committees in each state to investigate whether bonded labour existed. The court also drew on a letter in which the Secretary to the Minister of Labour, Government of India had set out a scheme for the rehabilitation of bonded labourers in framing its order.<sup>124</sup>

The cases discussed above show that the Indian Supreme Court's post-emergency activism produced a mixed bag of results. The court's inclusive approach to the scope of the right to life did not often translate into positive obligations on the state or even a willingness to impose more onerous procedural requirements on government than that which already existed in the legislation.<sup>125</sup> As indicated by Neuborne,<sup>126</sup> the real 'ground-breaking event' of the movement was the court's break with traditional adversarial modes of litigation – the relaxation of the rules of standing, flexible pleading rules, new methods of fact-finding<sup>127</sup> and expanded remedial powers.<sup>128</sup> On the substance of the rights, the court was certainly working with a transformed vision of constitutional interpretation and demonstrated a significant capacity for judicial creativity. Thus, the development of a variable standard of reasonableness and the reference to minimum standards are useful ideas which have influenced later cases as well as international jurisprudence. But the cases cannot simply be read as the beginning of a movement aimed at the judicial implementation of SE rights through the directive principles. This is clear from the cases themselves but also from the subsequent development of the jurisprudence.

#### **(4) A retreat from judicial activism?**

As noted in the Introduction to this thesis, the image of the Indian Supreme Court as tireless protector of the marginalised, and the perception that it enjoys widespread public support and

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<sup>124</sup> *Bandhua Mukti Morcha* (note 5 above) at 146, par.4.

<sup>125</sup> See Neuborne (note 4 above) at 501.

<sup>126</sup> Neuborne (note 4 above) at 501-3.

<sup>127</sup> In *Bandhua Mukti Morcha* (note 5 above), the court appointed a socio-legal commission to investigate, and report on, conditions in the quarries. The court treated the commission's report as a *prima facie* statement of the facts. The court explained its use of such commissions at some length in the judgment (at 111-13 and 142). See also *Common Cause v Union of India and others* 1996 (1) SCR 89 at par. 10.

<sup>128</sup> See, for example, *Indian Council for Enviro-Legal Action and others v Union of India and others* 1996 (2) SCR 503 at par. 70. The court ordered the government to file quarterly progress reports on its implementation of the court's directions.

respect are contested.<sup>129</sup> Examined more closely, the record of the Indian Supreme Court in protecting SE rights is not one of consistent judicial activism in securing these rights. Furthermore, for a number of reasons, the impact even of apparently 'pro-poor' Supreme Court jurisprudence on the lives of ordinary people is inconsistent and often minimal.<sup>130</sup>

In *Calcutta Electricity Supply Corporation (CESC) Ltd. Etc. v Subash Chandra Bose and Ors*,<sup>131</sup> the issue was whether people working for the respondent, which CESC had contracted to carry out work related to public roads, fell within the definition of 'employee' in the State Insurance Act, 1978. If they did, the respondent would have to pay contributions to the Employment Insurance Fund and the workers would be entitled to the relevant health and welfare benefits. The Act defined an employee as someone who is, *inter alia*:

employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment.<sup>132</sup>

A majority of the judges held that the workers did not fall within this definition because CESC's final acceptance or rejection of the work did not amount to 'supervision' as required in the legislation.<sup>133</sup> In his dissenting judgment, Ramaswamy J adopted an approach to constitutional interpretation much more consistent with that which emanated from the court's post-emergency jurisprudence, described above. He referred to international sources on health and workers' rights,<sup>134</sup> Article 39 (c) of the Indian Constitution<sup>135</sup> and the purpose of the Act - to extend health benefits and 'relieve employees from occupational hazards consistent with the constitutional and human rights scheme'.<sup>136</sup> He held that the degree of supervision necessary depended on the nature of the work and that the term was broad

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<sup>129</sup> See, for example Rajagopal (note 49 above) 157; and Krishnan (note 2 above).

<sup>130</sup> Rajagopal (note 49 above) at 158. Neuborne (note 4 above) at 503 argues that the PIL movement has had concrete results in helping 'many thousands of poor persons to invoke the rule of law to better their lives'. Rajagopal does not disagree with this but argues that the court's record on SE rights is 'patchy and getting worse' (at 160).

<sup>131</sup> 1991 SCR Supl (2) 267.

<sup>132</sup> Section 2(9) (ii) – See *CESC* (note 131 above) at 279.

<sup>133</sup> *CESC* (note 131 above) at 289.

<sup>134</sup> Art 25(2) of the Universal Declaration of Human Rights; and Article 7(b) of the International Convention on Economic, Social and Cultural Rights (ICESCR).

<sup>135</sup> Providing that state policy should be directed at securing the health and strength of workers. See *CESC* (note 131 above) at 293.

<sup>136</sup> *CESC* (note 131 above) at 301.

enough to include legal control of the work, as existed in this case.<sup>137</sup>

In *Almira H. Patel and Anr. v Union of India and Ors*,<sup>138</sup> a case dealing with solid waste management in Delhi, the court prioritised the cleaning-up of the city over the welfare of slum dwellers. In an earlier order, the court had appointed a committee to look into various aspects of solid waste management in a number of states. Following on from the Committee's recommendations, which had elicited a positive response from the four states concerned, the court took up the issue of cleaning up a number of cities, Delhi among them. In this case, the court handed down a series of orders aimed at enforcing statutory obligations regarding the cleaning up of the city, which suffers from notoriously high levels of pollution. One of the issues in the case was the management of domestic solid waste. In his judgment for the court, Kirpal J saw the existence of slums as an obstacle to the cleaning up of the city, indicating that management of waste was made more complicated when people lived in settlements with no proper means of disposing of domestic waste and effluents.<sup>139</sup> The court directed that steps be taken to improve the sanitation in the slums, as a temporary measure but made it clear that the goal was to get rid of them altogether as soon as possible.<sup>140</sup> In *Olga Tellis*, the court also ultimately upheld the government's decision to remove pavement and slum dwellers from their homes. But the judges in that case were alive to the question of how this would impact on the lives of the individuals concerned. Thus, the order, whatever its limitations, contained references to the need to provide people with alternative accommodation that did not take them too far away from their places of work. In *Almira Patel*, Kirpal J ordered the government to 'take appropriate steps' to stop new illegal occupation of public land<sup>141</sup> and stated that '[r]ewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket'.<sup>142</sup> The court's complete failure to

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<sup>137</sup> *CESC* (note 131 above) at 298 and 301.

<sup>138</sup> Unreported judgment, decided on 15/02/2000, available at <http://www.judis.nic.in/supremecourt/chejudis.asp>, last accessed on 12 May 2009.

<sup>139</sup> *Almira Patel* (note 138 above) at 4.

<sup>140</sup> See par. 6 of the court's order in *Almira Patel* (note 138 above) at 7.

<sup>141</sup> *Almira Patel* (note 138 above) at 7.

<sup>142</sup> *Almira Patel* (note 138 above) at 4. This may be contrasted with the South African CC's approach in both *Grootboom* (note 111 above) at par. 2 and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005(5) SA 3 (CC) at pars. 33 and 50. In these cases, the judges expressed concern about the illegal occupation of land, indicated that self-help was not to be viewed as an acceptable solution to the country's housing problems and did not want to appear to be rewarding illegal occupiers

consider what was to become of the slum-dwellers is what sets this case apart from *Olga Tellis* and is a worrying precedent.<sup>143</sup>

*BALCO Employees' Union v Union of India*<sup>144</sup> is another case that has attracted criticism. The court was asked to review the central government's decision to disinvest from a public company involved in manufacturing aluminium. BALCO argued that government giving up its control over the company in this way would violate the constitutional provisions protecting workers' rights.<sup>145</sup> Not only did the court reject this argument, stating that it could not pronounce on a decision which raised complex economic factors, but it also held that there was no requirement of

public notice and hearing to persons who are generally affected as a class by an economic policy decision of the government... the disinvestment policy cannot be faulted if as a result thereof the employees lose their right or protection under Articles 14 or 16.<sup>146</sup>

Thus, the court was not even willing to provide the kind of procedural protection to the workers it had been prepared to uphold in some pre-1978 cases.

Finally, the court's long and complex history with the Sardar Sarovar Dam Project has come under fire, signalling for many a low point in the court's record. In its 2000 decision *Narmada Bachao Andolan v Union of India*,<sup>147</sup> the court approved what has been referred to as 'the largest Court-sanctioned forced eviction in the world'<sup>148</sup> in the face of evidence that the government had not attained environmental clearance for the project or done much to secure the rehabilitation of the displaced peoples, both of which were legally required.<sup>149</sup> The Ministry of Environment and Forests had given conditional clearance for the dam project in 1987. Construction work began in the absence of a comprehensive environmental impact assessment and the petitioners argued that this assessment had not been carried out in the

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at the expense of those waiting to be allocated low-cost housing by the state. However, they balanced this against the terrible circumstances in which the individuals concerned were living and the length of time for which they had been waiting for lawful housing. They also considered the options available to the state to deal with the particular problems.

<sup>143</sup> For a critique of the case, see Ramanathan (note 6 above) at 2908-10.

<sup>144</sup> (2002) 2 SCC 333.

<sup>145</sup> Articles 14 and 16 of the Constitution.

<sup>146</sup> Muralidhar (note 6 above) at 28.

<sup>147</sup> (2000) 10 SCC 664, available at <http://judis.nic.in/supremecourt/helddis.aspx>, last accessed on 26 August 2010.

<sup>148</sup> Rajagopal (note 49 above) at 162.

<sup>149</sup> Muralidhar (note 6 above) at 27-8; and Rajagopal (note 49 above) at 162.

intervening years.<sup>150</sup> In response to the concerns raised by Narmada Bachao Andolan, the non-governmental organisation which raised objections to the dam construction at the time and filed the case with the Supreme Court, government set up a group to look into the environmental issues and the questions around rehabilitation of displaced persons.<sup>151</sup> The group did not come up with a definitive finding, noting instead that the height of the dam could make the social costs of displacement and rehabilitation too burdensome to manage effectively. They recommended that government's plan for a phased construction go ahead on the basis that consistent monitoring of the situation occurred and that construction would be halted if became clear that the height of the dam would, in fact, result in problems too difficult to solve.<sup>152</sup>

The court indicated early in the judgment that it did not look upon the case favourably. Justice Kirpal criticised Narmada Bachao Andolan for bringing the case to court seven years after the construction of the dam had begun.<sup>153</sup> According to him, this delay meant that the only proper question for the court was whether the government's rehabilitation and relief measures were being properly implemented, consistently with the affected parties' Article 21 rights. In other words, the court would not address the concerns about the construction of the dam itself.<sup>154</sup> In making this decision, the court failed to recognise that the question of effective rehabilitation was inseparable from the question of whether the construction should go ahead as originally planned. The petitioners were arguing that the building of the dam at the planned height would result in a displacement problem impossible for government to manage. Furthermore, the court did not acknowledge that the reason for the delay was that the organisation was engaging in an ongoing process with government to try to get a comprehensive assessment of the project.

In spite of this effectively throwing out of a large part of the petitioner's case, the court went on to discuss their contentions on the environment and the impact on displaced peoples.

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<sup>150</sup> *Narmada Bachao Andolan* (note 147 above) at 9-10 of the electronic version.

<sup>151</sup> *Narmada Bachao Andolan* (note 147 above) at 11 of the electronic version.

<sup>152</sup> *Narmada Bachao Andolan* (note 147 above) at 12-13 of the electronic version. The petitioners argued that this recommendation had not been taken seriously by government – at page 39 of the judgment.

<sup>153</sup> *Narmada Bachao Andolan* (note 147 above) at 14 of the electronic version.

<sup>154</sup> *Narmada Bachao Andolan* (note 147 above) at 14-15 of the electronic version.

One of the main arguments presented by the petitioners was that there had never been an independent assessment of the impact of the project.<sup>155</sup> The court's response to this was there was no need for independent experts to evaluate the studies which had been carried out. There was no reason to question the accuracy of the studies or to believe that government would not be able to manage any problems that arose.<sup>156</sup> Adopting a position of extreme judicial deference, the court noted:

It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and peoples fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold... if the petitioner had the knowledge of such a decision and could have approached the Court at that time.<sup>157</sup>

On the Article 21 argument, the court took at face value government's assertions that the project would ultimately benefit the people displaced by the construction of the dam and found that their right to life was not under threat.<sup>158</sup> Justice Kirpal chose not to engage with the petitioner's submissions that the rehabilitation programme was fundamentally flawed and that the alleged benefits were in doubt.<sup>159</sup> Counsel for Narmada Bachao Andolan did not even raise the social, economic and cultural rights protected in the directive principles of the Constitution and in the ICESCR, which India has ratified.<sup>160</sup> As to the intensity of review, Kirpal J held that the court would not 'sit in appeal' over a decision taken after 'due consideration and full application of mind'.<sup>161</sup>

These cases do not represent a complete about-face and retreat from activism in protecting SE rights on the part of the Indian Supreme Court. Recent jurisprudence on the

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<sup>155</sup> *Narmada Bachao Andolan* (note 147 above) at 22 of the electronic version.

<sup>156</sup> *Narmada Bachao Andolan* (note 147 above) at 34 of the electronic version. See also page 70 of the judgment.

<sup>157</sup> *Narmada Bachao Andolan* (note 147 above) at 70 of the electronic version.

<sup>158</sup> *Narmada Bachao Andolan* (note 147 above) at 19-20 of the electronic version.

<sup>159</sup> *Narmada Bachao Andolan* (note 147 above) at 16 of the electronic version.

<sup>160</sup> Arguably because counsel had little confidence in the Court being swayed by this argument - see Rajagopal (note 49 above) at 162.

<sup>161</sup> *Narmada Bachao Andolan* (note 147 above) at 71-2 of the electronic version.

right to food<sup>162</sup> is held up as an example of the effective use of the courts to widen access to SE goods. The case indicates that the court is still willing to come to the assistance of the poor and the vulnerable and to place demands on government. However, the background to the case raises the concern that the court may only now be persuaded to do so in the most limited circumstances. The People's Union for Civil Liberties (PUCL) began the public interest litigation on the right to food by filing a writ petition in the Supreme Court in April 2001.<sup>163</sup> At the time, India's grain stocks were overflowing and in danger of being dumped into the sea or eaten by rats.<sup>164</sup> Yet India's rural population was experiencing a famine – malnutrition was common and people were dying of starvation.<sup>165</sup> A Famine Code and various schemes for distribution of food were already in place but were not being implemented by government.<sup>166</sup> PUCL asked for immediate release of the surplus food stocks – essentially, they wanted government to take steps to ensure the effective implementation of the schemes.<sup>167</sup> The legal basis for the claim was Article 21. The food distribution schemes were meant to ensure that people who could not afford to eat had access to food. Without such access they were in danger of malnutrition and death. The failure to implement the schemes violated their right to life. The scope of the case has widened over time and now addresses many issues connected with the right to food.<sup>168</sup> The court has yet to hand down a final judgment.<sup>169</sup> But, to date, it has handed down a series of interim orders<sup>170</sup> aimed at bringing immediate relief to the affected individuals. The most important of these

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<sup>162</sup> *Peoples' Union for Civil Liberties v Union of India* (2001) 5 SCALE 303; 7 SCALE 484. See Muralidhar (note 6 above) 29-30. The Supreme Court's orders have been compiled in N Saxena *et al* (eds.) *Right to food* 3ed (Socio-Legal Information Centre: New Delhi). The court has also recently held that the right to life in Article 21 includes a right to water in *MK Balakrishnan and others v Union of India and others*, Writ Petition No. 230 of 2001. Judgment was handed down on 28 April 2009 and is available at <http://www.judis.nic.in/supremecourt/helddis.aspx>, last accessed on 6 April 2010. In this judgment, the court gave the government of India two months in which to form a Committee to address the problem of water shortage in the country. The court made specific orders about the membership of the Committee and set out a list of issues for the Committee to consider.

<sup>163</sup> M Higgins *et al* (eds.) (2007) *Food security and judicial activism in India* (Human Rights Law Network: New Delhi) at viii.

<sup>164</sup> Supreme Court order of 20 August 2001 in Saxena (note 162 above) at 27.

<sup>165</sup> N Saxena 'Food security and poverty in India' in Higgins *et al* (note 163 above) at 9-12.

<sup>166</sup> On the failings of the Public Distribution Schemes, see B Patnaik 'The poorest in the poorest states suffer the most' in Higgins *et al* (note 163 above) at 45.

<sup>167</sup> See Supreme Court order of 2 May 2003 in Saxena *et al* (note 162 above) at 42-4.

<sup>168</sup> Including the right to work and 'even general issues of transparency and accountability' – Higgins *et al* (note 163 above) at viii.

<sup>169</sup> See Higgins *et al* (note 163 above) at viii-ix.

<sup>170</sup> For a summary of these orders, see Saxena *et al* (note 162 above) at 23-37.

orders was that handed down on 28 November 2001.<sup>171</sup> The order converted the schemes' benefits into legal entitlements.<sup>172</sup>

The November 2001 order dealt with eight schemes.<sup>173</sup> Each of the schemes centred on some aspect of food distribution as it related to a particular social group. The Mid-day Meals Scheme, for example, was directed at providing mid-day meals for all children in primary schools.<sup>174</sup> The court ordered government to make good defects in the implementation of these schemes – by completing the identification of people who fell into the targeted groups, issuing cards to allow them to collect the grain and distributing the grain to the relevant centres.<sup>175</sup> The court also ordered that those states which had been providing dry rations for the mid-day meal in schools begin providing cooked meals within three months of the order. Aspects of the order also dealt with inspection by government to ensure fair quality grain and replacement of grain that did not meet this standard.<sup>176</sup> In this and subsequent orders, the court has also set out requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.<sup>177</sup>

The right to food case certainly indicates that the history of the Supreme Court cannot be neatly divided into activist and non-activist phases. Alongside cases like *Narmada Bachao Andolan* above, the court has also handed down a series of interim orders prioritising the rights of the poorest in India. But there are several points to be made about the context of the case. For one thing, whilst the court has accepted the idea that the right to life contains a right to food,<sup>178</sup> the actual court remedies focus on the provision of grain to people who are without food in a national context of abundant food stocks. Furthermore, the litigation is primarily aimed at forcing government to fulfil its pre-existing guarantees and there are no

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<sup>171</sup> Saxena *et al* (note 162 above) at 31-37.

<sup>172</sup> Saxena *et al* (note 162 above) at 23.

<sup>173</sup> Saxena *et al* (note 162 above) at 31-4. The schemes are described in detail in Higgins *et al* (note 163 above) at 23-37.

<sup>174</sup> Higgins *et al* (note 163 above) at 27-8.

<sup>175</sup> Saxena *et al* (note 162 above) at 31-4; and Higgins *et al* (note 163 above) at 24-37.

<sup>176</sup> Saxena *et al* (note 162 above) at 32.

<sup>177</sup> See Higgins *et al* (note 163 above) at 23-4.

<sup>178</sup> See the order of 2 May 2003 in Saxena *et al* (note 162 above) at 45.

competing ‘big business’ or national development interests for the court to grapple with. The litigation has led the court to define government’s obligations more clearly (the emphasis on the quality of the grain is an example here) and to put in place supervisory measures. But the implementation of the basic and agreed upon guarantees, as well as more expansive orders regarding monitoring and access to information are problematic.<sup>179</sup> PUCL has gone back to court repeatedly due to delays in compliance; non-compliance with the orders; or governmental decisions to remove people from the list of those ‘Below the Poverty Line’, for example. The Mid-day Meal Scheme is widely agreed to be one of the more successful aspects of the litigation.<sup>180</sup> But the main reason for this is that, as a cause, it has been championed outside the courts through ‘lively campaigns’.<sup>181</sup> As the litigation is ongoing, any overall assessment of its effectiveness will have to wait but the court orders must be read within this wider context.

### (5) Conclusion

Non-governmental organisations working on access to SE goods like food, health care and education are quick to affirm the benefits of a clear and substantive judicial precedent recognising access to these goods and imposing corresponding duties on government, when these occur.<sup>182</sup> But, they have to weigh those benefits against the high cost of litigation and the massive delays in getting a judgment at all.<sup>183</sup> Studies convincingly demonstrate that non-governmental organisations are slow to turn to the courts<sup>184</sup> because of these institutional challenges. The structure of the Indian Supreme Court has added to the difficulties in SE rights enforcement. There are currently 26 justices on the bench, including the Chief Justice. The judges divide into subject-matter benches selected by the Chief Justice. A minimum of 5

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<sup>179</sup> See the section on the implementation of the various schemes in Higgins et al (note 163 above) at 39-85.

<sup>180</sup> See H Mander ‘Mid-day Meals Scheme’ in Higgins *et al* (note 163 above) at 70-74; J Dreze ‘Democracy and the right to food’ in P Alston and M Robinson (eds.) (2005) *Human rights and development: towards mutual reinforcement* (OUP: Oxford) 45 at 60-61.

<sup>181</sup> Dreze (note 180 above) at 61-2.

<sup>182</sup> The right to food initiative described above has resulted in some successes, as has the work of Lawyers’ Collective, an organization which lobbies for the protection of the rights of HIV positive people. The organization has had some notable judicial successes in respect of widening access to anti-retroviral drugs but has been less successful in working against HIV discrimination. See Krishnan *Human Rights Quarterly* (note 6 above) at 791-819; see also Shankar and Mehta (note 6 above) at 178.

<sup>183</sup> Krishnan *American Asian Review* (note 6 above) at 3 of the electronic version.

<sup>184</sup> Shankar and Mehta (note 6 above) at 176-9; and Krishnan *American Asian Review* (note 6 above) at 10 of the electronic version.

judges is required for constitutional matters but benches of 15 are not unusual for complex constitutional cases.<sup>185</sup> These factors do not favour legal consistency. In addition, although appointment of new Chief Justices through a strict principle of seniority removes elements of arbitrariness from the process, the result is that succeeding Chief Justices are already close to retirement and tend to serve for only a few years. Again, this does not facilitate legal continuity and Chief Justices do not have enough time to instigate major reforms.<sup>186</sup> The courts are overloaded but this is due to the fact that there aren't enough judges and courts not because of a highly litigious society.<sup>187</sup> On the one hand, these issues point to the question of whether the courts are the right place to deal with SE rights matters at all. This is an issue considered at length in chapter 1. As I am concerned in this thesis with best judicial practice in the South African and other contexts in which judges are required to engage with these issues, the lesson here is that social advocacy groups need to consider how best to use the courts, with all their limitations, in creating greater access to SE goods. The most successful legal interventions have been those which

envisioned “strategic” operations of a scale, scope, and continuity that enabled lawyers to acquire specialized experience, coordinate efforts on several fronts, select targets and manage the sequence and pace of litigation, monitor developments and deploy resources to maximize the long-term advantage of a client group.<sup>188</sup>

In addition to the institutional challenges facing the Indian courts, and the Supreme Court specifically, there is also a question-mark over the legal principles generated through SE rights litigation. It is tempting to view the Indian Supreme Court's history of implementing SE guarantees in the directive principles through Article 21 as comprising three distinct phases: an initial antipathy to any judicial interaction with the strictly non-enforceable directive principles; a post-emergency highly activist and creative phase in which the court regularly handed down ‘pro-poor’ judgments; and a subsequent retreat from activism with the court simply deferring to government on all matters of economic and social policy. The discussion of the cases above counsels one against such a view. When the Supreme Court's jurisprudence in this area is viewed as a whole, one is most struck by the

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<sup>185</sup> Neuborne (note 4 above) at 480.

<sup>186</sup> Neuborne (note 4 above) at 483; see also Shankar and Mehta (note 6 above) at 149.

<sup>187</sup> Krishnan *American Asian Review* (note 6 above) at 10 and 33.

<sup>188</sup> Galanter and Krishnan (note 51 above) at 796. The work of the Treatment Action Campaign in South Africa; the right to food campaign in India; and the work of the Lawyers' Collective on HIV in India arguably all fall into this category.

lack of consistency and firm legal principle.

Critiques of the Indian jurisprudence are not limited to the cases showing a more circumspect, deferential approach. Although the court's judicial creativity in the post-1978 line of cases discussed above has been praised, Cottrell and Ghai point out that there is a lack of principle in these cases, that it is extremely difficult to ascertain when and how the court will make use of the directive principles.<sup>189</sup> SE rights have not always been attributed to the directive principles and it is, thus, unclear where they derive from, making it difficult for future litigants to be certain of their legal position.<sup>190</sup> Furthermore, the court has sometimes extended remedies granted against the government to states that were not represented in court.<sup>191</sup> This tendency to hand down judgments without fully considering their implications is one of the main reasons why the efficacy of the court's approach to SE rights is doubtful. The huge backlog of cases in India,<sup>192</sup> is due, in part, to the fact that cases are often repeatedly brought back to court for 'fine-tuning' or because judgments have not been enforced, the court having failed to accurately assess the wider implications of their earlier orders.<sup>193</sup>

The problem with the early cases and more recent jurisprudence lies in the inconsistency of the judgments and in their wider impact. As stated by Upendra Baxi, '[j]udicial activism is at once a peril and a promise, an assurance of solidarity for the depressed classes of Indian society as well as a site of betrayal'.<sup>194</sup> The judgments do not easily separate into those with wide resource and policy implications and those without. It is not clear why the judges found they had the (institutional and constitutional) capacity<sup>195</sup> to act in particular cases and not in others. Instead, deference to the executive appears to occur

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<sup>189</sup> J Cottrell and Y Ghai 'The role of the courts in the protection of economic, social and cultural rights' in Ghai and Cottrell (note 6 above) at 76-7.

<sup>190</sup> Cottrell and Ghai (note 189 above) at 74.

<sup>191</sup> Cottrell and Ghai (note 189 above) at 75.

<sup>192</sup> Neuborne (note 4 above) 504.

<sup>193</sup> Cottrell and Ghai (note 189 above) 84-5.

<sup>194</sup> (2000) 'The avatars of Indian judicial activism: explorations in the geographies of (in)justice' in Verma and Kusum (note 54 above) at 161.

<sup>195</sup> J Jowell 'Judicial deference: servility, civility or institutional capacity?' (2003) *Public Law* 592. Jowell's exploration of the link between judicial deference and the institutional capacity of courts is discussed in detail in Chapter 1.

on an *ad hoc* basis.<sup>196</sup>

In short, the Indian Supreme Court has not been careful to locate its approach (whether interventionist or deferential) within a coherent, well-considered theory about its constitutional duties and responsibilities, informed by the need to maintain a dialogue between legislature and executive, the judiciary and civil society.<sup>197</sup> Judges are influenced by a number of factors, government's macro-economic policy being one important such factor. Government must be able to construct economic policy around changing national and international imperatives but dramatic shifts in that policy raise uncomfortable issues for judges. On the one hand, they have little expertise and experience in framing macro-economic policy and are therefore ill-suited to pronounce upon it; on the other, they have a duty to protect constitutional values.

The record of the South African CC in this area shows a court still struggling to come to terms with the difficult task of balancing these interests. Many would argue that the court is overly deferential to government's economic policy but the history of the Indian Supreme Court reveals a much more worrying trend. Where the South African CC is grappling with the intensity of review in cases with varying policy consequences, in the history of the Indian Supreme Court, it is increasingly seeing policy considerations as a complete bar to judicial pronouncement.<sup>198</sup> In India, economic liberalisation and a governmental emphasis on sustainable development have had an erratically significant impact on judicial decisions - land reform, housing and tribal rights take a back seat to these concerns in an increasing number of cases.<sup>199</sup> As stated by Krishna Iyer J:

There is no gainsaying the fact that social justice and equal opportunity for educational excellence at all levels have gone by default. Of course, globalization, liberalization,

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<sup>196</sup> Muralidhar (note 6 above) 31. Rajagopal refers to a 'serious measure of substantive ad hocism' in the judgments of the Indian Supreme Court (note 49 above) at 160.

<sup>197</sup> See R Dixon 'Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal on Constitutional Law* 391, where the author develops a theory of constitutional dialogue in the context of SE rights enforcement.

<sup>198</sup> Justice Suresh (retired) 'Socio-economic rights and the Supreme Court', available at [http://www.escri-net.org/usr\\_doc/suresh\\_article.doc](http://www.escri-net.org/usr_doc/suresh_article.doc) at par. 13, last accessed on 28 July 2010; see also U Ramanathan 'Communities at risk: industrial risk in Indian law' *Economic and Political Weekly*, 9 October 2004 4521 at 4524-5 on the court's approach to industrial risk.

<sup>199</sup> Rajagopal (note 49 above) at 161 and 166. See also *Divisional Manager, Aravali Golf Club and another v Chander Hass and another* 2007(12) SCR 1084; 2008(1) SCC 683.

privatisation and marketization have captured the Court's notice and the Preamble<sup>200</sup> to the Constitution is de facto judicially jettisoned'.<sup>201</sup>

The approach of the court in environmental cases is worth expanding on here. Whilst this is an area in which the court has been less cautious in expressing views on matters of policy, Bhushan has identified two disturbing trends in the approach. First, where there are competing interests between environmental protection, on the one hand, and the SE rights of the poor and vulnerable on the other, the court tends to find in favour of environmental rights.<sup>202</sup> Second, where protection of the environment comes up against powerful commercial interests, the environment is de-prioritised.<sup>203</sup>

The South African jurisprudence is assisted by the fact that the Constitution contains legally enforceable SE rights. This feature makes it more difficult for judges to simply bow to policy and legislation, and for the executive and the legislature to level charges of overreach and illegitimacy at the courts. But, as has been argued above, the CC has still to engage with the complex requirement of protecting both SE rights and the constitutional balance of powers. In the long term, thoughtful engagement with the judicial role in this area will be most influential in determining whether a model for SE rights enforcement is sustainable. As much of the South African SE rights jurisprudence turns on the notion of reasonableness, I move on to discuss this concept in its administrative law context before examining the South African cases in chapter 4.

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<sup>200</sup> Which prioritises social, economic and political justice.

<sup>201</sup> In *The Hindu*, 17 December 2002, as cited by Suresh (note 198 above) at par.15.

<sup>202</sup> P Bhushan 'Sacrificing human rights and environmental rights at the altar of development', talk presented at George Washington University Law School on 13 March 2009, text available at [http://www.judicialreforms.org/files/sacrificing\\_human\\_rights\\_and\\_environmental\\_rights\\_at\\_the\\_altar\\_of\\_development.pdf](http://www.judicialreforms.org/files/sacrificing_human_rights_and_environmental_rights_at_the_altar_of_development.pdf), last accessed on 15 May 2009 at 8. The attitude of the court towards slum clearance, described in the *Almira Patel* case (note 145 above) is an example here. Kirpal J's statements indicated that he viewed the slum dwellers an environmental hazard. He viewed the slums as responsible for the generation of garbage and solid waste. See also Ramanathan (note 6 above) at 2910.

<sup>203</sup> Bhushan (note 202 above) at 7-8.

## Chapter Three

### Review for unreasonableness in administrative law

#### (1) Introduction

The debate over the role of administrative law in the South African Constitutional Court's (CC's) approach to SE rights derives much of its impetus from comments made by Cass Sunstein following the CC's decision in *Grootboom*.<sup>1</sup> In the context of arguments about whether SE rights may ever be properly regarded to be justiciable, Sunstein suggested that the CC's approach in *Grootboom* was 'the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea'.<sup>2</sup> Referring to the typical administrative law case as one that places a burden of explanation on government agencies in which courts attempt to curb arbitrary administrative action whilst preserving the democratic integrity of government bodies, Sunstein noted that, in its approach to social and economic (SE) rights, the South African CC has put forward an administrative law model of SE rights.<sup>3</sup>

As is evidenced by cases like *Grootboom*,<sup>4</sup> *Treatment Action Campaign*<sup>5</sup> and *Khosa*,<sup>6</sup> the problem in most SE rights cases is likely to be one of government inaction, rather than action. In the judicial review of administrative action, Sunstein noted, courts would be cognisant of the limited resources of governmental agencies and 'any reasonable priority-setting will be valid and perhaps even free from judicial review'.<sup>7</sup> But there remains a duty of reasonableness on the setting of priorities. Administrative decisions that do not take statutory requirements and goals seriously should be held to be invalid.<sup>8</sup> In *Grootboom*, the judges found that government had not taken the constitutional goals regarding housing seriously enough in that it did not provide for emergency relief for those in desperate need.<sup>9</sup>

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<sup>1</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169.

<sup>2</sup> 'Social and economic rights? Lessons from South Africa' (2000/2001) 11(4) *Constitutional Forum* at 132.

<sup>3</sup> Sunstein (note 2 above) 130-1.

<sup>4</sup> Note 1 above.

<sup>5</sup> *Minister of Health and others v Treatment Action Campaign (No. 2)* 2002 (10) BCLR 1033 (CC).

<sup>6</sup> *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

<sup>7</sup> Sunstein (note 2 above) at 121.

<sup>8</sup> *Ibid.*

<sup>9</sup> Sunstein (note 2 above) at 132.

Sunstein's view was that the primary obligation on government was one of 'reasoned judgment', a 'burden of explanation'.<sup>10</sup> He noted that the approach could act to limit government action by ensuring, for example, that government allocate more resources than it otherwise would to housing. However, on his analysis, this would be an incident of the primary obligation on government to provide a reasonable explanation for its choices, rather than the result of an independent evaluation by the courts that the current allocation was inadequate.

The classification of the South African CC's treatment of SE rights as a reasonableness-centred administrative law approach, which makes appropriate demands on government 'without displacing democratic judgments about how to set priorities'<sup>11</sup> has encountered two kinds of resistance in the literature on the subject. First, a number of scholars are sceptical of the capacity of this kind of approach to give real content to SE rights. They argue that, rather than striking an appropriate balance between protection of SE rights and respect for democratic decision-making, an administrative law approach is overly deferential to governmental decisions. A focus on reasonableness in its administrative law form results in vagueness and entails a limited enquiry into the process by which decisions are made, rather than an interrogation of the substance of those decisions. The protection afforded to SE rights on such an approach is, thus, inevitably weak.<sup>12</sup>

An alternate view, articulated by Carol Steinberg in a 2006 article, is that the CC's SE rights approach is based on an intense form of scrutiny 'unprecedented in the area of

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<sup>10</sup> Ibid.

<sup>11</sup> Sunstein (note 2 above) at 131.

<sup>12</sup> See, for example, D Bilchitz (2007) *Poverty and fundamental rights: the justification and enforcement of socio-economic rights* (OUP: Oxford); 'Towards a theory of content for socio-economic rights', paper presented at the 7th Annual World Congress of Constitutional Law (Athens, 11-15 June 2007) at 5 – 8, available at: <http://www.enelsyn.gr/papers/w13/Paper%20by%20Dr.%20David%20Bilchitz.pdf>, last accessed on 4 August 2010; 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; and 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 118 *South African Law Journal* 484. See also D Newman 'Institutional monitoring of social and economic rights: a South African case study and new research agenda' (2003) 19 *South African Journal on Human Rights* 189 at 196 – 7; M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 at 407; and S Liebenberg 'Basic rights claims: how responsive is 'reasonableness review'? 2003 *ESR Review* 5(5)

administrative law'.<sup>13</sup> The CC's SE rights model, she argued, retained the notion of respect for the integrity of administrative decision-making and the idea that the intensity of the scrutiny must depend on the context. But the character of the scrutiny applied by the CC in these cases differed from that applied in administrative review in that the values of equality and human dignity 'are more heavily weighted in the proportionality exercise applied in the socio-economic rights cases'.<sup>14</sup> On this view, Sunstein's praise for the CC's approach to SE rights is affirmed. It is his classification of that approach as an administrative law one which is resisted.

Since the decision in *Grootboom*, the CC has gone on to confirm that its approach to SE rights turns on the question of the reasonableness of government action in several cases. But arguments about the role of administrative law in this approach cannot be assessed without some discussion of what the judicial scrutiny of reasonableness in the context of administrative action involves. The development of reasonableness as a standard of judicial review in administrative law is the subject of this chapter.

Sunstein's assessment of the CC's approach in *Grootboom* is that its key effect was to place a burden of justification on government. Critics of an administrative law model argue that it lends itself to an enquiry into process alone and consequently weakens the potential for adjudication to make an important contribution to the implementation of SE rights. The principal question for this chapter, then, is just how far can an approach based on justification go? Is review for unreasonableness limited to questions of process, either formally or in effect? Or can it be used as a means of interrogating the substance of a decision? As the South African jurisprudence in this area has its roots in English administrative law, I discuss both jurisdictions in addressing these questions.

Review for unreasonableness has always been controversial in administrative law because of its potential to blur the line between appeal and review. As stated by Cora

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<sup>13</sup> C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *South African Law Journal* 266 at 266. See also M Wesson 'Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284. Wesson argues that the classification of the CC's approach as an administrative law one is misconstrued and that the approach in *Grootboom*, *TAC* and *Khosa* is better understood as based on a concern that vulnerable sections of society should not be disregarded.

<sup>14</sup> Steinberg (note 13 above) at 277.

Hoexter:

More than any other ground, review for reasonableness exposes the tension between two conflicting judicial emotions: the fear of encroaching on the province of the executive arm of government by entering into the merits of administrative decisions, and the desire for adequate control over the decisions of administrative authorities.<sup>15</sup>

Many commentators and judges now accept that, whilst value judgments are unavoidable, it is possible for judges to enquire into the substance of a decision without substituting their view of the merits of the case for that of the original decision-maker.<sup>16</sup> Yet some judges continue to treat unreasonableness with a great deal of caution. An insistence that the level of unreasonableness had to be so severe as to border on insanity or absurdity has given way to a more realistic assessment of whether the decision made was within the range of reasonable responses open to the decision-maker, but whether reasonableness is measured by reference to a standard of rationality alone or something more searching is not always clear.

In this chapter, I begin by tracing the expansion of unreasonableness as a ground of review in U.K. law – from the extreme deference of the *Wednesbury*<sup>17</sup> approach, to the judicial relaxing of the test, to changes wrought by the enactment of the Human Rights Act, 1998 (HRA). I then discuss current debates about the future of substantive review and the role of proportionality in U.K. judicial review. I move on to an examination of pre- and post- constitutional review of administrative action for unreasonableness in South Africa. As is the case with the U.K., South African courts are grappling with questions about whether review for unreasonableness extends to an enquiry into proportionality. The aim of this chapter is to show that reasonableness review is not inherently weak, devoid of content and procedure-driven. Much depends on judicial responses to new constitutional and international influences in developing this ground for review.

## **(2) United Kingdom**

### **(a) From *Wednesbury* to the Human Rights Act**

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<sup>15</sup> C Hoexter (2007) *The New Constitutional and Administrative Law Volume Two: Administrative Law* (Juta: Cape Town) at 293-4.

<sup>16</sup> See Froneman DJP in *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) at par. 36; Hoexter (note 15 above) at 317-18; and P Craig (2003) *Administrative Law* (Sweet and Maxwell: London) at 631.

<sup>17</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Discussions of review for unreasonableness in English law tend to begin with the dicta laid down by Lord Greene M.R. in *Wednesbury*.<sup>18</sup> In *Wednesbury*, Lord Greene M.R. noted that lawyers tended to use the term 'unreasonable' to encompass any unlawful exercise of discretion.<sup>19</sup> Included under this head were acts that disclosed bad faith, dishonesty, attention given to irrelevant considerations and a disregard of public policy.<sup>20</sup> However, the term could also be used to describe an absurd exercise of that discretion. Lord Greene M.R. recognised that the two categories were not distinct and could overlap. Thus, for example, dismissing a teacher on the basis that she had red hair would be absurd and also amount to taking into account an irrelevant consideration, as the statute was highly unlikely to have listed hair colour as a significant factor.<sup>21</sup> But, to the extent that it was possible for unreasonableness to exist independently of the other recognised grounds of review, it could only be when there was some kind of absurdity or outrageousness.<sup>22</sup>

Summing up, Lord Greene M.R. noted:

The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.<sup>23</sup>

The *Wednesbury* test was designed to allay concerns about judicial intrusion into the legislative and executive domains, limiting as it did the kinds of cases in which judges could intervene to a rather narrow list. Over the years, it has come under fire for being tautological and unnecessarily extreme.<sup>24</sup> Judges have pointed out that a decision-maker could be acting with perfect lucidity or rationality yet still make an error. An error in reasoning should be sufficient as an indication of unreasonableness. The reviewing court

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<sup>18</sup> Note 17 above. The case concerned a condition, imposed by *Wednesbury Corporation* in the exercise of a statutory discretion, prohibiting children under 15 from attending Sunday performances at the local cinema theatre (at 226-7).

<sup>19</sup> *Wednesbury* (note 17 above) at 229.

<sup>20</sup> *Wednesbury* (note 17 above) at 229.

<sup>21</sup> *Wednesbury* (note 17 above) at 229.

<sup>22</sup> *Wednesbury* (note 17 above) at 229.

<sup>23</sup> *Wednesbury* (note 17 above) at 233-4. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 where Lord Diplock held that irrationality applied to 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (at 410).

<sup>24</sup> See H Woolf, J Jowell and A Le Sueur *De Smith's Judicial Review* (Sweet and Maxwell: London) at 551-3; Craig (note 16 above) at 613, citing Lord Cooke in *R. v Chief Constable of Sussex Ex. p*

should not need to go on to find that the decision-maker had temporarily lost control of his or her faculties.<sup>25</sup> Some judges also noted that the kind of unreasonableness or irrationality envisaged in *Wednesbury* gave the person challenging the decision ‘a mountain to climb’.<sup>26</sup> In 1985, the House of Lords made perhaps the most forceful judicial criticism of *Wednesbury* unreasonableness in English law. In an oft-quoted passage in *R v. Secretary of State for the Home Department Ex p. Daly*,<sup>27</sup> Lord Cooke described *Wednesbury* as:

[A]n unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.<sup>28</sup>

The test for reviewing delegated legislation on the basis of unreasonableness was significantly different from that for administrative decisions set out in *Wednesbury*.<sup>29</sup> In *Kruse v Johnson*,<sup>30</sup> Lord Russell of Killowen C.J. held that judges should be slow to overturn by-laws made by representative bodies with sufficient authority conferred by Parliament.<sup>31</sup> However, even such by-laws could be declared invalid in certain circumstances:

If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men...<sup>32</sup>

Whilst the term ‘manifestly unjust’ leaves this test open to charges of a lack of precision similar to that underlying the *Wednesbury* formulation, it is considerably more definite in other respects. The categorisation of bad faith, partiality, inequality and oppressive interference with rights as examples of what makes a by-law invalid is useful. And, in

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*International Trader’s Ferry Ltd.* [1999] 2 A.C. 418 at 452 and in *R. v Secretary of State for the Home Department Ex. p Daly* [2001] 2 A.C. 532 at 549.

<sup>25</sup> See Lord Woolf M.R. in *R. v Lord Saville of Newdigate Ex p. A* [1999] 4 All E.R. 860 at par. 33; Sedley J in *R. v Parliamentary Commissioner for Administration Ex p. Balchin* [1997] C.O.D. 146. See also *R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213 at pars 65-9. For criticisms of the *Wednesbury* approach, see also N Blake ‘Importing proportionality: clarification or confusion?’ (2002) 1 *European Human Rights Law Review* 19 at 19; A Le Sueur ‘The rise and ruin of unreasonableness’ (2005) 10(1) *Judicial Review* 32; D Longley and R James ‘Judicial review and tragic choices: Ex parte B’ (1995) *Public Law* 367 at 369, 372-3.

<sup>26</sup> Lord Bingham in *R. v Lord Chancellor Ex p. Maxwell* [1997] 1 W.L.R. 104 at 109.

<sup>27</sup> Note 24 above.

<sup>28</sup> *Daly* (note 24 above) at 549.

<sup>29</sup> Administrative decisions comprise the largest group of administrative actions. See Hoexter (note 15 above) at 294.

<sup>30</sup> [1898] 2 Q.B. 91.

<sup>31</sup> *Kruse* (note 30 above) at 98-99.

<sup>32</sup> *Kruse* (note 30 above) at 99-100.

contrast with *Wednesbury*, the test does not in general demand that the flaws in delegated legislation be extreme, bordering on the ridiculous, in order for them to be invalid.<sup>33</sup>

As noted by Craig, courts began to modify the *Wednesbury* approach - to temper the extreme nature of the test - even outside the context of human rights.<sup>34</sup> In other words, they considered *Wednesbury* unreasonableness to be too low a standard of scrutiny even where the case concerned did not impact on fundamental rights. Increasingly, courts have turned to a simpler version of the test: whether the impugned decision is 'within the range of reasonable responses' open to the decision-maker.<sup>35</sup> But the most obvious modification of the standard of reasonableness has taken place in the context of fundamental rights cases. Before the incorporation of the European Convention on Human Rights (ECHR) into domestic law through the HRA, courts had begun to adopt an 'anxious scrutiny' approach to cases involving breaches of human rights. They insisted on a compelling public interest as justification for the infringement of a right.<sup>36</sup> Moreover, certain statements from the courts indicated that, in such cases, the burden was on the decision-maker to show reasonableness, not on the claimant to prove unreasonableness.<sup>37</sup>

These developments have been somewhat overtaken by the enactment of the HRA. Since the HRA came into force, most cases involving the review of administrative action that impinges on human rights will be based on illegality, rather than unreasonableness.<sup>38</sup> Infringements of fundamental rights recognised in the HRA will fall outside the 'four corners' of that statute if they cannot be justified according to a structured test of proportionality,<sup>39</sup> developed by the European Court of Human Rights in its jurisprudence.<sup>40</sup>

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<sup>33</sup> De Smith (note 24 above) at 552.

<sup>34</sup> Craig (note 16 above) at 612. Craig observes that '[t]he courts have clung to the legitimating frame of the *Wednesbury* test, while at the same time exerting more extensive control than would be allowed by a literal reading of the test' (note 16 above at 634, and 610-617). See also T Hickman 'The reasonableness principle: reassessing its place in the public sphere' (2004) 63(1) *Cambridge Law Journal* 166 at 181-2; and *International Trader's Ferry* (note 24 above).

<sup>35</sup> De Smith (note 24 above) at 554. See the examples cited at 554, note 72.

<sup>36</sup> See, especially, *R. Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 686 at 749-51. See also Craig (note 16 above) at 613-4; De Smith (note 24 above) at 594-5, and see the cases mentioned at 595, note 318.

<sup>37</sup> De Smith (note 24 above) at 595, discussing *R v Minister of Defence Ex p. Smith* [1996] Q.B. 517.

<sup>38</sup> De Smith (note 24 above) at 552. See also Craig (note 16 above) at 569-604.

<sup>39</sup> De Smith (note 24 above) at 587-8. See also Blake (note 25 above) at 19.

<sup>40</sup> Discussed in part (d) below.

The movement away from *Wednesbury* unreasonableness is definitely cause for celebration. However, there is a degree of uncertainty over both the content and application of the various modified tests. The standard 'within the range of reasonable responses' used to test for unreasonableness in cases where human rights are not implicated has the pleasing features of being more comprehensible than *Wednesbury* and setting a higher standard of scrutiny for administrative action. However, it does not, of itself, provide an answer to the question of what makes a decision fall outside the range of reasonable responses. Furthermore, courts have sometimes retreated to the familiarity of *Wednesbury* unreasonableness in both human rights and non-human rights cases.<sup>41</sup>

When it comes to SE rights, which are not explicitly included in the HRA, U.K. courts have given effect to them indirectly, through the interpretation of recognised fundamental rights (mainly the right to respect for family life in Article 8) in the Act.<sup>42</sup> In such cases, the standard of review applied is the structured proportionality test mentioned above, and examined in detail below. Nevertheless, 'reasonableness' will continue to be applicable as a ground of review in a number of instances relevant to this thesis. First, U.K. courts are called upon to review rights and interests in SE goods like housing and health enshrined in ordinary legislation. In doing so, they apply established grounds of review, including reasonableness, to administrative action impacting on these rights and interests. Second, courts apply the usual grounds to review administrative action impacting on common law rights.<sup>43</sup> Whether recognition of common law rights to SE goods is likely or desirable is a point of some controversy.<sup>44</sup> But, whilst the possibility exists, it is an issue for discussion in this thesis. One of the enduring debates in this area is whether and when reasonableness should include an inquiry into proportionality; and whether proportionality may act as an independent ground of review outside HRA cases.<sup>45</sup> These are important questions for this chapter.

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<sup>41</sup> De Smith (note 24 above) at 596.

<sup>42</sup> Examples of such cases are discussed in Chapter 5 below. See also *Huang v Secretary of State for the Home Department*; *Kashmiri v Secretary of State for the Home Department* [2007] W.L.R. 581.

<sup>43</sup> De Smith (note 24 above) at 552.

<sup>44</sup> See G van Bueren 'Including the excluded: the case for an economic, social and cultural Human Rights Act' (2002) *Public Law* 256; and E Douglas 'Incorporating socio-economic rights in a British bill of rights: pragmatic progression or a step too far?' (2007) 4(1) *Justice Journal* 88.

<sup>45</sup> See Craig (note 16 above) at 628-32; De Smith (note 24 above) at 585. See further, Blake (note 25 above).

Much of the argument in this thesis addresses the question of whether the South African CC's reasonableness-based approach is a useful way for judges to approach SE rights adjudication. As SE rights are constitutionally entrenched and directly enforceable by courts in South Africa, it is tempting to conclude that the only U.K. standard of review relevant to the discussion is the structured proportionality test used in HRA cases. There are a number of reasons why this is not the case. First, whilst the arguments in this thesis have been prompted by the South African approach to SE rights, the focus is on a more generally workable model for SE rights adjudication. Second, the main SE rights provisions in the South African Constitution of interest for this thesis explicitly demand an enquiry into reasonableness.<sup>46</sup> Third, and most importantly, variable intensity of review is an essential aspect of the argument here. Alongside the modifications to *Wednesbury*, and in recognition of the impossibility of deciding in advance what reasonableness requires in all cases,<sup>47</sup> courts and academic commentators have indicated support for the idea that the standard of review must vary according to context<sup>48</sup> in order to achieve a proper balance between protection of individual rights and interests and respect for government decision-making in the public interest.<sup>49</sup> But flexibility need not translate into a complete lack of certainty over when and, moreover, why a particular intensity of review is preferred.

The immediate task then is to identify all aspects of unreasonableness and consider how exacting these aspects are on exercises of public power. A careful study of what we mean by unreasonableness may go some way to promoting the culture of justification<sup>50</sup> that has become so much a part of the vocabulary of public law in jurisdictions like South Africa and the United Kingdom.<sup>51</sup> In the following discussion of what unreasonableness has come to mean in the judicial review of administrative action, I

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<sup>46</sup> The identically worded sections 26 (2) and 27 (2) provide: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.

<sup>47</sup> As noted in De Smith (note 24 above at 556-7) 'the term "unreasonable", in its *Wednesbury* or any other sense, is no magic formula; everything must depend upon the context'.

<sup>48</sup> See Craig (note 16 above) at 613. See also *Daly* (note 24 above) at 549.

<sup>49</sup> Discussed in Chapter 1, above. Proportionality may also be applied more or less intensely. See J Rivers 'Proportionality and variable intensity of review' (2006) *Cambridge Law Journal* 65(1) 174 at 178.

<sup>50</sup> E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 32.

<sup>51</sup> De Smith (note 24 above) at 597-8.

rely on the classification of categories of unreasonableness set out in De Smith<sup>52</sup> as the most current and thorough analysis of its kind.

**(b) Requirements of reasonableness**

As noted above, *Wednesbury*<sup>53</sup> provided little guidance on what makes an administrative decision unreasonable. The difficulties associated with identifying aspects of unreasonableness are compounded by the overlap between grounds of review. This is partly due to the looseness with which lawyers and judges used the term unreasonableness. As noted by Lord Greene M.R. in *Wednesbury*, lawyers used the term to encompass bad faith, dishonesty, ignoring public policy and taking into account irrelevant considerations – all of which are more accurately instances of illegality.

More recent accounts of unreasonableness still tend to begin with the issue of relevant and irrelevant considerations.<sup>54</sup> This could well be because the statute in question is not always explicit about what is and is not relevant, making this a question of reasonableness, rather than legality. More significantly, it is an indication that an enquiry into reasonableness now focuses on the *balance* of relevant considerations,<sup>55</sup> rather than the need to simply ensure that some consideration was given to them. The other factor commonly associated with any test for reasonableness is rationality. The term ‘rationality’ was used as a substitute for *Wednesbury* unreasonableness in English law.<sup>56</sup> Thus, it was used to refer to absurdity, bordering on insanity. Today, however, rationality interrogates the reasoning process. It demands a rational or logical ‘connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it reached’.<sup>57</sup>

In a detailed classification of categories of unreasonableness, De Smith include both these defects – manifest imbalance in the weight attached to the considerations on which the decision is based and irrationality – in the group ‘unreasonable process’, along with ‘uncertain decisions’; ‘decisions supported by inadequate or incomprehensible reasons’ or ‘by inadequate evidence’; and decisions ‘made on the basis of a mistake of

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<sup>52</sup> Note 24 above.

<sup>53</sup> Note 17 above.

<sup>54</sup> See, for example, De Smith (note 24 above) at 557.

<sup>55</sup> De Smith (note 24 above) at 557-9.

<sup>56</sup> See Lord Diplock in *CCSU* (note 23 above) at 410.

fact'.<sup>58</sup> A flaw in the decision-making process, in the process of reasoning and justification, taints each one of these decisions.<sup>59</sup> If review for unreasonableness went no further than this, charges that administrative law is entirely focused on decision-making procedures would be difficult to refute. But the authors move on to describe categories of unreasonableness that go to the substance of the decision. Decisions that violate the common law or constitutional principles such as the rule of law and equality may be impugned for unreasonableness. Furthermore, oppressive decisions - those that have an unduly harsh impact on the rights and interests of affected parties - may also be challenged as unreasonable.<sup>60</sup>

Over the years, English courts have come to accept that administrative acts must be consistent, not just with their enabling statutes, but with common law and constitutional principles.<sup>61</sup> Using principles of interpretation, courts recognised a number of individual rights as common law rights even before the HRA was enacted.<sup>62</sup> Constitutional principles are those 'governing the exercise of power in a constitutional democracy'.<sup>63</sup> These include respect for certain individual rights, common to constitutional democracies the world over – freedom of expression and access to justice are examples here. Some overlap between the HRA and common law rights is, consequently, to be expected. Courts have, in addition, applied the general constitutional principles of respect for the rule of law and equality to all exercises of public power.<sup>64</sup>

The rule of law, as a general principle, is a rich source of values through which the exercise of public power is controlled and limited.<sup>65</sup> The courts have developed the principles on a case-by-case basis. To date, it has been held to encompass 'the values of

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<sup>57</sup> Mureinik (note 50 above) at 41. See also De Smith (note 24 above) at 559-60.

<sup>58</sup> De Smith (note 24 above) at 556.

<sup>59</sup> Ibid.

<sup>60</sup> De Smith (note 24 above) at 556-7.

<sup>61</sup> De Smith (note 24 above) at 569-70.

<sup>62</sup> De Smith (note 24 above) at 570.

<sup>63</sup> De Smith (note 24 above) at 569.

<sup>64</sup> De Smith (note 24 above) at 570. The authors note that an express parliamentary directive against any of these principles would be sufficient to rob them of their authority, due to the fact that parliamentary supremacy continues as the 'prime constitutional principle' in this jurisdiction. Some writers have taken issue with this argument – see T Allan 'The constitutional foundations of judicial review: conceptual conundrum or interpretive inquiry?' (2002) 61(1) *Cambridge Law Journal* 87 at 88.

<sup>65</sup> This is also the case in South Africa. See the discussion of the constitutional principle of legality, which derives from respect for the rule of law, below.

legal certainty, consistency, due process and access to justice.<sup>66</sup> More recently, the House of Lords has also interpreted the principle of respect for the rule of law to demand a level of accountability from public officials.<sup>67</sup> The principle of equality, increasingly employed by U.K. courts, is used in a formal sense to demand that the law is applied in an even-handed fashion. The values of legal certainty and consistency under the rule of law would produce the same effect in most circumstances but, with formal equality, the underlying goal is equal treatment of similarly situated persons, rather than predictability.<sup>68</sup> In its substantive sense, the principle of equality focuses not on whether the law is applied even-handedly, without prejudice or preference, but on whether the content of that law discriminates against individuals or groups.<sup>69</sup> Equality in its formal and substantive senses is now part of domestic law because of the HRA. The principle has also been used to challenge administrative action under the common law, with varying degrees of success.<sup>70</sup>

The final category of unreasonableness in the classification devised by De Smith is that of oppressive decisions. As the authors note, this issue reveals an obvious overlap between reasonableness review and the principle of proportionality, discussed below.<sup>71</sup> However, the status of the principle of proportionality in English law is unclear. A concern with whether administrative action imposes too onerous a burden on rights and interests has been a part of substantive review in English law, quite independently of any express recognition of a proportionality principle, for some time.<sup>72</sup> Examples of oppressive decisions range from those which impose burdens impossible for individuals to meet, to those made despite the fact that an alternative, less burdensome on rights and interests, was available to the public body concerned.<sup>73</sup>

The categorisation used by De Smith indicates that unreasonableness is no longer

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<sup>66</sup> De Smith (note 24 above) at 571.

<sup>67</sup> *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604, as cited in De Smith (note 24 above) at 571.

<sup>68</sup> De Smith (note 24 above) at 572.

<sup>69</sup> De Smith (note 24 above) at 574. See further, S Fredman 'From Deference to Democracy: the role of Equality under the Human Rights Act 1998' (2006) 122 *Law Quarterly Review* 53.

<sup>70</sup> For examples, see De Smith (note 24 above) at 576-8.

<sup>71</sup> De Smith (note 24 above) at 578. See also Blake (note 25 above) at 19.

<sup>72</sup> De Smith (note 24 above) at 579.

<sup>73</sup> De Smith (note 24 above) at 579-84. See also, the discussion of *R. v Secretary of State for Social Security ex parte. Joint Council for the Welfare of Immigrants; R. v Secretary of State for Social Security ex parte. B* [1997] 1 W.L.R 275 in Chapter 5, below.

used as shorthand for the conclusion that an administrative act is invalid, thereby drawing procedural unfairness and illegality into its ambit.<sup>74</sup> Although there can be no bright lines separating these three grounds of review from each other, post-*Wednesbury* jurisprudence has served to strengthen unreasonableness as a ground of review in its own right. Cases emerging just before and after the HRA have added a great deal of content to the notion of unreasonableness. Administrative acts that impinge on the principles of respect for the rule of law and equality, for example, are often overturned on the basis that they are unreasonable.<sup>75</sup> The enactment of the HRA and a more widespread consensus over the meaning and applicability of the values underlying a constitutional democracy have provided a solid foundation for the development of the content of the standard of reasonableness. But unreasonableness, as it now operates, is open to criticism on the basis that it is applied with a great degree of uncertainty and, sometimes, inconsistency.

### (c) The place of proportionality in English law

Lord Diplock suggested the possibility that proportionality could become an independent ground of review in *Council of Civil Service Unions v Minister for the Civil Service*.<sup>76</sup> He held, however, that the case at hand was not a suitable one in which to develop this ground. Judges in earlier cases had accepted that an administrative act could be overturned if it was disproportionate with the harm it sought to address. However, these judges considered a lack of proportionality to be an indication of irrationality or unreasonableness in the *Wednesbury* sense, not a separate ground of review.<sup>77</sup> Furthermore, as is the case with *Wednesbury* unreasonableness generally, judges would overturn a decision only if the level of disproportion was extreme.<sup>78</sup>

Although the *CCSU* case was decided in 1985, proportionality is still only a

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<sup>74</sup> In the sense discussed by Lord Greene M.R. in *Wednesbury* (note 17 above) at 229.

<sup>75</sup> De Smith (note 24 above) at 569-70.

<sup>76</sup> Note 23 above at 410.

<sup>77</sup> Lord Donaldson M.R. summarised the pre-*CCSU* developments in this area in the Court of Appeal's decision in *Brind* (note 36 above) at 721-2. Examples of cases in which judges accepted that proportionality played a role in assessing *Wednesbury* reasonableness are *R v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052 at 1057 and 1063; and *R. v Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990 at 1001.

<sup>78</sup> See, for example, Woolf L.J. (McCullough J. concurring) in *R. v Brent London Borough Council, Ex parte Assegai* (unreported), 11 June 1987, as cited by Lord Donaldson in *Brind* (note 36 above) at 721. In his judgment, Woolf L.J. noted that the Council's action was 'wholly out of proportion to what Dr. Assegai had done. Where the response was of out of proportion with the cause to this extent, this provides a very clear indication of unreasonableness in a *Wednesbury* sense'.

possible fourth ground of review. The House of Lords pronounced on the status of the proportionality principle again in considerable detail in *R. v Secretary of State for the Home Department Ex p. Brind*,<sup>79</sup> decided as debates about the incorporation of the ECHR were reaching their peak. Echoing Lord Diplock in *CCSU*, Lord Roskill held that, whilst proportionality could emerge as a separate ground of review at some future stage this was not an appropriate case in which to incorporate it.<sup>80</sup> A number of the Law Lords expressed concern that proportionality would entail an enquiry into the merits of the case – that, were proportionality to be accepted as an additional basis for review, judges would, in effect, be substituting their own views for that of the original decision-maker.<sup>81</sup> The situation was, of course, fundamentally altered by the incorporation of the HRA. Currently, courts in this jurisdiction will apply proportionality expressly when dealing with directly effective European Community law (EC) and with justification for the limitation of rights under the HRA.<sup>82</sup> In recent cases, some judges have expressed support for proportionality as an independent ground of review, applicable to the review of all administrative acts.<sup>83</sup> But the status of proportionality in all non-EC and non-HRA cases remains unclear.

English law has developed to the point where proportionality in such cases could continue to be an element of the general test for unreasonableness; become an independent ground of review applied together with illegality, procedural unfairness and unreasonableness; or supplant unreasonableness as a ground of review altogether.<sup>84</sup> The meaning to be given to various tests of proportionality is considered below. For the moment, it is important to note that, as the widely discredited *Wednesbury* test for unreasonableness has given way to a modified, looser version in which claimants no longer need to show extreme forms of unreasonableness, so too a lack of proportionality between objective and means need not be acute or complete for a governmental act to be successfully challenged before the courts. Rather the focus is on the balance between

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<sup>79</sup> Note 36 above.

<sup>80</sup> *Brind* (note 36 above) at 750.

<sup>81</sup> See Lord Roskill at 750; Lord Ackner at 762-3; and Lord Lowry at 767 in *Brind* (note 36 above).

<sup>82</sup> De Smith (note 24 above) at 584. See also Craig (note 16 above) at 620-22. As this thesis is concerned with the protection of rights, I will not be discussing the structured proportionality test applied in European Community (EC) law, which pre-dated the incorporation of the ECHR – see De Smith (note 24 above) at 587; Craig (note 16 above) at 621-2.

<sup>83</sup> See Lord Slynn in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389 at par. 51.

<sup>84</sup> See Craig (note 16 above) at 628-32; and De Smith (note 24 above) at 585.

means and ends.<sup>85</sup> Some commentators have questioned whether the choice between these options makes any practical difference as the tests for reasonableness and proportionality interrogate very similar issues.<sup>86</sup> Whether this is the case depends on the content of the proportionality test applied.

**(d) The scope of proportionality**

As pointed out by Craig, striking a balance between a variety of interests and aims lies at the heart of any enquiry into proportionality. In particular, proportionality requires that the means used be commensurate with the objective sought to be achieved, the most vivid example of a lack of proportionality being the use of a sledgehammer to crack a nut.<sup>87</sup> But the widely used formulation of the test for proportionality goes further than this. It asks not merely whether some, less restrictive means could have been used to achieve the desired goal but goes on to reject that goal if the cost to the individual is considered to be too high. In terms of this formulation, a court will ask:

- (1) Whether the measure was necessary to achieve the desired objective.
- (2) Whether the measure was suitable for achieving the desired objective.
- (3) Whether it nonetheless imposed excessive burdens on the individual. This part of the inquiry is often termed proportionality *stricto sensu*.<sup>88</sup>

The discussion of unreasonableness above indicates that aspects of an enquiry into proportionality made their way into the modified *Wednesbury* test for unreasonableness before the HRA came into operation. Following the enactment of the HRA, there are two ways in which proportionality is now applied in English courts.<sup>89</sup> The Strasbourg court has developed a structured test of proportionality to determine whether infringements of the rights in Articles 8 – 12, those capable of limitation, are justifiable.<sup>90</sup> De Smith summarise the test as follows:

The authority will normally be required to demonstrate that the measures are 'prescribed by the law'; that they pursue a legitimate end or an end specified in the relevant Article (ends such as national security or public safety); that they are rationally connected to that end; that no less restrictive alternative could have been adopted, and that they are necessary (and not merely desirable).<sup>91</sup>

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<sup>85</sup> See De Smith (note 24 above) at 585-6.

<sup>86</sup> See Craig (note 16 above) at 621; De Smith (note 24 above) at 585; Lord Steyn in *Daly* (note 24 above) at 547; and Blake (note 25 above) at 19.

<sup>87</sup> See *Brind* (note 36 above) at 706.

<sup>88</sup> Craig (note 16 above) at 622.

<sup>89</sup> De Smith (note 24 above) at 585. See also Craig (note 16 above) at 618-22.

<sup>90</sup> De Smith (note 24 above) at 587.

<sup>91</sup> De Smith (note 24 above) at 587.

Articles 8 – 11<sup>92</sup> of the HRA add depth to the concept of necessity by requiring any limitation of these rights to be ‘necessary in a democratic society’. This addition means that the courts must consider whether the objective the public authority seeks to achieve is consistent with the values underlying a constitutional democracy. It is not enough that there be some rational connection to a legitimate societal goal – the goal itself must cohere with values such as tolerance and pluralism.<sup>93</sup> Strasbourg jurisprudence is not binding on domestic courts and there is, therefore, no obligation on the courts to apply it. It does, however, have persuasive force<sup>94</sup> and courts have consistently applied the test in HRA cases.

In respect of non-HRA cases, courts consider elements of proportionality in a less defined way as a feature of substantive judicial review of administrative action for unreasonableness. De Smith refers to the proportionality enquiry in this context as a test of ‘fair balance’.<sup>95</sup> In applying a test of fair balance, courts will examine the balance of relevant considerations to see whether the appropriate weight has been attached to various factors. They will also ask if there has been a disproportionately severe invasion of individual rights and interests. And a rational connection between means and end has always been a requirement of reasonableness.<sup>96</sup> The overlap in content between the two kinds of tests is obvious. The most important difference between the two lies in the question of the burden of proof.<sup>97</sup> With the Strasbourg-developed structured test for proportionality, the burden of proving that the limitation of the right was justified rests on the public authority. With the test of fair balance, it is the claimant – the person bringing the case for judicial review – who bears the onus of proving a lack of proportionality.<sup>98</sup> But are there also differences in content and scope between these two forms of proportionality?

In *R. v Secretary of State for the Home Department, Ex parte Daly*,<sup>99</sup> the judges were of the view that, though proportionality in each of these contexts would often yield

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<sup>92</sup> Dealing with the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association, respectively.

<sup>93</sup> De Smith (note 24 above) at 587-8.

<sup>94</sup> Craig (note 16 above) at 623.

<sup>95</sup> De Smith (note 24 above) at 585.

<sup>96</sup> De Smith (note 24 above) at 585.

<sup>97</sup> De Smith note 24 above) at 585-6.

<sup>98</sup> De Smith (note 24 above) at 586.

the same result, there was nonetheless a substantial difference between the two. The impugned decision in *Daly* was made before the HRA came into effect.<sup>100</sup> Daly argued that a blanket policy requiring examination of prisoners' legally privileged correspondence in their absence was an unnecessary and impermissible infringement of a fundamental right recognized in the ECHR and the common law – the right to communicate with one's legal advisor confidentially, under the protection of legal professional privilege.<sup>101</sup> The role of the principle of proportionality in fundamental rights cases was, as a result, very much at the centre of the decision. Lord Bingham found that the infringement of prisoners' rights was indeed greater than that shown to be necessary in order to meet the relevant public aims.<sup>102</sup> He chose to base his conclusions on an 'orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review'.<sup>103</sup> Noting that the same result would be achieved on an application of the ECHR to this case, Lord Bingham acknowledged that there could well be cases in which this was not so.<sup>104</sup>

Lord Steyn, in whose judgment Lord Bingham and Lord Cooke of Thorndon concurred,<sup>105</sup> referred to the Privy Council's test for proportionality set out in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* in the context of the limitation of the fundamental right to free expression. In terms of that test, a court will consider the following factors:

[W]hether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>106</sup>

According to Lord Steyn, these three factors impose a more onerous burden on public authorities than that required by a *Wednesbury* test, even one modified for human rights cases:

First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational

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<sup>99</sup> Note 24 above.

<sup>100</sup> Lord Steyn in *Daly* (note 24 above) at 546.

<sup>101</sup> The facts of the case are set out in Lord Bingham's judgment - *Daly* (note 24 above) at 536-8.

<sup>102</sup> *Daly* (note 24 above) at 543.

<sup>103</sup> *Daly* (note 24 above) at 545.

<sup>104</sup> *Daly* (note 24 above) at 545-6, citing *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 in which the European Court held that the domestic approach did not provide the applicants with an effective remedy because the judicial review threshold had been set too high.

<sup>105</sup> See pages 546 and 548 of the judgment, *Daly* (note 24 above).

<sup>106</sup> [1991] 1 AC 69 at 80. See also *Daly* (note 24 above) at 547.

or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.<sup>107</sup>

Lord Steyn went on to note that the heightened scrutiny test which was developed in *Ex parte Smith*<sup>108</sup> was also not ‘necessarily appropriate to the protection of human rights’.<sup>109</sup> Although the court in *Ex parte Smith*<sup>110</sup> was ostensibly applying a *Wednesbury* test modified to the human rights context, in reality the threshold for review was set at an extremely high level. The Court of Appeal required the Secretary of State to show that there was an important competing public interest, which *he* considered an adequate justification for the infringement of the right. The court would only intervene ‘if his purported justification outrageously defies logic or accepted moral standards’.<sup>111</sup> As noted by Lord Steyn in *Daly*, the Strasbourg court objected to this test on the basis that it did not allow domestic courts to themselves enquire into whether the measure being challenged was taken in pursuit of a compelling public interest and was proportionate to that interest.<sup>112</sup> The requirement of necessity in *De Freitas* was limited to the question of whether there were less restrictive means to achieve the purpose. Lord Steyn’s reasoning in *Daly*, based on the Strasbourg jurisprudence, added a fourth element to the test for proportionality in HRA cases – courts had to decide whether the measure was necessary in the sense that it pursued a compelling, rather than merely desirable or reasonable, public need.<sup>113</sup>

Formally, then, proportionality, as applied in HRA cases sets the threshold for interference with a right at a higher level than applies when a Convention right is not implicated and the courts merely enquire into the question of fair balance as a feature of reasonableness. In practice, however, elements of the more onerous structured proportionality test have been employed by courts in cases which ostensibly turn on unreasonableness.<sup>114</sup> When it comes to content, there is no bright line between the two forms of proportionality described here. Despite this, there are some differences which remain relevant. First, the importance of the onus of proof should not be underestimated.

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<sup>107</sup> *Daly* (note 24 above) at 547. See also Blake (note 25 above) at 22-3.

<sup>108</sup> Note 39 above.

<sup>109</sup> *Daly* (note 26 above) at 547. See also Blake (note 27 above) at 22-3.

<sup>110</sup> Note 37 above.

<sup>111</sup> *Ex parte Smith* (note 37 above) at 540.

<sup>112</sup> *Smith and Grady* (note 104 above) at 543 par. 138, cited in *Daly* (note 24 above) at 547-8; see also Craig (note 16 above) at 621.

<sup>113</sup> De Smith (note 24 above) at 588.

<sup>114</sup> De Smith (note 24 above) at 590. See also Craig (note 16 above) at 619.

The burden of proving a lack of proportionality is a heavy one to bear and could defeat a claimant trying to overturn the decision of a state actor with much wider access to information or resources. Furthermore, the structured proportionality test arguably has the advantage of enhancing legal certainty by removing the discretion about what questions are relevant from judicial hands and requiring that the full gamut of the enquiry be applied whenever the HRA is implicated. The problem with this argument is there is now growing agreement that, as with unreasonableness, proportionality may be applied more or less intensely, depending on the demands of a particular case.<sup>115</sup> Julian Rivers notes that the tendency of some courts (British, Canadian and South African) to treat “‘necessity” as the final stage of proportionality review and to suppress the language of balancing’ means that the public interest is also suppressed.<sup>116</sup> Rivers’ point is that this need not be the case if a proportionality analysis is seen as a balancing, rather than a ‘state-limiting’ exercise. Rivers argues that although ‘state-limiting’ approaches to proportionality appear, at first sight, to grant more extensive rights-protection, British courts tend to uphold the government purpose as important and test simply for efficiency, assuming that ‘whatever it takes to achieve a government aim is justified’.<sup>117</sup> Furthermore, the necessity test may often be reduced to the question of whether a decision is unreasonable in the *Wednesbury* sense,<sup>118</sup> where some theory of judicial deference is at play.

Citing Lord Steyn in *Daly*,<sup>119</sup> Rivers notes that the idea of variability in the intensity of review derived from a comparison of *Wednesbury* unreasonableness with proportionality. Lord Steyn indicated that a decision might be found to be reasonable in the *Wednesbury* sense but still be disproportionate. Thus, in both English and South African law,<sup>120</sup> proportionality tends to be seen as the most demanding level of scrutiny in a number of contexts in which state action is being evaluated.<sup>121</sup> However, recent cases have shown that, instead of seeing proportionality as the extreme end of the review scale, it is more useful and accurate to acknowledge that proportionality may itself be applied

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<sup>115</sup> Craig (note 16 above) at 632; Rivers (note 49 above); and De Smith (note 24 above) at 593-4.

<sup>116</sup> Rivers (note 49 above) at 179.

<sup>117</sup> Rivers (note 49 above) at 190.

<sup>118</sup> Rivers (note 49 above) at 178, citing W Wade and C Forsyth (2004) *Administrative Law* (OUP: Oxford) at 366.

<sup>119</sup> Note 24 above at 547-548; Rivers (note 49 above) at 202.

<sup>120</sup> See the discussion on reasonableness in South African administrative law below and Rivers (note 49 above) at 180 – 1.

<sup>121</sup> Rivers (note 49 above) at 202.

more or less strictly.<sup>122</sup> What makes proportionality a flexible principle is not the concept itself, but developing theories regarding judicial deference and restraint.<sup>123</sup> The question then becomes one of which factors within a case will demand higher or lower levels of scrutiny.<sup>124</sup>

The House of Lords recently addressed the issue of the balancing of interests in a proportionality enquiry in *Huang v Secretary of State for the Home Department*; *Kashmiri v Secretary of State for the Home Department*.<sup>125</sup> In a written intervention made on behalf of counsel for the applicants, Liberty criticised the formulation of the proportionality test in *De Freitas*, discussed above, on the basis that it ignored the ‘overriding requirement’ for proportionality set out in the watershed Canadian decision on proportionality and the limitation of rights, *R v Oakes*.<sup>126</sup> This requirement was the balancing of the interests of society with those of individuals and groups. The House of Lords agreed that this was an essential aspect of the enquiry.<sup>127</sup> But as pointed out by Jeffrey Jowell, *Huang* appears to endorse a more utilitarian approach to the balancing of rights and the public interest than was intended in *Oakes*.<sup>128</sup> Chief Justice Dickson did refer to the balancing of societal interests with those of individuals and groups as an objective of the enquiry into proportionality<sup>129</sup> but prefaced this concern by noting that, in the first leg of the test, a court had to establish that the impugned act was taken in the pursuit of a sufficiently important objective – one related to concerns ‘which are pressing and substantial in a free and democratic society’.<sup>130</sup> Thus, balancing is indisputably part of the enquiry but, in that balancing process, courts are not meant to accept any governmental objective as legitimate. The governmental act must be necessary according to the standards of a democratic society.<sup>131</sup> It is important to note here that the House of Lords’ engagement with this issue does not detract from the concerns raised by Rivers. In fact, Liberty’s written intervention in the case is an indication that the balancing element and a proper interrogation of the governmental objective are often missing from the cases.

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<sup>122</sup> Rivers (note 49 above) 202-3.

<sup>123</sup> Rivers (note 49 above) at 203.

<sup>124</sup> Rivers (note 49 above) at 204.

<sup>125</sup> Note 42 above.

<sup>126</sup> [1986] 1 SCR 103 at 139.

<sup>127</sup> *Huang* (note 42 above) at 593.

<sup>128</sup> Seminar ‘Proportionality and the standard of review after *Huang*’, Institute of Advanced Legal Studies, 23 November 2007.

<sup>129</sup> *Oakes* (note 126 above) at par. 70; see also De Smith (note 24 above) at 589, note 284.

<sup>130</sup> *Oakes* (note 126 above) at par. 69.

This issue must be borne in mind as we consider the future of substantive review in this jurisdiction.

**(e) The future of substantive review**

A number of commentators have emphasised the impossibility of separating what is required in terms of the proportionality tests – fair balance as well as structured proportionality – from the requirements of reasonableness.<sup>132</sup> The balance of relevant considerations, and the questions of whether there is a rational connection between means and objectives and whether the measure taken by the public authority has too oppressive an impact on affected individuals are all aspects of both reasonableness and proportionality enquiries.<sup>133</sup> This is not to say that all judges are willing to apply these factors in all cases – as noted earlier, some judges continue to apply *Wednesbury* in its strictest form,<sup>134</sup> even where nothing in the subject matter of the case requires such high levels of judicial restraint. This kind of judicial deference is, however, becoming less defensible as domestic and international pressure on courts to intervene in areas previously impervious to judicial review increases.

There are a number of possible developments in this area of English law. First, proportionality could continue to be applied alongside the modified *Wednesbury* test. Thus, the structured proportionality test would apply only in EC and, more significantly for the purposes of this thesis, HRA cases. Courts would apply a modified version of the *Wednesbury* test to all other judicial review cases. In cases where common law rights and interests are implicated, or where the administrative act imposes penalties on individuals,<sup>135</sup> courts would use a fair balance test and insist on a compelling public interest justifying the infringement of the rights. Where rights are not implicated at all, courts would ask whether the decision falls within the range of reasonable responses. A second possibility is that proportionality will develop into an independent ground of review, potentially applicable in all judicial review cases. If this development were to take place, the result would be either official acceptance of the informal fair balance

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<sup>131</sup> Jowell (note 128 above).

<sup>132</sup> De Smith (note 24 above) at 560, Craig (note 16 above) at 630. See also S Fredman (2008) *Human rights transformed: positive rights and positive duties* (OUP:Oxford) at 66-7.

<sup>133</sup> De Smith (note 24 above) at 560.

<sup>134</sup> De Smith (note 24 above) at 596.

enquiry or adoption of the structured proportionality test currently used in HRA cases. The latter option is the more likely one. It is difficult to see how proportionality as fair balance would suffice when concerns with a fair balance have already been developed as part of a less onerous enquiry into reasonableness. The third and final possibility is that proportionality could supplant unreasonableness as a ground of review.

Although commentators are still reluctant to hail the demise of unreasonableness, there are three reasons why this is a likely development. First, a large number of the cases that would previously have been brought on the basis of reasonableness review will now be brought as HRA cases, provided a fundamental right in the HRA is implicated.<sup>136</sup> Second, as argued in De Smith, one effect of the increased use of the structured test for proportionality is a change in expectations of how decision-makers ought to behave. An emerging culture of justification demands that an enquiry more searching than is permitted under *Wednesbury* take place when a decision impacts upon fundamental rights and important interests.<sup>137</sup> Similarly, Craig makes the point that the somewhat tenuous distinction that currently exists between a modified *Wednesbury* test and structured proportionality may become harder to maintain as courts get into the practice of applying structured proportionality.<sup>138</sup> A third, related point is that, as proportionality may be applied at varying levels of intensity, *Wednesbury* unreasonableness may be ‘caught within the “pincers” of the tests used in EC law and the HRA’.<sup>139</sup> In other words, structured proportionality, applied at a less intense level to suit the circumstances of the case, would, in fact, accommodate the kind of enquiry which now takes places under reasonableness.

Arguments to retain unreasonableness alongside proportionality have more to do with the different flavours of the tests than their actual content. It has been difficult for courts to shake the test for unreasonableness free of its *Wednesbury* roots. The association of review for unreasonableness with a high level of judicial caution, whilst not inescapable, is strong. By contrast, the structured proportionality test has developed in response to international obligations to protect fundamental human rights. The test places

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<sup>135</sup> See Craig (note 16 above) at 625-30. See further, M Elliott ‘The Human Rights Act and the standard of substantive review’ (2001) 60(2) *Cambridge Law Journal* 301 at 302.

<sup>136</sup> Craig (note 16 above) at 616.

<sup>137</sup> De Smith (note 24 above) at 598.

<sup>138</sup> Craig (note 16 above) at 617.

more serious demands of justification on public authorities and gives courts greater capacity to overturn their decisions. However, this increased capacity for judicial interference should not be overestimated. As argued by Craig,

This is, however, not an argument for rejecting proportionality as a general head of review, but for ensuring that its application is subject to the same threshold principles which apply generally within administrative law. The reach of proportionality must be limited by justiciability.<sup>140</sup>

The *Wednesbury* test has already been used to enquire into the merits of, and strike down, decisions which could not be said to be absurd or illogical.<sup>141</sup> Neither this, nor an enquiry into the substance of a decision in an application of a structured proportionality test, need involve a judge substituting his or her views about what the ‘best’ or ‘correct’ outcome would have been for that of the public authority. Some enquiry into merits in substantive review is inescapable but this kind of review principally involves an evaluation of the proffered justification. It does not detract from courts’ secondary role as reviewers, rather than originators of public decisions.<sup>142</sup> Variability of the intensity of review means that proportionality itself may be applied more or less strictly – as a test of mere rationality in appropriate instances, for example. There could even be cases in which substantive review is not applicable because of widespread policy implications or a serious institutional capacity deficit on the part of the courts in a particular area.<sup>143</sup>

### (3) South Africa

#### (a) Pre-1994 review for unreasonableness

Although some apartheid-era judges used principles of administrative justice to protect individuals’ rights and interests against racist and oppressive government policies, many considered themselves bound by Parliamentary intent to apply those laws. The system of Parliamentary supremacy also meant that the legislature could pass Acts removing the power of review from the courts.<sup>144</sup> As a result, administrative justice in the apartheid era was marked by curtailment of judicial power to question or overturn administrative action.

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<sup>139</sup> Craig (note 16 above) at 617.

<sup>140</sup> Note 16 above at 632.

<sup>141</sup> Craig (note 16 above) at 631.

<sup>142</sup> See Lord Steyn in *Daly* (note 24 above) at pars. 27-8; and J Jowell ‘Beyond the Rule of Law: Towards Constitutional Review’ (2000) *Public Law* 671 at 681.

<sup>143</sup> Craig (note 16 above) at 31-2. Discussed further in Chapter 1.

<sup>144</sup> On these ouster clauses, see J de Ville (2003) *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths: Durban) at 457-60.

Under the common law's convoluted classification of functions approach, a series of factors were applied to decide whether the action could be scrutinised in terms of principles of administrative law: 'the nature of the functionary performing the action; the nature of the power being exercised; the source of the power; the subject matter of the power; and whether the body concerned had a duty to act in the public interest'.<sup>145</sup> A further classification of the action as purely judicial, purely administrative, legislative or quasi-judicial decided the bases for review.<sup>146</sup>

When it came to the review of administrative decisions, by far the largest category of administrative acts,<sup>147</sup> courts applied a symptomatic unreasonableness test. The leading authority here was *Union Government v Union Steel Corporation*, in which Stratford JA stated:

Nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of mala fides or ulterior motive" ... or that it amounts to proof that the person on whom the discretion is conferred has not applied his (sic) mind to the matter...<sup>148</sup>

Thus, unreasonableness was not, in itself, a ground of review for administrative decisions at all. Instead, judicial review was based on pre-existing grounds of procedural review (the presence of *mala fides* or ulterior motive).<sup>149</sup> In *NTC v Chetty's Transport Commission (Pty) Ltd*, the Appellate Division held that, in order to be successfully challenged, the decision had to be 'so grossly unreasonable to so striking a degree' that some other illegality could be inferred from it.<sup>150</sup> Thus, the jurisprudence tended to focus on a notion of super-unreasonableness. This approach was heavily criticised on the basis that, if we consider unreasonableness to mean that a decision lacks 'plausible justification', it is difficult to see why an unreasonable decision, as opposed to a grossly unreasonable decision made in bad faith or with an ulterior motive, should not be evidence of an abuse of discretionary powers.<sup>151</sup>

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<sup>145</sup> J de Ville (note 144 above) at 36.

<sup>146</sup> Ibid.

<sup>147</sup> Hoexter (note 15 above) at 294.

<sup>148</sup> 1928 AD 220 at 236-7.

<sup>149</sup> For other early cases on review of administrative decisions on the ground of unreasonableness, see Hoexter (note 15 above) at 295.

<sup>150</sup> 1972 (3) SA 726 (A) at 735.

<sup>151</sup> Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* 35 at 40-46.

As with English law, the position was different for acts classified as legislative – mainly the enactment of delegated legislation. In such cases, the leading authority was the English decision *Kruse v Johnson*, discussed above.<sup>152</sup> If legislative acts disclosed inequality, injustice and oppression; bad faith; vagueness or uncertainty<sup>153</sup> they could be successfully challenged for unreasonableness.<sup>154</sup> But under the system of Parliamentary supremacy, Parliament could authorise unreasonable forms of delegated legislation, such as oppressive or unequal bye-laws, either explicitly or by implication.<sup>155</sup> Scholars researching and writing in this field expected the Constitution to signal a ‘seismic shift’ in this area of the law.<sup>156</sup>

### (b) Reasonableness and the Constitution

This expectation appeared to be well founded in three important CC decisions: *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*;<sup>157</sup> *President of the Republic of South Africa v SARFU*;<sup>158</sup> and *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa*.<sup>159</sup> In these cases, the CC developed a principle of legality based on constitutional principles, rather than legislative intent. The constitutional right to administrative justice in section 33 and its predecessor, section 24 of the interim Constitution applied only to administrative action. Academic commentators took the approach that the definition of ‘administrative action’ in these sections was intended to be wide.<sup>160</sup> This was not always

<sup>152</sup> Note 30 above.

<sup>153</sup> Vagueness and uncertainty had been acknowledged as a basis for review by South African courts for quite some time, independently of *Kruse v Johnson* (note 30 above) – see Hoexter (note 15 above) at 298. The subordinate legislation had to be reasonably lucid. See *R v Jopp* 1949 (4) SA 11 (N); Hoexter (note 15 above) at 299.

<sup>154</sup> *Kruse v Johnson* (note 30 above) and Hoexter (note 15 above) at 296-8. Hoexter provides a number of examples of South African cases in which delegated legislation was challenged on the basis that it was unreasonable for one or more of the reasons described here.

<sup>155</sup> See Hoexter (note 15 above) at 297.

<sup>156</sup> K O’Regan ‘Breaking ground: some thoughts on the seismic shift in our administrative law’ (2004) 121 *South African Law Journal* 424.

<sup>157</sup> 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

<sup>158</sup> 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

<sup>159</sup> 2000 (2) SA 674 (CC).

<sup>160</sup> Academic commentary on the definition of ‘administrative action’ under sections 24 and 33 indicated that the term encompassed a broader category of acts than it did under the common law – see L Du Plessis and H Corder (1994) *Understanding South Africa's Transitional Bill of Rights* (Juta: Cape Town) at 168. On the definition of administrative action in current South African administrative law generally, see de Ville (note 144 above), Chapter 2.

borne out in the cases<sup>161</sup> and the definition of ‘administrative action in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) has been criticised as being overly complicated and narrow.<sup>162</sup>

However, in the three cases above, the CC held that *all* exercises of public power were susceptible to review by the courts on the basis of an overarching constitutional principle of legality. This principle included both explicit and implicit constitutional requirements<sup>163</sup> such as a Presidential duty to act in good faith and not misconstrue the relevant power.<sup>164</sup> Moreover, in *Pharmaceutical Manufacturers*, the Court interpreted the constitutional principle of legality to demand a rational connection between the decision and the purpose for which the power had been awarded.<sup>165</sup>

A number of pre- and post- Constitutional cases challenged the traditional symptomatic and gross unreasonableness formulations.<sup>166</sup> Academic opinion supported the view that the interim Constitution’s formulation of a right to administrative action that was ‘justifiable in relation to the reasons given’<sup>167</sup> overruled both the symptomatic and gross unreasonableness approaches.<sup>168</sup> However, there was little agreement on exactly what a new test entailed.

Etienne Mureinik suggested an enquiry encompassing aspects of rationality and proportionality, in the fair balance sense discussed above, but was careful to avoid any suggestion that the reviewing court could substitute its own judgment on the merits for that of the decision-maker. The factors to be considered were whether:

- (a) the decision-maker has considered all the serious objections to the decision taken, and has answers which plausibly meet them;
- (b) the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and

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<sup>161</sup> D Van Wyk 'Administrative Justice in *Bernstein v Bester* and *Nel v Le Roux*' (1997) 13 *SAJHR* 249. See also Mureinik (note 50 above) at 40-1 on the different thresholds for the application of the rights in section 24.

<sup>162</sup> De Waal et al (2001) *The Bill of Rights Handbook* (Juta: Cape Town) at 500.

<sup>163</sup> *Fedsure* (note 157 above) at pars. 34, 54-9. The proposition that local government acts unconstitutionally when it acts outside its statutory powers derived from the principle of respect for the rule of law – see *Fedsure* (note 157 above) at par. 56.

<sup>164</sup> *SARFU* (note 158 above) at pars. 147-8.

<sup>165</sup> *Pharmaceutical Manufacturers* (note 159 above) at par. 85.

<sup>166</sup> *Theron v Ring van Wellington van die NG Sendingkerk* 1976 (2) SA 1 (A); *Standard Bank of Bophuthatswana Ltd v Reynolds* 1995 (3) BCLR 305 (B) at 325; *Carephone* (note 16 above).

<sup>167</sup> Section 24(d) of the interim Constitution.

<sup>168</sup> Mureinik (note 50 above) at 39-40.

- (c) there is a rational connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it reached.<sup>169</sup>

Some commentators were of the view that 'justifiable in relations to the reasons given' was used as a synonym for 'reasonable' in the interim Constitution's right to just administrative action.<sup>170</sup> More recently, the CC has indicated that the interim Constitution's formulation demanded only that decisions be lawful, procedurally fair and rational.<sup>171</sup> The final Constitution's section 33(1), '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair' appeared to finally close the door on gross and symptomatic unreasonableness but subsequent developments in South African administrative law have threatened this apparent clarity.

The Promotion of Administrative Justice Act (PAJA) was enacted to 'give effect to' the s 33(1) right. Judicial review cases will now ordinarily be grounded in this piece of legislation, rather than the common law<sup>172</sup> or section 33 of the Constitution.<sup>173</sup> PAJA was one of the most anticipated pieces of post-apartheid legislation in South Africa. A number of commentators had argued strongly for the need for an Administrative Justice Act to provide the framework on which to hang the constitutional right to just administrative action.<sup>174</sup> Commentators hoped that the Act would clarify and contain, to some extent, the constitutional right to just administrative action. The English version of the Act is only nine pages long. For such a modest piece of legislation, PAJA certainly attracted a great deal of controversy upon its enactment. Many would argue that it served to mystify rather than clarify matters.

The South African Law Commission (SALC) undertook, on request by the Minister of Justice, to set up a project committee, which would 'investigate and

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<sup>169</sup> Mureinik (note 50 above) at 41.

<sup>170</sup> See Du Plessis and Corder (note 160 above) at 169.

<sup>171</sup> Chief Justice Chaskalson in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at par. 108.

<sup>172</sup> See *Pharmaceutical Manufacturers* (note 159 above) at par.45.

<sup>173</sup> See *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others*, 2004 (4) SA 490 (CC) at par. 25. An applicant could still rely on section 33 to challenge a provision of PAJA, for example. See further Hoexter (note 15 above) at 113-4.

<sup>174</sup> See M Asimow 'Administrative Law under South Africa's Interim Constitution' (1996) 44 *American Journal of Comparative Law* 393 at 412-15, especially; 'Administrative Law under South Africa's Final Constitution: the Need for an Administrative Justice Act' (1996) 113 *South African Law Journal* 613. See also H Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 33.

recommend proposals for the fulfilment of the constitutional obligation obtained in s 33 (3).<sup>175</sup> The SALC produced a report and an Administrative Justice Bill by August 1999.<sup>176</sup> The final form of Bill was then presented to the Minister of Justice.<sup>177</sup> In its Draft Bill, the SALC adopted a generous approach to unreasonableness as a ground of review, including arbitrariness, irrationality and a lack of proportionality in its scope. However, the executive and legislature did not approve this formulation.<sup>178</sup> In its final form, the Act includes arbitrariness and irrationality as grounds for review. It does not refer to proportionality as an aspect of reasonableness or an independent ground of review but includes a general ground of 'unreasonableness' as a separate basis for review.

As to what makes an administrative act irrational, section 6(f) (ii) of PAJA states that a court or tribunal is empowered to review administrative action that is not rationally connected to:

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; *or*
- (dd) the reasons given for it by the administrator [emphasis added].

The fact that the rational connection need only exist between the action and any one of the categories listed here encourages a deferential approach to judicial review. Courts will not be allowed, on the face of it, to enquire into the nature of the purpose for the action or the reasons given for such action. Oppressive acts would therefore pass muster on this ground provided they exhibit the rational connection required.<sup>179</sup> There is some uncertainty over whether a rational connection exists where there is an objective probability that the end will be achieved or whether simply aiming at that end is sufficient.<sup>180</sup> On either interpretation, rationality does not, of itself, allow a court to enquire into the legitimacy or impact of the purpose. In certain circumstances, a court could find that a rational connection does not exist because the reasons given were so obviously baseless. The problem here is that much depends on the willingness of

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<sup>175</sup> H Corder 'Reinventing Administrative Law in South Africa' 12, paper presented at the 2000 Administrative Law Forum, Adelaide, published in C Finn (ed.) (2000) *Sunrise or Sunset? Administrative Law in the New Millennium* (Australian Institute of Administrative Law Inc.: Canberra), available at <http://law.anu.edu.au/aial/Publications/PubProcNatConf.html>, last accessed on 3 August 2010.

<sup>176</sup> Corder (note 175 above) at 12-13.

<sup>177</sup> See I Currie and J Klaaren (2001) *The Promotion of Administrative Justice Act Benchbook* (SiberInk: Cape Town) at 7.

<sup>178</sup> See De Ville (note 144 above) at 197.

<sup>179</sup> However, if the action infringes a right in the Bill of Rights, it may be challenged on that basis.

<sup>180</sup> See Hoexter (note 15 above) at 307; and De Ville (note 144 above) at 201.

individual judges to interpret PAJA in this way and that judges are only likely to do this in extreme cases where decisions are based on patently 'bad' reasons, for example.<sup>181</sup> On balance, then, this ground of review in PAJA codifies but does not add anything to the usual common law grounds.<sup>182</sup>

Unreasonableness is mentioned as an independent basis for review in PAJA in the following terms:

A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering legislation, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.<sup>183</sup>

This appears to import *Wednesbury* unreasonableness<sup>184</sup> into South Africa's post-constitutional jurisprudence, at a time when the notion is widely discredited in English law. At the same time, rationality is a separate ground of review in the Act. These factors indicate that, when a court reviews the reasonableness of administrative action, it must require something more than 'mere' rationality – arguably, proportionality.<sup>185</sup> As stated by Cora Hoexter:

A reasonable decision is rational in the sense that it is supported by the evidence and information before the decision-maker and the reasons given for it; and in the sense that it is rationally connected to its purpose or objectively capable of furthering the purpose. One must add, however, that a reasonable decision also reveals proportionality between ends and means, benefits and detriments.<sup>186</sup>

Decisions by the CC have fuelled the confusion on this issue. In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*,<sup>187</sup> a minority of the judges held that justifiability, although it does not amount to the court determining what would, in its view, have been the 'correct' or best outcome, does require 'something more substantial and persuasive' than a rational connection between the reasons given and the

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<sup>181</sup> See Cameron JA in *Rustenburg Platinum Mines v CCMA* (2007) 1 SA 576 (SCA) at par.33 where he held that 'bad reasons cannot provide a rational connection to a sustainable outcome'.

<sup>182</sup> See Hoexter (note 15 above) at 309.

<sup>183</sup> Section 6 (2) (h), Act 3 of 2000.

<sup>184</sup> Although writers argued that the section could not be read in this way if it were to pass constitutional scrutiny. On this issue, see C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 South African Law Journal 484 at 518-19; Hoexter (note 15 above) at 185-7 and Currie and Klaaren (note 177 above) at 169-173.

<sup>185</sup> Section 6(2) (f).

<sup>186</sup> Hoexter (note 184 above) at 511.

<sup>187</sup> 2002 (3) SA 265 (CC).

decision reached.<sup>188</sup> In their dissenting judgment, Mokgoro and Sachs JJ were unequivocal about the place of proportionality in post-Constitutional South African administrative law:

The right to administrative action that is justifiable in relation to the reasons given incorporates the principle of proportionality, fundamental to a constitutional regime. This would ordinarily require that the effects of the action be proportionate to the objective sought to be achieved.<sup>189</sup>

However, Chaskalson CJ, writing for the majority, found that the interim Constitution had not introduced substantive fairness as a basis for reviewing administrative action into South African law.<sup>190</sup> He held that justifiability required only that the decision be a rational one, taken lawfully and to a proper purpose.<sup>191</sup> The majority left open the possibility for justifiability to encompass a more intensive standard of review. However, this case was held to be an inappropriate one in which to set such a higher standard.<sup>192</sup>

A concern with the principle of separation of powers was at the heart of Chaskalson CJ's reasoning. He held that the application of a standard of substantive fairness would involve the courts trespassing into the political and administrative domains. This was of great significance in cases like *Bel Porto*, where the issues at stake were highly complex and politically charged.<sup>193</sup> In his reasoning, however, Chaskalson CJ saw this concern as one that applied when *any* administrative act was challenged before the courts:

I do not consider that item 23(2) (b) of schedule 6 has...introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag courts into matters which according to the separation of powers should be dealt with at a political or administrative level and not at a judicial level.<sup>194</sup>

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<sup>188</sup> Mokgoro and Sachs JJ in *Bel Porto* (note 187 above) at par. 40.

<sup>189</sup> *Bel Porto* (note 187 above) at par. 40.

<sup>190</sup> Note 187 above at par.88.

<sup>191</sup> Chaskalson CJ in *Bel Porto* (note 187 above) at par. 89. Lord Roskill adopted a similar approach in *Brind* (note 36 above) at 749-50.

<sup>192</sup> *Bel Porto* (note 187 above) at par. 128.

<sup>193</sup> *Bel Porto* (note 187 above) at par. 88. As part of a plan to rationalise and create a more equitable education system, the Western Cape Education Department (WCED) decided to reduce posts at overstaffed schools and create new posts at understaffed schools. It refused to create new posts until the plans had been finalised. The appellants were a group of former House of Assembly (reserved for those people classified as 'white') Elsen schools. The Elsen schools catered for students with disabilities. Under apartheid, the education department paid a subsidy to these schools, but not to those of other racial groups, for the employment of general assistants. Under the new plans, the WCED would no longer do this. The appellants argued that this change violated their rights to equality and just administrative action, as well as the children's rights in the Constitution. See Chaskalson CJ at pars.8-10; 12-14; 22; 34; 37; 39-40; and 43.

<sup>194</sup> *Bel Porto* (note 187 above) at par. 88.

What this passage fails to recognise is that not all administrative acts implicate the principle of separation of powers or involve politically contentious and complicated subject matter. Furthermore, the reasoning here does not take account of the variable intensity of judicial scrutiny, indicating instead that a blanket low threshold must apply to all administrative acts.

Fortunately, in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others*,<sup>195</sup> the judges of the CC unanimously criticised the *Wednesbury* unreasonableness formulation in PAJA, noted that few decisions would ever be successfully challenged on a literal interpretation of the standard and held that the section had to be interpreted in line with the Constitution, which required that administrative action be reasonable.<sup>196</sup> The CC referred to the idea of judicial deference as a fundamental part of the separation of powers doctrine<sup>197</sup> but stated

[t]his does not mean... that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision.<sup>198</sup>

In the recent case of *Sidumo*, the CC approved the reasoning in *Bato Star* and applied it to a labour dispute.<sup>199</sup> The court held that the relevant question was whether the decision made by the Commission for Conciliation, Mediation and Arbitration (CCMA) upholding Mr Sidumo's claim for an unfair dismissal had been reasonable. That question had to be answered with reference to the test set out by O'Regan J in *Bato Star*: was the commissioner's decision one that a reasonable decision-maker could not reach?<sup>200</sup>

These cases indicate that the general tenor of the test for unreasonableness has changed substantially in the constitutional era. But has there also been a transformation of the content of that test? In arriving at its decision in *Bato Star* the CC, per O'Regan J, set out a number of factors to be used in determining whether a decision is reasonable:

[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of

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<sup>195</sup> Note 173 above.

<sup>196</sup> *Bato Star* (note 173 above) at par. 44.

<sup>197</sup> *Bato Star* (note 173 above) at par. 46.

<sup>198</sup> *Bato Star* (note 173 above) at par. 48.

<sup>199</sup> *Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd; Commission for Conciliation, Mediation and Arbitration and Moropa NO 2008 (2) SA 24 (CC)*.

<sup>200</sup> *Sidumo* (note 199 above) at pars. 106-10.

those affected.<sup>201</sup>

O'Regan J's open-ended list adds a number of searching concerns to the enquiry and, most importantly, acknowledges that a decision might fall within the parameters of the legislation but still have a troubling, adverse impact on affected parties. This idea is in keeping with the approach favoured by Sachs and Mokgoro JJ in *Bel Porto*, above – that administrative review for unreasonableness in a constitutional context ordinarily includes an enquiry into proportionality. Chief Justice Chaskalson approved O'Regan J's formulation of the relevant factors in a reasonableness enquiry in *New Clicks*.<sup>202</sup> In addition, he noted that the section 33 (1) of the Constitution sets a standard higher than rationality for the review of administrative action. Moreover, this standard is variable.<sup>203</sup>

The idea of a variable intensity of review is extremely important as it addresses the concerns explored in chapter 1 of this thesis and highlighted in Chaskalson CJ's judgment in *Bel Porto* above.<sup>204</sup> A high but variable standard for review does not force courts to adopt the highly deferential stance taken by the majority in *Bel Porto* in all cases. It allows judges to balance the protection of rights and interests with respect for political and administrative judgment. For different reasons, the Court did not apply this higher standard in either case.<sup>205</sup> In *Bato Star*, the application of these factors to the case was less than rigorous, with no consideration of impact in the determination of reasonableness.<sup>206</sup> Arguably, the judges in *Bato Star* did not apply proportionality in its fullest sense because of the political sensitivity of the issues involved.<sup>207</sup> This fits with the idea of a high but variable intensity of review but this is not clearly articulated in the judgment. Explicit engagement with the principle of proportionality and the notion of a variable intensity of review could address this concern. Despite the positive development of the reasonableness standard in *Bato Star*,<sup>208</sup> the CC continues to steer clear of

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<sup>201</sup> *Bato Star* (note 173 above) at par. 45.

<sup>202</sup> Note 171 above at par. 187.

<sup>203</sup> *New Clicks* (note 171 above) at par. 108.

<sup>204</sup> Note 187 above. Variable intensity of review is discussed further in the chapters below.

<sup>205</sup> On *Bato Star*, see pars. 53-4 of the judgment (note 173 above) and J de Ville 'Deference as respect and deference as sacrifice: a reading of *Bato Star Fishing v Minister of Environmental Affairs* (2004) 20 *South African Journal on Human Rights* 577 at 580, 583-5. See also *New Clicks* (note 171 above) at par.188.

<sup>206</sup> De Ville (note 205 above) at 585.

<sup>207</sup> Discussed further in section 3 (c) below.

<sup>208</sup> Chief Justice Chaskalson approved O'Regan J's formulation of the relevant factors in a reasonableness enquiry in *New Clicks* (note 171 above) at par. 187.

explicitly endorsing proportionality as an integral factor of an enquiry into reasonableness.<sup>209</sup>

**(c) Rights, proportionality and the future of reasonableness under the Constitution**

The scope of review for unreasonableness in South Africa is not as critical to the protection of individual rights as it was under apartheid. Individuals whose rights and interests have been adversely affected by administrative action need not rely on administrative law for relief. For example, claims that administrative acts such as a decision or the enactment of subordinate legislation are unequal in their impact are likely to be brought in terms of the right to equality protected in section 9 of the Constitution. The Bill of Rights is remarkably inclusive and it is probable that many other challenges to the acts of public officials will be brought on the basis of rights to freedom of expression, dignity, freedom of religion, privacy and so on. Most rights in the Bill of Rights are subject to limitation in terms of section 36:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
  - a. the nature of the right;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the relation between the limitation and its purpose; and
  - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The CC has made it clear that the limitation analysis is a balancing exercise, an enquiry into proportionality:

The limitation of constitutional rights... involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of *section 33(1)*.<sup>210</sup> The fact that different rights have different implications for

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<sup>209</sup> But, see the separate, concurring judgment of Sachs J in *New Clicks* (note 171 above) at par. 637 and the minority judgment of Sachs and Mokgoro JJ in *Bel Porto* (note 187 above), discussed earlier.

<sup>210</sup> The test of section 33, the limitation clause in the interim Constitution, in terms of which this case was decided, was slightly different from that in section 36 of the final Constitution. However, the

democracy... means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.<sup>211</sup>

Thus, administrative acts that infringe rights protected in the Bill of Rights will have to pass a quite onerous proportionality test in order to be upheld.<sup>212</sup> In the South African system, the same applies to original legislation and executive policies, which are no longer immune from judicial review. Despite this, the interpretation placed on reasonableness as a ground of review in administrative law remains relevant for similar reasons as those that apply to non-HRA cases in the U.K.

Important interests that do not easily fall within the protection of any of the rights in the Bill of Rights are likely to be at stake in a significant number of cases. The *Bato Star*<sup>213</sup> case, mentioned above, is a good example of this. The case dealt with the allocation of fishing quotas in the deep-sea hake trawling industry in South Africa.<sup>214</sup> In 2002, the Department of Environmental Affairs and Tourism set up an application process for longer-term allocations, thought to be preferable, as it would encourage key participants to invest their capital and human resources in the fishing industry.<sup>215</sup> *Bato Star*, one of the applicants for the 2002 – 2005 allocation, was unhappy with the allocation it had been granted, first by the Central Director, an official in the Department and then on appeal to the Minister.<sup>216</sup> The company launched the internal appeal to the Minister and simultaneously sought judicial review of the allocation decisions before the High Court.<sup>217</sup>

The Department's policy guidelines, which accompanied the public invitation for applications indicated that allocations would be assessed according to the criteria set out in section 2 of the Marine Living Resources Act 18 of 1998. The aim of protecting scarce

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sections are textually very similar and this interpretation of section 33 is as applicable to section 36.

<sup>211</sup> Chaskalson P, as he then was, in *S v Makwanyane and another* 1995 (3) SA 391 (CC) at par. 104.

<sup>212</sup> Although the test is not always applied rigorously. This issue is explored further in Chapter 5.

<sup>213</sup> Note 173 above.

<sup>214</sup> *Bato Star* (note 173 above) at par.1.

<sup>215</sup> *Bato Star* (note 173 above) at par. 8.

<sup>216</sup> The Minister had increased the allocation from 856 to 873 tonnes – see pars. 15-16 of the judgment (note 173 above).

marine resources featured prominently in the Act's objectives. The need to transform the industry, historically controlled by people classified as 'white', in order to redress past imbalances and ensure equity was also a goal in the legislation.<sup>218</sup>

Thus, issues vital not just to the individual companies concerned but to society in general were implicated in this case. Despite this, it would have been a legal distortion had the applicants based their claim on any of the rights in the Bill of Rights. Constitutional values such as equality<sup>219</sup> and protection of the environment<sup>220</sup> were important to the judgment but *Bato Star's* fishing rights were not akin to an individual or group right to any of the rights listed in the Bill of Rights. Section 33 – the right to just administrative action – was, naturally, pivotal in the case<sup>221</sup> but the section cannot be understood without some interpretation of 'procedurally fair', 'lawful' and, most importantly for this chapter, 'reasonable'.<sup>222</sup>

#### (4) Conclusion

It is important to acknowledge the overlap between the various grounds of review in administrative law. It is impossible to conceive of these grounds as distinct wholes, hermetically sealed off from each other. Whilst review of administrative decisions for unreasonableness in these two jurisdictions began as a legal fiction, a term used merely to indicate that some more established basis for review existed in a case, it has evolved into a more searching enquiry. This more searching enquiry interrogates the reasoning process, by demanding a rational connection between means and ends, for example. The enquiry could go even further by imposing certain requirements on the substance of the decision – that the importance of the goals underlying the administrative act outweighs its oppressive impact, for instance.

Thus, a reasonable administrative act can denote much more than just a rational decision, provided for by the relevant legislation and taken according to established

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<sup>217</sup> *Bato Star* (note 173 above) at pars.14-16. Phambili Fisheries, another company unhappy with its quota, also challenged the decision and the applications were heard together in the High Court. See O'Regan J (note 173 above) at par. 17.

<sup>218</sup> *Bato Star* (note 173 above) at par. 5.

<sup>219</sup> See the separate concurring judgment of Ngcobo J, *Bato Star* (note 173 above) at pars. 73-5.

<sup>220</sup> See O'Regan J, *Bato Star* (note 173 above) at par.38.

<sup>221</sup> O'Regan J, *Bato Star* (note 173 above) at par 23.

<sup>222</sup> Generally now to be interpreted through the lens of PAJA.

procedural norms. Currently, courts in both jurisdictions discussed here apply the reasonableness enquiry at varying levels of intensity. Where these cases involve the protection of fundamental rights, certain writers have been critical of a weak approach to review.<sup>223</sup> But such writers themselves admit to limits on the capacity of judges to interfere in politically sensitive matters, in respect of which the legislature and executive have the responsibility to make long-term decisions in the public interest. Varying the intensity of review has the benefit of accommodating these limits whilst protecting rights and interests. Unfortunately, it has proved difficult for many judges to separate review for unreasonableness from its deferent roots. Furthermore, even where judges apply a higher standard of scrutiny, their reasons for doing so are often unclear. The standard of review applied must be related to current debates about justiciability.<sup>224</sup>

A structured proportionality test seemingly has the advantage of being a more precise means through which all decision-makers, including judges, must justify their decisions. It also has the advantage of explicitly encompassing procedural and substantive, deferential and more invasive aspects of review. But, even within a structured proportionality test, much depends on the attitude of judges to their role. As Rivers argues, judges could decide to emphasise the question of whether there are less restrictive means to achieve the purpose at the expense of a real enquiry into an appropriate balance between individual and societal interests. They often choose to simply accept the public official's view of whether a compelling public interest exists. So, applying a structured proportionality test does not, in itself, guarantee greater certainty or more effective protection of rights.

The burden of proof is another issue which must be addressed in any model of SE rights adjudication. When structured tests for proportionality such as those set out in HRA cases in the U.K. and section 36 of the South African Constitution are applied, the onus of demonstrating proportionality rests with the decision-maker. This means that a claimant need not confront the difficulty of proving a lack of proportionality in someone else's decision-making process. When proportionality is considered as a feature of review for unreasonableness in administrative law, the burden of proof is the claimant's unless

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<sup>223</sup> The critique of SE rights cases or cases impacting on SE interests are most relevant for this thesis and are examined in detail in Chapters 4 and 5 below.

<sup>224</sup> Discussed in Chapter 1.

common law rights are implicated. At the moment, common law rights do not extend to SE rights. The South African Constitution contains SE rights but these are subject to internal limitations which turn on reasonableness, rather than the general limitation clause in section 36. As a result, the claimant bears the onus of proof. This is a factor to be borne in mind when thinking about the extent to which administrative law and reasonableness should inform judicial approaches to SE rights. These issues are discussed further in chapter 5.

## Chapter Four

### Using reasonableness to enforce social and economic guarantees in South Africa

#### (1) Introduction

In this chapter, I discuss the South African Constitutional Court's (CC's) approach to social and economic (SE) rights in the most important cases decided to date. At the outset, it is worth emphasising the point that the judicial role in implementing SE rights is a limited one. The importance of adjudication in this area has been exaggerated in South Africa, arguably because of the novelty value of constitutionally protected, justiciable SE rights. This judicial emphasis may also be related to the part judicial review sometimes played in vindicating rights under apartheid.<sup>1</sup> Before the enactment of our first post-apartheid Constitution, South Africans often turned to the courts for relief from discriminatory laws and practices because they had few other available means to protect their rights. Although the record of the courts in protecting rights was patchy, the image of the judiciary as a principal means through which to resist state interference with rights has survived.

In reality, judicial oversight is only one of a number of tools which may be used to secure access to housing, medical treatment, social security benefits and so on. It is not even the most important such tool:

The greatest challenge facing human rights implementation is perhaps what is neatly but glibly referred to as 'mainstreaming' human rights. It may be that the consciousness of 'the judge over your shoulder' is necessary to begin or to reinforce the awareness and operationalisation of standards of behaviour, but eventually success will depend on this seeming right (not a matter of rights).<sup>2</sup>

Furthermore, as argued in chapter 1, even where there is a constitutional mandate to give effect to SE rights and interests there are often convincing reasons for judges to exercise caution. The potential exists for the judiciary to do damage to the broader goal of societal transformation and a fair distribution of resources if judges do not consider the long-term implications of their orders, or if they impede the ability of government officials to quickly respond to changing needs and priorities. As a result, we must consider the judicial role

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<sup>1</sup> C Hoexter 'The future of judicial review in South African administrative law' (2000) *South African Law Journal* 484 at 499-500.

<sup>2</sup> J Cottrell and Y Ghai 'The role of the courts in the protection of economic, social and cultural rights' in Y Ghai and J Cottrell (eds.) (2004) *Economic, social and cultural rights in practice: the role of judges*

within the context of that played by others - such as lawmakers, legal practitioners and civil society organizations - who have an interest in protecting these rights.

Most of the commentary on the CC's approach to SE rights focuses on four early cases: *Soobramoney*,<sup>3</sup> *Grootboom*,<sup>4</sup> *Treatment Action Campaign*<sup>5</sup> and *Khosa*.<sup>6</sup> As stated at the beginning of chapter 3, Cass Sunstein's classification of the CC's approach to SE rights as an administrative law model, following the court's decision in *Grootboom*, has been remarkably influential in the debate over the efficacy of SE rights adjudication in South Africa.<sup>7</sup> To reiterate, many commentators do not share Sunstein's enthusiasm for the CC's approach. Scholars have identified a preoccupation with the internal limitations set out in sections 26 (2) and 27 (2); a consequent failure to give real content to the rights; and the rejection of a minimum core approach to the rights as the main flaws in the CC's SE rights adjudication. They trace these shortcomings to the court's adoption of an administrative law approach, arguing that a focus on procedure, rather than substance, is one of the defining characteristics of administrative law.<sup>8</sup>

Certain commentators have disagreed with Sunstein's assessment that the CC's approach to SE rights is driven by administrative law principles. Steinberg, for instance, argues that the court employs a unique concept of reasonableness suited to the adjudication of SE rights in that it places particular emphasis on the values of human dignity and equality.<sup>9</sup> Wesson also refutes the administrative law understanding of the CC's SE rights jurisprudence, suggesting that the judgments in *Grootboom*, *Treatment Action Campaign* and *Khosa* are better understood as driven by a concern that government action should not

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*in implementing economic, social and cultural rights* (Interights: London) at 65.

<sup>3</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

<sup>4</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>5</sup> *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (10) BCLR 1033 (CC).

<sup>6</sup> *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

<sup>7</sup> 'Social and economic rights? Lessons from South Africa' (2000/2001) 11(4) *Constitutional Forum* at 132.

<sup>8</sup> See, for example, D Bilchitz (2007) *Poverty and fundamental rights: the justification and enforcement of socio-economic rights* (OUP: Oxford), chapter 5; and M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 at 407.

<sup>9</sup> C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *South African Law Journal* 264 at 265 and 277.

disregard or neglect vulnerable sections of society.<sup>10</sup>

For the sake of clarity, scholars in this area may roughly be divided into three categories: those who are attracted to the idea of an administrative law model because it limits what may be expected of government to process-related concerns of transparency and justification; those who reject the model for precisely the same reason, arguing that it entails weak enforcement of the rights; and those who support the CC's model as one that goes beyond administrative law review for unreasonableness to an emphasis on substantive concerns such as dignity and equality. It is not always possible to fit particular commentators neatly into any single category. For example, with reference to the South African CC's decision in *Khosa*, Sandra Fredman notes that the standard of reasonableness may be interpreted to include a high level of substantive content and may entail high intensity review of governmental action and inaction. At the same time, 'the ease with which reasonableness can descend into a highly deferent standard of review has frequently been noted'.<sup>11</sup>

Fredman's comment highlights an important point about the academic criticism of the CC's SE rights jurisprudence. Although many scholars have questioned the CC's focus on reasonableness, few have quibbled with the outcome of the early decisions mentioned above. Most of the criticism of the CC's approach has been based on the court's methodology.<sup>12</sup> Sometimes, calls for the court to have gone further in its interpretation of the content of the SE rights have been accompanied by praise for aspects of the judicial method and approval

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<sup>10</sup> M Wesson 'Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284.

<sup>11</sup> 'Human rights transformed: positive duties and positive rights' (2006) *Public Law* 498 at 515. See also S Liebenberg 'Basic rights claims. How responsive is "reasonableness review"?' (2003) *ESR Review* 5 (5) 7 at 9-10.

<sup>12</sup> See note 8 above. See also M Pieterse 'Resuscitating Socio-economic Rights: Constitutional Entitlements to Health Care Services' (2006) 22 *South African Journal on Human Rights* 473 at 475; D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1 at 2. Many commentators have criticised the CC's failure to use the remedy of a structural interdict, which would have required government to report back to the court on the implementation of its orders. In this thesis, I focus on the court's approach to the interpretation of SE rights. A discussion of supervisory jurisdiction and other remedies is beyond the scope of the thesis. Literature on this issue includes: T Bollyky 'R if C>P+B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' (2002) 18 *South African Journal on Human Rights* 161; K Pillay 'Implementing Grootboom: Supervision Needed' (2002) 3 *ESR Review* 11; and D Davis 'Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5(5) *ESR Review* 3.

for the judicial outcome.<sup>13</sup> In light of this, it is important to address the question of why further engagement with the South African CC's approach to SE rights adjudication is necessary.

Although fourteen years have elapsed since the final Constitution was enacted, there have been relatively few cases dealing with the SE rights sections of the Constitution. In cases such as *Grootboom*, *Treatment Action Campaign* and *Khosa*, the court's task was made easier by the fact that the cost implications were limited or that there was already a level of agreement between government and the litigants. However, the court has had to confront much more complex issues in cases decided in 2008 and 2009. Furthermore, the question of relative institutional power is an increasingly thorny issue in the South African political context.

To date, executive criticism of the court has been swiftly followed by ruling party (ANC) statements of respect for judicial independence, evidence that the court enjoys a significant amount of institutional security.<sup>14</sup> As Theunis Roux points out, the CC's institutional security cannot be explained either by high levels of judicial deference – the court continues to hand down judgments which are not always popular with legislative and executive bodies – or by high levels of public support.<sup>15</sup> Roux locates the CC's success, measured in terms of institutional security and widespread respect in the national and international legal communities, in 'its ability to hand down decisions of principle in cases where other courts may have balked'.<sup>16</sup> The fact that the CC has managed to do this in the absence of public support is due to what Roux has termed a 'mutually beneficial relationship' between it and the ANC. The CC has 'managed' its role with the legislature and executive, sometimes compromising on legal principle 'in the long term interests of the constitutional project'.<sup>17</sup> The ANC's public endorsement of the CC's work and role has mitigated the effect

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<sup>13</sup> See D Bilchitz 'South Africa: right to health and access to HIV/AIDS drug treatment' (2003) 1(3) *International Journal of Constitutional Law* 524 at 530-1; Pieterse (note 8 above) at 402-3.

<sup>14</sup> T Roux 'Principle and pragmatism on the Constitutional court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106 at 112. See also the discussion of the *TAC* case in section 3 below.

<sup>15</sup> Roux (note 14 above) at 106-107.

<sup>16</sup> Roux (note 14 above) at 137.

<sup>17</sup> Roux (note 14 above) at 138.

of public reaction to unpopular judgments. And the CC's consequent ability to go on handing down principled judgments in certain cases lends credence to government policies.<sup>18</sup> Furthermore, government's acceptance of such decisions – those that challenge established policy, in particular, provides very public evidence of the health of the rule of law and good governance in the country.

But recently, ruling party criticism of the judiciary has become more common and more vehement, with cases involving Judge President of the Cape High Court John Hlope and ANC President Jacob Zuma attracting the most attacks on the judiciary in general and the CC in particular.<sup>19</sup> The delicate balance of power between the judiciary and other branches of government may well be shifting. In the current political climate, the judiciary could begin to face greater threats to its security as an institution. It is even more important that their approach to politically controversial cases – often those involving protection of SE rights – acts as a bolster, rather than a threat, to that security.

The concern with the court's approach to SE rights, then, is largely located in the fear that future cases are likely to pose more complex problems; that the political climate could pose new challenges to the approach; and that the content of the SE rights has not been defined in sufficient detail to cater for this. This concern for the future of SE rights adjudication means that we need to engage seriously with the current South African model and consider whether it has the potential to address more difficult SE rights cases. The court is likely to face increasing criticism from a government following a particular transformation agenda and a population frustrated by the slowness of delivery of goods like housing and health care. Some of its later SE rights cases deal precisely with the conflict between these two sets of interests. The court's ability to preserve its institutional security as well its

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<sup>18</sup> Roux (note 14 above) at 138.

<sup>19</sup> In 2008, the Constitutional Court lodged a complaint against Cape Judge President John Hlope. In it, they alleged that Hlope had attempted to improperly influence two CC judges over judgements concerning Jacob Zuma and the French arms company, Thint. ANC Secretary-General, Gwede Mantashe, described the judges as 'counter-revolutionary' for the manner in which they had handled the issue. See 'Mantashe slated for attitude on Concourt' by Lavern de Vries, *Cape Argus*, 16 October 2008, page 5. See also 'Provincial ANC takes Hlope's side' by Bonganie Mthembu and Ella Smook, 23 June 2008, page 3; and 'Mantashe lashes out at black judges' by Political Staff, *Cape Argus*, 14 December 2008, page 1. These articles are available at [www.iol.co.za](http://www.iol.co.za) (last accessed on 18 February 2009).

reputation for principled decision-making will be significantly influenced by the extent to which its approach to SE rights stands up to the most rigorous scrutiny. These concerns provide the background against which I examine the CC's developing model of SE rights adjudication.

## **(2) Constructing an approach to social and economic rights adjudication: early cases before the Constitutional Court**

*Soobramoney v Minister of Health (KwaZulu-Natal)*<sup>20</sup> was the first case brought on the basis of one of the SE rights in the Constitution. Mr Soobramoney was a diabetic with ischaemic heart disease and cerebro-vascular disease. He had a stroke in 1996 and his kidneys failed. At the time the case was decided, he was suffering from chronic renal failure. The outcome of the case could not have been more serious for Mr Soobramoney as his continued survival depended on his access to renal dialysis treatment.<sup>21</sup> Due to a shortage of resources and facilities, the relevant hospital's policy was that patients with acute renal failure that could be remedied by renal dialysis would automatically be given treatment. Other patients had to show they were eligible for a kidney transplant. Mr Soobramoney's renal failure was irreversible and, due to the fact that he suffered from the other health conditions mentioned above, he was also not eligible for a kidney transplant.<sup>22</sup> The case dealt with whether Mr Soobramoney could compel the hospital to provide renal dialysis by relying on his constitutional right to health. The court rejected his argument that the treatment amounted to emergency medical treatment in terms of section 27 (3) of the Constitution.<sup>23</sup> The case then turned on whether the hospital's policy amounted to reasonable access to health care services, as required by section 27 (1) (a), read with section 27 (2).

The court held that the hospital's policy benefitted more patients than any other

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<sup>20</sup> Note 3 above.

<sup>21</sup> *Soobramoney* (note 3 above) at par. 1.

<sup>22</sup> *Soobramoney* (note 3 above) at pars. 1 and 3-4.

<sup>23</sup> The court found that the ordinary meaning of 'emergency medical treatment' did not include the ongoing treatment of chronic illnesses for the purpose of prolonging life. In Mr Soobramoney's case, there was no emergency that called for immediate remedial treatment. Instead, the condition was ongoing and incurable. *Soobramoney* (note 3 above) at par. 21.

policy would.<sup>24</sup> *Soobramoney* is an example of a case in which the court found that the resource limitations on the state made its policy reasonable in the circumstances. The case has been criticised for a number of reasons.<sup>25</sup> For the purposes of this chapter, the problem with the case lies in the court's reasoning on what 'reasonableness' required in this context.

The court held:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with *rational decisions taken in good faith* by the political organs and medical authorities whose responsibility it is to deal with such matters [emphasis added].<sup>26</sup>

The rationality standard is an extremely low one. In *Pharmaceutical Manufacturers*, the CC referred to rationality as 'a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries'.<sup>27</sup> On the question of what the content of the requirement of rationality is, the court found, relying on *Prinsloo v van der Linde*<sup>28</sup> that '(a) s long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way'.<sup>29</sup>

On a reading of section 27(1) itself, use of the standard of rationality is a problem, as the section demands that state action be measured against a standard of reasonableness. But, if one accepts that some degree of variability is necessary to uphold a constitutional balance of powers, as I have argued in chapter 3 above, what is missing from the *Soobramoney* judgment is not necessarily the application of a more onerous standard but some explanation, based on the circumstances of the case, for the adoption of bare rationality. Furthermore, although the court used the language of bare or mere rationality, its reasoning was more complex, focusing on the potential of the policy to benefit the greatest number of patients and

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<sup>24</sup> *Soobramoney* (note 3 above) at par. 25.

<sup>25</sup> For a more general critique of the court's approach, see C Scott and P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206.

<sup>26</sup> *Soobramoney* (note 3 above) at par. 29.

<sup>27</sup> *Pharmaceutical Manufacturers Association of South Africa: ex parte President of the Republic of South Africa* (2) SA 674 (CC) at par. 90.

<sup>28</sup> 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

<sup>29</sup> *Pharmaceutical Manufacturers* (note 27 above) at par. 90, note 108.

the KwaZulu-Natal Department of Health's significant overspending on its annual budget.<sup>30</sup> This closer examination of the court's reasoning reveals a more nuanced approach but provides little guidance on what, in the nature of the case, attracted the low standard of scrutiny adopted by the court. Looking to the court for some elaboration of its general approach to SE rights adjudication in this, its first judgment on an SE rights claim, commentators were disappointed to find a simple, inadequately explained, application of rationality review. As a result, the *Soobramoney* judgment appeared to signal a highly deferential judicial attitude to these rights.

Happily, the CC moved away from the *Soobramoney* rationality standard in *Government of the Republic of South Africa and others v Grootboom and others*.<sup>31</sup> The case concerned a group of some 900 adults and children<sup>32</sup> who had been living in terrible conditions, decided to move onto private land illegally and were evicted.<sup>33</sup> They wanted the government to 'provide them with adequate basic shelter or housing until they obtained permanent accommodation'.<sup>34</sup> The CC did not endorse the rationality standard from *Soobramoney* but also did not detail the content of the standard of reasonableness. On the judicial role in such cases, the court stated that the particulars of the housing programme should be left to the executive and the legislature to work out. It held:

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. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>35</sup>

In effect then, this aspect of the judgment is disappointingly tautological, indicating that the question of reasonableness turns on whether the particular measures taken are reasonable. In the result, however, the court found government's housing programme to be deficient because it did not provide temporary relief for those in desperate need, described in the

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<sup>30</sup> *Soobramoney* (note 3 above) at pars. 24 – 25.

<sup>31</sup> Note 4 above at par. 20.

<sup>32</sup> *Grootboom* (note 4 above) at par. 4, note 2.

<sup>33</sup> *Grootboom* (note 4 above) at par. 3. Other people had already moved onto the vacated settlement. At the time the case was decided, the litigants were living on a sports field (at pars. 9 -11).

<sup>34</sup> *Grootboom* (note 4 above) at par. 4.

<sup>35</sup> *Grootboom* (note 4 above) at par. 41.

judgment as those with ‘no access to land, no roof over their heads’; ‘people who are living in intolerable conditions’ and ‘people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition’.<sup>36</sup> The court set out, at some length, what would constitute reasonable government action in the context of housing. Amongst other things, a housing programme had to be reasonable in both design and implementation; it could not ignore a significant segment of the population; it had to be coherent and set out clear tasks for the different spheres of government; national government had to put in place an equitable distribution of the housing budget to provincial and local governments; and government had to ensure that the required resources, financial and human, were available for the implementation of the programme.<sup>37</sup>

In *Soobramoney*, the judges placed far fewer demands on government action. They took at face value the claim of a lack of resources, based on the provincial Department of Health’s overspending on its budget. As indicated above, the court’s dictum in *Soobramoney* that all government decisions, whether taken at a political (setting the health budget) or functional (deciding on health priorities) level had only to be rational and taken in good faith, appeared to create a worrying precedent for SE rights jurisprudence. After all, it is difficult to conceive of an SE rights case where neither political nor functional decision-making would be implicated. But, in *Grootboom*, the judges did interrogate a functional decision – government’s assessment of priorities in respect of housing – at a higher level of scrutiny. The court expressed approval for various aspects of government’s housing programme<sup>38</sup> but it dismissed as unreasonable government’s decision to focus on medium and long-term housing aims at the expense of those people facing a housing emergency.<sup>39</sup> It is likely that the judges were influenced by the fact that more rigorous scrutiny of the justification for the hospital’s policy in *Soobramoney* could not have been achieved without some assessment of the budgetary allocation, a decision taken at a political level. The fact that, by the time the case reached the CC in *Grootboom*, the Cape Metropolitan Council had already conceded that its housing programme needed to be amended to cater for people in crisis situations is

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<sup>36</sup> *Grootboom* (note 4 above) at par. 52.

<sup>37</sup> *Grootboom* (note 4 above) at pars. 39-45.

<sup>38</sup> *Grootboom* (note 4 above) at pars. 53-55.

<sup>39</sup> *Grootboom* (note 4 above) at par. 66.

also significant.<sup>40</sup> In the face of such a concession, it could hardly be objected that the judges were overstepping the mark in their assessment that the housing programme was deficient.

In the subsequent *Treatment Action Campaign* case,<sup>41</sup> dealing with access to the once-off provision of the anti-retroviral drug nevirapine to prevent mother-to-child transmission of the HI virus, the CC's judgment was more far-reaching. Government had put forward a number of justifications for limiting the provision of the drug to certain 'pilot sites'.<sup>42</sup> The court employed various aspects of reasonableness in rejecting each of the justifications. First, the court examined the argument that nevirapine was not shown to be effective in circumstances where the full package of 'testing and counselling, dispensing of nevirapine and follow-up services'<sup>43</sup> was not available. The full package was only available at the pilot sites at the time the case was decided. The court rejected this as a reason for refusing to provide nevirapine to pregnant women outside the pilot sites on the basis that the evidence showed that provision of nevirapine would save a significant number of lives, even without the full package being available. The court also rejected the associated argument that breastfeeding negates the use of nevirapine, saying that this was not true of all cases.<sup>44</sup>

The second argument put forward by the state was that widening the provision of nevirapine could mean that people develop a resistance to it.<sup>45</sup> Reasoning on the basis of proportionality,<sup>46</sup> the court held:

Although resistant strains of HIV might exist after a single dose of nevirapine, this mutation is likely to be transient. At most there is a possibility of such resistance persisting, and although this possibility cannot be excluded, its weight is small in comparison with the potential benefit of providing a single tablet of nevirapine to the mother and a few drops to her baby at the time of birth. The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time

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<sup>40</sup> In an earlier order, the CC had essentially given formal judicial recognition to an agreement reached between the parties (order dated 26 September 2000, available at <http://www.constitutionalcourt.org.za/Archimages/2874.PDF>, last accessed on 29 January 2010).

<sup>41</sup> Note 5 above.

<sup>42</sup> *Treatment Action Campaign* (note 5 above) at paras. 51-5.

<sup>43</sup> *Treatment Action Campaign* (note 5 above) at paras. 51; 57-8.

<sup>44</sup> Ibid.

<sup>45</sup> *Treatment Action Campaign* (note 5 above) at par. 52.

<sup>46</sup> Government's policy on the provision of nevirapine imposed an excessive burden on HIV-positive mothers and their children and revealed an imbalance between detriments and benefits. See *Treatment Action Campaign* (note 5 above) at par. 59.

in the future is well worth running.<sup>47</sup> The government's argument that nevirapine has not been established to be safe was also rejected. The court referred to the fact that the drug is recommended without qualification by the World Health Authority (WHO). There was also South African evidence of its safety. In addition, the only evidence that it could be unsafe related to cases where it is used as chronic medication, which would not be the case with the prevention of mother-to-child transmission.<sup>48</sup>

Finally, the government argued that it lacked the capacity to provide the comprehensive package of treatment.<sup>49</sup> However, the court stated that this argument related only to the provision of the comprehensive package across the public sector and not to the once-off provision of nevirapine to reduce mother-to-child transmission outside the pilot sites where the facilities exist for counselling and testing.<sup>50</sup> The court found that government's policy was not reasonable because it was inflexible and did not take into account a significant segment of society.<sup>51</sup>

Once again, the court did not explicitly engage with the question of what reasonableness means in the context of SE rights adjudication and, in particular, whether it entails an enquiry into proportionality. Furthermore, the reasons for the court's more searching examination of government policy remained unarticulated. The court's observation that 'determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets'<sup>52</sup> provides some guidance as to what these reasons were. In this case, the cost of the once-off provision of the drug nevirapine was not an issue in the case as the drug was being provided free of charge by pharmaceutical companies for five years.<sup>53</sup> The court did not have to grapple with what, in *Soobramoney*, they had classified a political decision.

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<sup>47</sup> *Treatment Action Campaign* (note 5 above) at par. 59.

<sup>48</sup> *Treatment Action Campaign* (note 5 above) at pars. 60-64.

<sup>49</sup> *Treatment Action Campaign* (note 5 above) at par. 54.

<sup>50</sup> *Treatment Action Campaign* (note 5 above) at pars. 65-6

<sup>51</sup> *Treatment Action Campaign* (note 5 above) at pars. 78 and 114.

<sup>52</sup> *Treatment Action Campaign* (note 5 above) at par. 38.

<sup>53</sup> *Treatment Action Campaign* (note 5 above) at par. 71.

The final case I will discuss in this section is *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others*.<sup>54</sup> The case is important for two reasons. First, it is the only SE rights case in which the CC has expressly acknowledged that a requirement of rationality is not especially onerous and that section 27(2) demands reasonableness, a 'higher standard than rationality'.<sup>55</sup> Second, the case may be distinguished from earlier decisions because of the court's employment of a detailed equality analysis.

The question before the court was whether the exclusion of permanent residents from social security benefits, to which they would have been entitled had they been South African citizens, was a violation of section 27's protection of the right to social security.<sup>56</sup> The CC found government's policy to be unreasonable. The judges echoed the sentiments in *Grootboom* about the limited role of the court. Nevertheless, Mokgoro J held, for a majority of the judges, that a series of quite searching factors should be taken into account in determining whether the legislation's exclusion of permanent residents was reasonable. These factors were 'the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose'.<sup>57</sup> Accepting that there could well be compelling reasons for limiting access to social security benefits, Mokgoro J found that the position of permanent residents was fundamentally different to that of temporary or illegal residents in that the former had developed significant links with the country.<sup>58</sup> She rejected the argument that providing social security benefits to permanent residents would impose too onerous a burden on government resources, stating that, on government's own higher estimate, the extension would entail a less than two percent increase on the existing cost of social grants.<sup>59</sup> Justice Mokgoro referred to the strong stigmatising impact of the policy of exclusion on permanent residents, an already vulnerable

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<sup>54</sup> Note 6 above.

<sup>55</sup> *Khosa* (note 6 above) at par. 67.

<sup>56</sup> *Khosa* (note 6 above) at pars. 1-3.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Khosa* (note 6 above) at pars. 58-59.

<sup>59</sup> *Khosa* (note 6 above) at pars. 60-62. Government had already conceded that its social security policy could not exclude children who were South African citizens from benefits. The residency status of their parents or primary care-giver was immaterial (at par. 33).

group and warned that the policy could force them into relationships of dependency.<sup>60</sup> In short, she held for a majority of the court, that the dire consequences of exclusion for the lives and dignity of permanent residents significantly outweighed the financial and immigration concerns on which the state based its case.<sup>61</sup>

Murray Wesson has argued that in considering factors such as the impact of the policy on permanent residents, Mokgoro J employed proportionality as part of the enquiry into reasonableness.<sup>62</sup> But the examination of the proportionality of government's social security policy vis-à-vis permanent residents did not arise from the section 27 enquiry. Counsel for the permanent residents raised the right to equality, protected in section 9 of the Constitution, alongside section 27. The CC has interpreted section 9 to require first, that any differentiation between people or groups of people be rational and, second, that such differentiation not have an unfair impact on the affected parties. Failure to meet either of these requirements would amount to a violation of section 9. Despite the weaknesses in government's justifications for distinguishing between citizens and permanent residents, the policy succeeded at the first hurdle. Justice Mokgoro was prepared to assume that the policy met the relatively undemanding prerequisite of rationality. But the enquiry did not end there as section 27 (2) required something more than rationality – namely, reasonableness.<sup>63</sup> In concluding that the impugned policy was unreasonable, Mokgoro J focused, not on section 27 (2), but on the question of whether government's policy was unfairly discriminatory for the purposes of the equality clause.<sup>64</sup> And her examination of the impact of the policy was made in the context of section 9's enquiry into unfair discrimination. Mokgoro J interpreted reasonableness through the lens of section 9 because the applicants claimed that government's policy was unfairly discriminatory as well as an infringement of the right to social security. Whilst this approach has its strengths,<sup>65</sup> it does not provide much guidance as

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<sup>60</sup> *Khosa* (note 6 above) at pars. 74 and 76.

<sup>61</sup> *Khosa* (note 6 above) at par. 82.

<sup>62</sup> 'Equality and social rights: an exploration in light of the South African Constitution' (2007) *Public Law* 748 at 757.

<sup>63</sup> *Khosa* (note 6 above) at par. 67.

<sup>64</sup> *Khosa* (note 6 above) at see pars. 68-77.

<sup>65</sup> The court has a well-developed approach to the equality clause due to the large number of cases brought on the basis of section 9. The court employs the impact test to determine whether discrimination is unfair. That test requires the court to balance a number of concerns, including the impact of the discriminatory measure on the affected parties. See, for example, *Harksen v Lane NO*

to what reasonableness in the context of section 27 (2), or the identically worded section 26 (2), means and is useful only where a claim of unfair discrimination is raised alongside one of these sections.

An analysis of the court's approach to substantive equality lies beyond the scope of this thesis. As to what the *Khosa* judgment means for the development of the reasonableness approach, given the focus on the equality claim, it is difficult to draw from the case an unequivocal acceptance of proportionality as an element of a reasonableness enquiry where the right to equality is not explicitly engaged.<sup>66</sup> At the same time, the court was careful not to state that rationality was *all* section 27 (2) required in this context. The judgment is arguably an indication that variability of the content of a reasonableness enquiry is appropriate in adjudicating SE rights. It did not take the jurisprudence much further as to the elements of such an enquiry, however.<sup>67</sup>

### **(3) Competing readings of the Constitutional Court's approach: criticism, praise and alternatives**

#### **(a) Cass Sunstein's administrative law model**

In categorising the court's approach in *Grootboom* as an administrative law model, Cass Sunstein was commenting not only on SE rights jurisprudence but also on administrative law. His conception of the defining characteristics of administrative law is a useful starting point from which to consider whether the South African CC's approach to SE rights is actually an administrative law model. Three things should be borne in mind here. First, Sunstein's view was that the primary obligation on government was one of explanation, the duty to provide

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*and others* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at pars. 50 – 51. As a consequence of this, discriminatory policies or programmes must meet the stringent requirement of proportionality in section 9 cases.

<sup>66</sup> This is borne out by the fact that *Khosa* is the only case in which the CC has applied the equality analysis, developed in section 9 cases.

<sup>67</sup> Dennis Davis has recently argued that the court's 'approach appeared to be unfettered by the reasonableness standard that had dominated the earlier cases' in 'Socioeconomic rights: do they deliver the goods?' (2008) 6 *International Journal of Constitutional Law* 687 at 703. As indicated above, in my view, the CC determined whether government policy was reasonable through the prism of substantive equality only because section 9 was raised alongside section 27 in the case. The case did not represent a shift in the CC's approach to SE rights.

reasons for its choices regarding matters such as housing, health care and social security.<sup>68</sup> He noted that the approach could have the effect of limiting government action by ensuring, for example, that government allocate more resources than it otherwise would to housing. However, this allocative impact would arise indirectly from the primary obligation on government to provide a reasonable explanation for its choices, rather than an independent judicial assessment that the current allocation was inadequate. Second, Sunstein's argument was aimed principally at an audience sceptical of justiciable SE rights. He presented the 'administrative law model' as a third way, the most palatable middle ground between immediately and fully enforceable SE rights on the one hand, and a complete bar on their justiciability, on the other.<sup>69</sup> Thus, Sunstein's argument was an attempt to soothe concerns over rampant judicial intervention. In light of this, it is not surprising that the administrative law model he presented was relatively deferential to government policy. Third, Sunstein's description of the administrative law model as applied by the court in *Grootboom* does not provide an answer to the question of what, on an administrative law approach, makes an act or a lack of action unreasonable. The 'burden of explanation' idea provides a framework within which to understand the CC's approach to SE rights. A fuller understanding of the approach demands that we grapple with the question of what makes an explanation inadequate.

What led the CC to conclude that section 26 (1) included an obligation to provide temporary shelter to those in desperate need? What made the exclusion of such a provision from the National Housing Programme unreasonable? Without an answer to these questions, it is difficult to establish whether Sunstein's view of an administrative law model of SE rights adjudication rested solely on the protection of process values or extended to include principles of equality and proportionality, arguably part of substantive administrative review in jurisdictions like South Africa and the U.K. And these questions would, in any event, have been difficult to address based on the CC's limited jurisprudence at that point. Sunstein's argument was located in a particular context: drawing on the *Grootboom* judgment to convince sceptics that the adjudication of SE rights need not undermine a constitutional

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<sup>68</sup> Sunstein (note 7 above) at 130.

<sup>69</sup> Ibid.

balance of powers. The usefulness of an administrative law approach must be assessed in the light of the CC's SE rights jurisprudence as a whole and the criticisms of that jurisprudence.

**(b) Criticisms of the Constitutional Court's approach and the minimum core argument**

It is largely because of the amorphous nature of the reasonableness standard that critics have argued that the CC is failing in its duty to give content to the constitutional SE rights.<sup>70</sup>

Commentators have proposed a shift of focus to the minimum core content of the rights as one of the main alternatives to the court's preferred reasonableness approach.<sup>71</sup> The origins of this concept are to be found in General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights:

[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... If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.<sup>72</sup>

Although it is clear from the above that a state's resource limitations will be taken into account in determining its minimum core obligations, the Committee has also indicated that a state claiming a lack of resources will have to '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.'<sup>73</sup>

Counsel in *Grootboom* and *Treatment Action Campaign* argued that the CC should interpret the rights set out in sections 26 (1) and 27 (1) to include minimum core obligations to which everyone in need is entitled. In *Grootboom*, the court rejected this argument, citing

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<sup>70</sup> See, for example, Bilchitz (note 8 above) at 162; (note 14 above) at 532; Pieterse (note 8 above) at 410; and 'Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882 at 898.

<sup>71</sup> David Bilchitz is the main proponent of this approach in South Africa. See notes 8 and 12 above; 'Towards a theory of content for socio-economic rights', unpublished paper presented at the 7th Annual World Congress of Constitutional Law (Athens, 11-15 June 2007) at 5 – 8, available at: <http://www.enelsyn.gr/papers/w13/Paper%20by%20Dr.%20David%20Bilchitz.pdf>, last accessed on 4 August 2010; and 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 118 *South African Law Journal* 484.

<sup>72</sup> At par. 10.

<sup>73</sup> Ibid.

a lack of information as its main reason.<sup>74</sup> But the judgment did not shut the door on the minimum core argument. Writing for a unanimous court, Yacoob J stated:

There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.<sup>75</sup>

Faced with a minimum core argument for a second time in *Treatment Action Campaign*, the CC was less equivocal in its rejection. The court's main objection was that judges did not have the institutional expertise or capacity to undertake the extensive factual and political investigations needed to determine minimum core standards with respect to each of the SE rights. The court further stated that judges were ill-suited to adjudicate on issues with multiple SE implications for society and to decide on how state resources should be spent.<sup>76</sup> The court reiterated its finding in *Grootboom* that evidence of a minimum core with respect to a particular right could be relevant in determining whether government action is reasonable but concluded that 'the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them'.<sup>77</sup> According to the court, any attempt to provide everyone with a minimum core of each of the SE rights would be doomed to failure due to apartheid's legacy of extreme levels of poverty and inequality, a legacy which the first democratically elected government would have to progressively address.<sup>78</sup>

Whatever its stated position on the concept, the court, in effect, set out a minimum core obligation with respect to section 26 (1) of the Constitution, when it held in *Grootboom* that the state's policy was defective because it did not provide temporary relief for those in desperate need – described in the judgment as those with no

access to land, no roof over their heads...people who are living in intolerable conditions

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<sup>74</sup> *Grootboom* (note 4 above) at par. 32.

<sup>75</sup> *Grootboom* (note 4 above) at pars. 33. See also *Treatment Action Campaign* (note 5 above) at par. 34.

<sup>76</sup> *Treatment Action Campaign* (note 5 above) at pars. 37 and 38.

<sup>77</sup> *Treatment Action Campaign* (note 5 above) at par. 34.

<sup>78</sup> *Treatment Action Campaign* (note 5 above) at pars. 35-6.

and... people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.<sup>79</sup>

Furthermore, the court's judgments are shot through with references to the basic necessities of life,<sup>80</sup> and the duty to cater for those in desperate need.<sup>81</sup> However, in the cases in which the CC has intimated that there are certain minimum levels of social welfare to which every individual is entitled, it has traced this idea to the Constitution's protection of the right to human dignity rather than the notion of minimum core obligations set out in General Comment 3.<sup>82</sup> The clearest expression of the relationship between the right to dignity, minimum standards of social welfare and the Constitution's SE rights provisions is still that set out by Yacoob J in *Grootboom*:

The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. 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 aimed at achieving realisation of the right.<sup>83</sup>

At most, the early cases discussed above demonstrate the CC's acceptance of the idea that basic standards of health care, housing, etc. may be enforced by the court when it considers these standards to be reasonably definable and this would generally occur on a case-by-case basis.<sup>84</sup>

For commentators like David Bilchitz, these nods in the direction of minimum core obligations are inadequate. Bilchitz argues that the CC should integrate the minimum core approach into its judgments.<sup>85</sup> He is critical of the CC's reasonableness-centred approach for

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<sup>79</sup> *Grootboom* (note 4 above) at par. 52.

<sup>80</sup> *Khosa* (note 6 above) at par. 52.

<sup>81</sup> *Grootboom* (note 4 above) at par. 52.

<sup>82</sup> See *Khosa* (note 6 above) at par 52; and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at par. 29.

<sup>83</sup> *Grootboom* (note 4 above) at par. 44.

<sup>84</sup> Though the notion that state policy must provide for those in desperate need, developed in *Grootboom* (note 4 above) has been relied upon in later cases to find government action inadequate – see *Treatment Action Campaign* (note 5 above) at par. 68; *Port Elizabeth Municipality* (note 82 above) at pars.29 and 59; *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W) at par. 47; and *Minister of Public Works and others v Kyalami Ridge Environmental Association and others* [2002] 1 LRC 139 (CC) at pars. 39 and 52.

<sup>85</sup> Note 8 above at 144-6. Bilchitz notes that Yacoob J ended up 'smuggling an obligation to meet short-term needs into the very notion of reasonableness' in *Grootboom* and argues that it would have been both more transparent and more theoretically sound for the judge to have acknowledged what he was doing (at 149). See also Bilchitz (note 13 above) at 534; and note 12 above at 15-17.

intersecting conceptual and practical reasons. He argues that the approach is conceptually flawed because it emphasises procedural concerns over individual interests.<sup>86</sup> The reasonableness standard is amorphous<sup>87</sup> and does not provide a conceptually satisfactory explanation for conclusions the CC has reached in its judgments.<sup>88</sup> Bilchitz argues further that the term ‘reasonable measures’ in sections 26 (2) and 27 (2) should be read as allowing government some leeway in respect of the means it chooses to adopt in implementing SE rights. Instead, the CC has used the term to qualify the content of the rights themselves.<sup>89</sup> As a result, the CC’s judgments provide little or no analysis of what the rights to housing and health care actually entail. He acknowledges that, depending on the particular right, this could be a complex task but argues that the judges should have made some attempt at specification.<sup>90</sup> Without a greater attention to content, it is difficult for judgments to be truly effective as there are no clear guidelines on what government is required to do to meet its SE obligations.<sup>91</sup>

But the alternative Bilchitz puts forward is problematic for two main, related reasons. First, the determination of the content of minimum core obligations with respect to SE rights may be a task for executive bodies. It is one courts are comparatively ill-equipped to undertake. This is an obvious criticism – one relied upon in the CC’s judgments in both *Grootboom* and *Treatment Action Campaign*. Bilchitz addresses this concern by defining an extremely narrow content for minimum core obligations - ensuring that people are not exposed to conditions that threaten their survival - that is not difficult to square with the CC’s pronouncements in specific cases to date.<sup>92</sup> In the context of housing, for example, he defines the minimum content of the right as ‘minimal shelter from the elements such that one’s health and thus one’s ability to survive are not compromised’.<sup>93</sup> Specifically, this

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<sup>86</sup> Bilchitz (note 8 above) at 160.

<sup>87</sup> Bilchitz (note 8 above) at 162.

<sup>88</sup> See the discussion of *Grootboom* in Bilchitz (note 8 above) at 144-5.

<sup>89</sup> Bilchitz (note 8 above) at 143.

<sup>90</sup> Bilchitz (note 8 above) at 156-8.

<sup>91</sup> Bilchitz (note 8 above) at 162. Bilchitz expressly rejects suggestions that the main problem lies with weak remedies. He argues that, in order to be truly effective, supervisory jurisdiction must be combined with a clearer articulation of government’s obligations (at 164-5).

<sup>92</sup> Except that Bilchitz argues that the court should set out this kind of obligation for all those affected in South Africa, not just particular litigants. See unpublished paper (note 71 above) at 15.

<sup>93</sup> Bilchitz (note 8 above) at 187.

would include ‘access to accommodation that offers protection from the elements, sanitary conditions, and access to basic services such as sanitation and running water’.<sup>94</sup> Furthermore, and this brings us to the second main problem with the argument, Bilchitz states:

The approach does not require that absolute weight be given to the realization of minimal interests and, where there is a strong justification, it allows for circumstances in which it may be legitimate to fail in this endeavour.<sup>95</sup>

Thus, the minimum core approach he proposes falls back on the need for judicial assessments of the quality of government’s justification, either for its suspect policies or inadequate implementation of sound policies. Such an approach is not far removed from a reasonableness-based approach. Where Bilchitz’s argument is different is in its desire for the minimum core approach to become part of the CC’s judgments, rather than an *ad hoc* consequence of the interpretation of rights in the circumstances of a particular case. Potential litigants would be able to rely on the court’s determinations of government’s minimum obligations with respect to each of the constitutional SE rights and any courts would require the strongest justification for any deviation from these minimum standards by government bodies. This kind of development of CC jurisprudence would undoubtedly provide some answers to the challenges of uncertainty and weak review. But there are certain persistent questions related to the feasibility of Bilchitz’s suggested model.

Bilchitz is too dismissive of concerns about the democratic legitimacy and institutional wisdom of judges making decisions on the allocation of scarce resources that have exercised the minds of so many scholars working in this area - both those in favour of justiciable SE rights and those against. Thus, for example, he describes the process of judicial review in conditions of limited resources as follows:

The first stage is to consider the current allocation of the government to the specific area

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<sup>94</sup> Bilchitz (note 8 above) at 188. Even this more concrete formulation is not far removed from the CC’s jurisprudence. See the specifications for the temporary residence units set out in the court’s order at par. 7 of the judgment in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC). This case was decided after Bilchitz’s book was written and is discussed further below.

<sup>95</sup> Unpublished paper (note 71 above) at 26. See also Bilchitz (note 8 above) at 209-11 where the author makes it clear that he does not favour lexical priority for the minimum core obligation. Rather, his argument is for a weighted priority. In other words, government is not required to fulfil minimal interests as a precondition to moving on to address maximal interests. Government must realise minimal interests as a matter of priority but an approach that accords lexical priority to such minimal interests would prevent government from adopting forward-looking policies aimed at ensuring that people do not fall below the minimum core.

under consideration [e.g. housing, health care] and determine whether the policy in such a department accords with the dictates of fundamental human rights. If it does not meet these standards and this defect cannot be corrected within existing budgetary allocations, then a court will be required to consider the overall budgetary allocations of the government. Again the enquiry is whether the budgetary allocations of the government fulfil its duties under the Constitution in giving priority to the urgent interests of individuals.<sup>96</sup>

As noted by Jeff King, to expect judges to engage in this kind of exercise is simply not realistic as, if they were to do this with the thoroughness needed to make it a worthwhile exercise, the task would require them to have a breadth of knowledge about the economy that is usually only gained through years of hands-on experience.<sup>97</sup> Perhaps most importantly, the approach suggested by Bilchitz has the potential to close-off, rather than enhance, the kind of ongoing dialogue amongst the branches of government argued to be the most effective means of implementing SE rights in chapter 1 of this thesis. It denies courts the flexibility they require to cater for the range of (often competing) interests involved in SE rights adjudication.

The delicate balancing act required for effective SE rights adjudication is well-illustrated by the facts surrounding the decision in *Treatment Action Campaign*. The court showed itself to be acutely aware of the challenges facing government, not just in the context of health care but with respect to the implementation of SE rights generally. At the same time, it noted that the state had certain obligations under the SE rights provisions of the Constitution.<sup>98</sup> In their unanimous judgment, the judges rejected, in no uncertain terms, government's submission that that the court only had the power to issue declaratory relief in this case. The judges pointed to the fact that under the Constitution, its powers of relief were much wider than this and could extend to orders of supervisory jurisdiction in the form of a structural interdict.<sup>99</sup> The court refused to order supervisory jurisdiction in this case, however.<sup>100</sup>

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<sup>96</sup> Bilchitz (note 8 above) at 233.

<sup>97</sup> J King 'Publication Review *Poverty and fundamental rights: the justification and enforcement of socio-economic rights* by David Bilchitz' (2008) *Public Law* 820 at 828. For further criticisms, see Steinberg (note 9 above) at 270-6; and O Ferraz 'Poverty and human rights' (2008) 28(3) *Oxford Journal of Legal Studies* 585.

<sup>98</sup> *Treatment Action Campaign* (note 5 above) at pars. 93 – 94.

<sup>99</sup> *Treatment Action Campaign* (note 5 above) at pars. 99 – 114.

<sup>100</sup> On the court's approach to remedies in SE rights cases, see note 12 above.

In a telling series of paragraphs, the judges noted first, that government policy on provision of the anti-retroviral drug nevirapine to prevent mother-to-child transmission of the HI virus had evolved in the course of the proceedings in the case.<sup>101</sup> Second, the court stated that this development of state policy was an indication that ‘provided the requisite political will is present, the supply of nevirapine at public health institutions can be rapidly expanded to reach many more than the 10% of the population intended to be catered for in terms of the test site policy.’<sup>102</sup> Finally, the judges noted that ‘[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case’.<sup>103</sup> But, in the lead up to the court’s decision, there was a very real fear that this was exactly what would happen. This concern was based on statements reported in the media by the then Minister of Health, Manto Tshabalala-Msimang. In a televised interview with the SABC (South African Broadcasting Corporation), Tshabalala-Msimang was asked whether government would abide by the high court’s order. She said: ‘No, I think the courts and the judiciary must also listen to the authorities — regulatory authorities — both from this country and the United States,’ she said. Asked to clarify if she was saying no, Tshabalala-Msimang said: ‘Yes and no. I’m saying no.’<sup>104</sup> Although she was quickly made to retract the statement,<sup>105</sup> the Health Minister’s comment highlighted the fact that, in the absence of political will and a healthy respect for the rule of law, there is little the judiciary can do to ensure that SE rights, indeed any rights, are adequately protected. Judges need to consider their role in the context of that played by the other arms of government and act in a manner which promotes, rather than closes down, the conversation about how best to alleviate poverty in the country. The CC’s approach is an attempt to do that. The extent to which it is succeeding is a question I will explore further below. But an approach based on minimum core obligations is not a feasible alternative. Any greater clarity regarding the standards which government must meet in implementing SE rights gained through a minimum core

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<sup>101</sup> *Treatment Action Campaign* (note 5 above) at pars. 118 and 120.

<sup>102</sup> *Treatment Action Campaign* (note 5 above) at par. 119.

<sup>103</sup> *Treatment Action Campaign* (note 5 above) at par. 129.

<sup>104</sup> Source: <http://www.journaids.org/politicsofhiv.php#pmtctpolitics>, last accessed on 12 November 2008. See also Roux (note 14 above) at 124.

<sup>105</sup> Roux (note 14 above) at 124.

approach will amount to a pyrrhic victory if government simply ignores the standards set by the courts.<sup>106</sup>

**(c) An administrative law model? Alternative readings of the Constitutional Court's approach to SE rights**

In contrast with the detractors, Carol Steinberg has recently defended the viability of the Court's reasonableness approach on the basis that it depends on an intense form of scrutiny 'unprecedented in the area of administrative law'.<sup>107</sup> The CC's SE rights model, she argues, retains the notion of respect for the integrity of administrative decision-making and the idea that the intensity of the scrutiny must depend on the context. But the character of the scrutiny applied by the CC in these cases differs from that applied in administrative review in that the values of equality and human dignity 'are more heavily weighted in the proportionality exercise applied in the socio-economic rights cases'.<sup>108</sup> In my view, this argument misjudges the court's approach to SE rights to date and underestimates the potential of principles of administrative justice to allow for an enquiry into the substance of governmental decisions.

There is no doubt that the values of equality and human dignity have informed all the court's judgments on SE rights to date. The inclusion of the SE rights provisions in the Constitution arose from a deep-rooted awareness of how apartheid sought to rob individuals of their equal worth and respect. This background has served as a touchstone from which the CC has built its model of SE rights adjudication. But the CC's reasons for finding government action to be unconstitutional in the SE rights context, have revolved around concepts familiar to any administrative lawyer: the requirement of a rational connection between premises and conclusions, an assessment of the balance of relevant and irrelevant considerations and an examination of whether the evidence or information before the court supports a particular conclusion.<sup>109</sup>

That the government policies in *Grootboom*, *Treatment Action Campaign* and *Khosa*

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<sup>106</sup> A concern which is reinforced by the Indian case study in chapter 2.

<sup>107</sup> Note 9 above at 266.

<sup>108</sup> Steinberg (note 9 above) at 277.

<sup>109</sup> Discussed in chapter 3 above.

did not cater for particular groups of people – those in a housing crisis, those who lived too far away from the pilot sites to have access to nevirapine and permanent residents excluded from social security benefits, respectively – played a significant role in the judgments.<sup>110</sup> Where a policy excludes people from some advantage or benefit, the right to equality is obviously implicated and the exclusion may amount to a violation of that right. But the tools of administrative review for unreasonableness – rationality, relevant and irrelevant considerations, the relative weight of the considerations taken into account – are equally applicable and are capable of leading a court to a conclusion of unconstitutionality. Whilst substantive equality has informed the court’s assessment of government justification for its action in particular cases, it is not the prism through which the court evaluates such action in SE rights cases generally.<sup>111</sup> The primary tool for analysis in SE rights cases is reasonableness.<sup>112</sup>

It was only in *Khosa* that the CC applied the equality analysis it had developed in previous cases to reach the conclusion that government’s policy was unfairly discriminatory and therefore unreasonable. However, in that case, the right to equality protected in section 9 of the Constitution was raised alongside the right of access to social security. As stated by Mokgoro J, writing for a majority of the judges in that case, when the right to life, dignity or equality is implicated in a case brought on the strength of one of the SE rights provisions, the right forms part of the enquiry into reasonableness, together with the availability of resources. What made this case different, she noted, was that the applicants raised a claim of unfair discrimination, rooted in the equality provision in the Bill of Rights, in addition to the section 27 claim.<sup>113</sup>

The point is reinforced by Mokgoro J’s treatment of the dignity claim raised in *Jaftha*

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<sup>110</sup> *Grootboom* (note 4 above) at par. 43; *Treatment Action Campaign* (note 5 above) at par. 68; and *Khosa* (note 6 above) at pars. 58; 80-2.

<sup>111</sup> For a reading of the cases based on substantive equality, see Wesson (note 62 above) at 748-69. For a critique of an equality-based approach to SE rights, see Bilchitz (note 8 above) at 166-70.

<sup>112</sup> This is borne out in later CC judgments, discussed below.

<sup>113</sup> *Khosa* (note 6 above) at par. 44.

*v Schoeman and others; Van Rooyen v Stoltz and others.*<sup>114</sup> Writing for a unanimous court, Mokgoro J noted that the CC has always found the right to dignity to be relevant to an SE rights claim. However, the appellants' reliance on the right to dignity, protected in section 10 of the Constitution added nothing to the case. This is an indication that, even where the right to dignity is raised alongside an SE rights provision, it will play no bigger role than informing the interpretation of the SE right, unless the dignity claim is more specific. A similar argument would apply to any other right raised alongside one of the SE rights in the Constitution.

Even in *Grootboom*, where the emphasis was very much on the need to cater for those most desperate in our society as a matter of fundamental human dignity,<sup>115</sup> the court noted that the absence of temporary housing provision for those in crisis situations may have been acceptable if government could have shown that the 'nationwide housing programme would result in affordable houses for most people within a reasonably short time'.<sup>116</sup> The tenor of Sachs J's judgment in *Port Elizabeth Municipality* was somewhat different:

In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided'.<sup>117</sup>

But the court's decision that it was not just and equitable to order the occupiers to be evicted was influenced as much by the fact that the Municipality had not attempted any kind of discussion or mediation process with the occupiers as by the protection of the occupiers' fundamental dignity.<sup>118</sup> The primary impact of the decision was to require that government agencies engage in the 'administrative statecraft' to which Sachs J referred, not that they be obliged to provide occupiers with alternative accommodation as a pre-requisite to eviction in every case. Whatever the circumstances of the case, the court's findings have always

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<sup>114</sup> 2005(2) SA 140 (CC) at par. 21. The question before the court was whether a law allowing for homes to be sold in execution to pay off debts infringed the right of access to adequate housing, protected in section 26 – see par. 1 of the judgment.

<sup>115</sup> See especially, par. 44 of the judgment (note 4 above).

<sup>116</sup> *Grootboom* (note 4 above) at par. 65.

<sup>117</sup> *Port Elizabeth Municipality* (note 82 above) at par. 29. The case dealt with the question of whether, and under what conditions, the municipality could evict a group of about 68 children and adults occupying informal homes which they set up on privately-owned land (at par. 1).

<sup>118</sup> *Port Elizabeth Municipality* (note 82 above) at pars. 47, 54 and 58.

involved a careful balancing of individual dignity and equal worth against respect for the long-term goals of government policy.

As a value, human dignity informs the judicial enforcement of all rights at a very general level.<sup>119</sup> It may have a special role in SE rights cases as the very existence of these rights in the Constitution stems from a desire to break with the past, to recognise that all South Africans are equally deserving of respect, opportunity and socio-economic wellbeing. But, in the SE rights cases to date,<sup>120</sup> the rights to housing, health care and social security were treated as the primary rights. Whether the values of human dignity and equality are given a central or secondary role in influencing the outcome of SE rights cases depends on a range of factors in each of the cases. In my view, the weight attached to these values in SE rights jurisprudence cannot be taken for granted in the CC's approach. In short, the court has been eager to acknowledge the centrality of dignity and equality to its interpretation of the SE rights provisions generally but, where the primary claim involves an SE right, it has stuck quite closely to administrative law principles in framing the questions it has asked of government action.

In her discussion of SE rights cases, Steinberg praises the CC for going beyond the administrative law focus on rationality to a more substantive conception of reasonableness in determining the constitutionality of government measures. As noted earlier, this assessment underestimates the breadth of administrative law. The more substantive conception of reasonableness she refers to is not unknown in administrative law. A finding of irrationality need no longer be based on absurd or perverse decision-making. An enquiry into rationality now also examines the process of reasoning and demands a logical connection between premises and conclusion, between the evidence before the decision-maker and the decision reached. Rationality has also been used to enquire into the balance of relevant considerations. Moreover, rationality is only one aspect of unreasonableness. Unreasonableness, as a ground of review, now places quite onerous demands on the reasoning process – decisions must be

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<sup>119</sup> See Mohamed J in *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at par. 35.

<sup>120</sup> With the exception of *Khosa*, discussed above.

supported by the evidence, rather than merely logically connected to them. Most importantly, judicial review of administrative action on the basis of unreasonableness now also entails an examination of the substance of the decision: does the decision violate the common law or constitutional principles such as the rule of law or equality?<sup>121</sup>

The questions of whether proportionality forms part of an enquiry into unreasonableness and whether it has even become a ground of review in its own right are more controversial. The findings in cases like *Grootboom* and *Treatment Action Campaign* fit easily into an enquiry into unreasonableness in the administrative law context, as described in chapter 3 above, even if we proceed on the assumption that proportionality does not apply. In *Grootboom*, for example, the fact that the National Housing Programme did not make provision for those in desperate need was arguably a failure to take into account a relevant consideration or to give that consideration sufficient weight. The first issue in the *Treatment Action Campaign* case was whether government's decision to limit the provision of nevirapine to certain pilot sites constituted a violation of section 27 (1). The court held that government's fears that the provision of nevirapine to pregnant women to prevent mother-to-child transmission of HIV is ineffective where an alternative to breastfeeding is not provided, was not supported by any of the evidence provided by government. In fact the weight of scientific evidence put forward by both sides in the case pointed in the opposite direction.<sup>122</sup> A lack of evidence was also the court's reason for rejecting government's submission that the drug was not safe. Again, available evidence, South African and international, pointed to a widespread consensus on the safety of the drug.<sup>123</sup> In balancing the weight of the government's concern that wider provision of nevirapine would result in people developing a resistance to it against the benefit of preventing transmission of the virus, the court held, in effect, that government's policy got the balance of relevant considerations wrong.<sup>124</sup> The question of whether government had the capacity to provide a 'full package' including counselling was an irrelevant consideration at this stage as the court was concerned

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<sup>121</sup> See chapter 3 above.

<sup>122</sup> *Treatment Action Campaign* (note 5 above) at pars. 57-8.

<sup>123</sup> *Treatment Action Campaign* (note 5 above) at pars. 60-4.

<sup>124</sup> *Treatment Action Campaign* (note 5 above) at par. 59.

with the once-off provision of the drug.<sup>125</sup>

The second main issue in *Treatment Action Campaign* was whether government had a comprehensive plan to combat mother-to-child transmission of the virus. This aspect of the judgment was more complicated, as it demanded that the court consider available resources in a more serious way.<sup>126</sup> The court held that the inflexible nature of government's approach meant that the entire policy needed to be reviewed. In particular:

Hospitals and clinics that have testing and counselling facilities should be able to prescribe nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.<sup>127</sup>

Whilst providing guidance to government on what a policy should contain and making a judgment that additional training of counsellors will not be a difficult task, the judges left much to the discretion of government. This is reflected in the court's order on government's plan, which required simply that government take 'reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV'.<sup>128</sup> The judges allowed government further flexibility by holding that the mandatory aspects of their order, including the order that government remove the restrictions on provision of nevirapine, did not prevent government from choosing an 'equally appropriate or better' manner of adapting its policy, provided this met with constitutional requirements.<sup>129</sup>

Thus, whilst there is no doubt that the court's approach to SE rights is strongly informed by the values of dignity and equality and that the judges have been prepared to place onerous demands on government policy and decision-making, including a requirement

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<sup>125</sup> *Treatment Action Campaign* (note 5 above) at pars. 65-6.

<sup>126</sup> *Treatment Action Campaign* (note 5 above) at par. 71. The cost of the nevirapine itself was not an issue, as a group of pharmaceutical companies were providing the drug free of charge for a period of 5 years. See also pars. 93-4 of the judgment.

<sup>127</sup> *Treatment Action Campaign* (note 5 above) at par. 95.

<sup>128</sup> *Treatment Action Campaign* (note 5 above) at par. 3 (d) of the order.

of proportionality, this is not universally so. Although the court has found against government in the many of the SE rights cases decided to date, it has done so on relatively narrow grounds and often in circumstances where resource implications were not a hugely important factor.

In arguing that the CC's approach to SE rights is not an administrative law model, Steinberg highlights several problems with an approach based on administrative law. She identifies the problems with weak review in administrative justice with a focus on 'the right of the individual citizen against the arbitrary exercise of public power'. By contrast, she argues, the SE rights provisions in the Constitution 'are concerned with the rights of classes of deprived people in the context of systemic injustice in our society'.<sup>130</sup> But this represents a quite narrow view of what the body of administrative law seeks to achieve. As I have argued in chapter 3, the desire to ensure quick, effective implementation of government policy in the public interest is at the heart of administrative justice. That individual rights and interests should be protected in the process means that courts have to perform a complex balancing exercise.

Under apartheid, judicial review came to be seen as the only means through which individuals suffering the impact of apartheid policy could try to secure their rights and interests. In a racist system based on Parliamentary sovereignty and executive dominance, progressive judges found themselves in a combative, relatively powerless relationship with the other branches of government. South African administrative law still suffers from this historical baggage. The CC's reluctance to explicitly engage with proportionality as an aspect of judicial review for unreasonableness is one manifestation of this.<sup>131</sup> But the adoption of the 1996 Constitution should be seen as an opportunity to reinvent our administrative law. For years, administrative lawyers in South Africa have hankered after a richer understanding of this area of the law – as a means to facilitate good decision-making and allow for the effective implementation of sound government policies. Judges now have

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<sup>129</sup> *Treatment Action Campaign* (note 5 above) at par. 4 of the order.

<sup>130</sup> Steinberg (note 9 above) at 282.

<sup>131</sup> This is discussed in chapter 3. See also C Hoexter 'Judicial policy revisited: transformative adjudication in administrative law' (2008) 24 *South African Journal on Human Rights* 281.

more extensive powers but they act within a legitimate legal system and must take the limitations of their role in a constitutional democracy seriously.

In enforcing SE rights, judges are required to confront the problems of systemic injustice and the need for redistribution of goods like housing head on but this task is not altogether different from the post-apartheid conception of judicial review of administrative action described above. Judges enforcing SE rights often have to weigh up the immediate interests of the claimants before them against the long-term goals of government policy and are equally limited by relative lack of expertise and the need to maintain a constitutional balance of powers.

The CC has not consistently opted for a higher or lower standard of review in the cases discussed above. The shifting content of reasonableness employed in the cases is, thus, not an attempt to simply defer to the executive or legislative bodies in every case where policy-making and resource-allocation are concerned. As stated by Dennis Davis:

...where the Court has employed administrative law principles to deal with socio-economic rights, its judgments have been based on a deep-seated concern about the limited role of a judiciary and the dangers of polycentricity. The tests of reasonableness, sometimes employed interchangeably with rationality, have enabled the Court to strike an uneasy balance between the existence of a right and its limited input on the nature and extent of policy.<sup>132</sup>

Most scholars will admit to the need for courts to exercise restraint in appropriate cases. Any model for the judicial protection of SE rights must be flexible enough to cater for this. The CC's model of SE rights adjudication is based on certain ideas about when it is appropriate for a court to defer to executive or legislative expertise. If the CC's approach leans too heavily toward weak review, as some commentators argue, this is due to the court's underlying ideas about the appropriate role of the judiciary, and is not an inevitable consequence of the administrative law roots of the approach. These underlying ideas about judicial restraint must be interrogated. In the absence of such an interrogation, suggestions of alternative approaches are unlikely to yield any changes – either because the court will simply reject them or because alternatives will also be interpreted through the gloss of a particular notion of deference.

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<sup>132</sup> D Davis 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 *South African Journal on Human Rights* 301 at 323.

#### **(4) Developing the South African model for the adjudication of social and economic rights: implications of recent cases**

Much of the commentary assessing the South African CC's jurisprudence on SE rights focuses on four relatively early cases: *Soobramoney*, *Grootboom*, *Treatment Action Campaign* and *Khosa*. In this section, I consider the impact of more recent cases on our understanding of the CC's approach to adjudicating SE rights. As my interest lies in identifying trends in, or changes to, the CC's approach, the section is not intended to be a comprehensive examination of each of the relevant cases. Instead, I focus on particular themes emerging from these cases.

##### **(a) Meaningful engagement**

The most interesting and enduring contribution of recent cases lies in the CC's development of the notion 'meaningful engagement'. Drawing on Horn AJ's reasoning in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others*,<sup>133</sup> Sachs J held in a subsequent CC case *Port Elizabeth Municipality v Various Occupiers* that, when dealing with the fraught issue of evictions, the legislation and the Constitution required courts to engage in 'active judicial management'.<sup>134</sup> This meant that, in addition to considering whether potential evictees were in lawful occupation, a court had also to take into account broad considerations of fairness and equitable treatment. Furthermore, the 'active judicial management' he referred to would impact not just on how a court chose to deal with the issues before it but also on the procedures it adopted, the evidence it took into account and the remedies it handed down.<sup>135</sup>

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<sup>133</sup> 2000(2) SA 1074 (SECLD). Though the notion of meaningful engagement was foreshadowed by comments in *Grootboom* (note 4 above) at par. 87; and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005(5) SA 3 (CC) at par. 31.

<sup>134</sup> *Port Elizabeth Municipality* (note 82 above) at par. 36. For the facts of the case, see note 117 above.

<sup>135</sup> *Port Elizabeth Municipality* (note 82 above) at par. 36. On a consideration of the factors listed in the PIE Act as relevant to an enquiry into whether an eviction is just and equitable, the court held that it was not just and equitable to evict the occupiers (at par. 59). The fact that the municipality had not engaged the occupiers in any kind of discussion before seeking their eviction was influential in this conclusion (see par. 54), as were the facts that the occupants had been on the land for an extended period; that they moved on to the land with what they thought was the permission of the owner (at par. 53); and that the

A central theme of this part of Sachs J's judgment was that, in seeking a sustainable way of dealing with competing interests, judges would not always be able to draw a bright line between the 'procedural and substantive aspects of justice and equity'.<sup>136</sup> The managerial role of judges would sometimes have to be expressed in creative ways – requiring the parties to engage with each other in a serious attempt to find mutually acceptable solutions was a tangible example of this kind of creative expression.<sup>137</sup> Justice Sachs' comments about the managerial role of the courts in this case led him to consider whether it would be appropriate for the court to order the parties to engage in mediation. This question was left unanswered as, on the court's analysis, mediation was unlikely to be effective at that point of the proceedings.<sup>138</sup> So the practical impact of 'active judicial management' in this case, lay in the factors the court took into account in concluding that eviction would not be just and equitable – most significant amongst these was the fact that the municipality had not engaged in any discussion with the respondent occupiers.<sup>139</sup>

The notion of 'active judicial management' which emerged from the case, however, played a much more significant role in the CC's later decision *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others*.<sup>140</sup> The case concerned a decision by the City of Johannesburg to eject approximately 400 occupiers from buildings considered to be unsafe and unhygienic in inner city Johannesburg.<sup>141</sup> The Supreme Court of Appeal (SCA) had earlier authorised the eviction and ordered the City to assist those in desperate need of housing to find temporary accommodation.<sup>142</sup> On the 30<sup>th</sup> of August 2007, two days after the CC heard the occupiers' application for leave to appeal, the court handed down an interim order designed to ensure

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municipality had not given serious consideration to the question of alternative accommodation for them (at par. 58). See par. 59 for a summary of the reasons for the court's decision.

<sup>136</sup> *Port Elizabeth Municipality* (note 82 above) at par. 39.

<sup>137</sup> *Port Elizabeth Municipality* (note 82 above) at par. 39.

<sup>138</sup> *Port Elizabeth Municipality* (note 82 above) at pars. 39-47.

<sup>139</sup> *Port Elizabeth Municipality* (note 82 above) at par 54. See note 135 above for a summary of the court's findings.

<sup>140</sup> 2008 (3) SA 208 (CC) (*Olivia Road*).

<sup>141</sup> *Olivia Road* (note 140 above) at pars. 1-2.

<sup>142</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* (253/06) [2007] 2 All SA 459 (SCA); 2007 (6) SA 417 (SCA).

that the parties ‘engaged with each other meaningfully on certain issues’.<sup>143</sup> One of the arguments made by the occupiers was that the City should have given them a hearing before taking the decision to evict as the decision was administrative in nature.<sup>144</sup> But none of the parties had directly raised the lack of meaningful engagement as an issue before the SCA or the CC.<sup>145</sup>

The court drew on its earlier findings in *PE Municipality* for the underlying rationale of the meaningful engagement order – the engagement order was an instance of active judicial management.<sup>146</sup> But Yacoob J also noted that the duty on the state to engage meaningfully with people who could be left homeless following an ejection was firmly rooted in section 26 (2)’s requirement of reasonable state action. This requirement meant that each step taken with respect to the provision of adequate housing had to be reasonable. Where the state sought an ejection or eviction order which could render people homeless, a court had to take into account the question of whether the authorities had engaged with those people in deciding whether the state had satisfied its section 26 (2) obligations.<sup>147</sup> At the same time, people confronting homelessness also had a duty to act reasonably and in good faith. The court drew a link between the notion of meaningful engagement and the value of participation in a democratic state, noting that people in need of housing should not be seen as a ‘disempowered mass’ but as active participants in the process of finding housing solutions.<sup>148</sup>

In its detailed engagement order, the court set out both the subject matter and the objectives of meaningful engagement in the context of this case. The order also specified a date by which the parties had to submit affidavits to the court reporting on the progress of their engagement.<sup>149</sup> When the parties submitted their affidavits, they indicated that they had entered into a settlement agreement, although there was some disagreement about which

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<sup>143</sup> *Olivia Road* (note 140 above) at par. 5.

<sup>144</sup> *Olivia Road* (note 140 above) at par. 7.

<sup>145</sup> *Olivia Road* (note 140 above) at par. 9.

<sup>146</sup> *Olivia Road* (note 140 above) at par. 12.

<sup>147</sup> *Olivia Road* (note 140 above) at pars. 17-18.

<sup>148</sup> *Olivia Road* (note 140 above) at par. 20.

<sup>149</sup> *Olivia Road* (note 146 above) at par. 5.

issues remained to be decided by the court.<sup>150</sup> The settlement agreement formed an important reference point for the court's judgment on the merits of the appeal. The agreement contained detailed provisions aimed at making the buildings 'safer and more habitable' as an immediate, interim measure. The rest of the agreement, which would take effect only with the court's approval, provided for alternative accommodation in specified buildings. It set out how rent would be calculated and made it clear that the alternative accommodation was provided as a temporary measure – the City would work with the occupiers to find permanent housing solutions.<sup>151</sup>

The court held that the agreement was, in fact, a reasonable outcome of the engagement process.<sup>152</sup> In terms of the agreement, a concrete plan for permanent housing would be developed in consultation with the occupiers. However, the occupiers wished the court to pronounce on the state's failure to provide permanent housing solutions for them and others in their situation. They argued that consultation on the issue of permanent housing was being obstructed by the state's failure to put together a concrete plan.<sup>153</sup> In response, the City attached a housing plan, formulated after the settlement agreement, to its affidavit for the court's consideration. The occupiers asked for time to consider, and respond to, this plan.<sup>154</sup> But the court held that it was not necessary for it to consider the plan at this stage – there was every indication that the process of consultation would continue in good faith and the CC should, in any event, not be the first and only arbiter of whether the plan was reasonable.<sup>155</sup> For similar reasons, the court refused to accede to the occupiers' request that it evaluate the reasonableness of the housing plan vis-à-vis the thousands of other poor people living in inner-city Johannesburg. They held that such an evaluation would be premature and overly-generalised. A case concerning specific allegations of unreasonableness could be initiated, if necessary, at a later stage. For the moment, the court was satisfied with the state's acceptance of the need for meaningful engagement.<sup>156</sup>

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<sup>150</sup> *Olivia Road* (note 146 above) at par. 6.

<sup>151</sup> *Olivia Road* (note 146 above) at pars. 25-7.

<sup>152</sup> *Olivia Road* (note 140 above) at par. 28.

<sup>153</sup> *Olivia Road* (note 140 above) at pars. 32 and 33.

<sup>154</sup> *Olivia Road* (note 140 above) at par. 33.

<sup>155</sup> *Olivia Road* (note 140 above) at par. 34.

The notion of meaningful engagement is a promising addition to the jurisprudence on SE rights and was used to good effect in this case. As a judicial tool, insisting on engagement between the parties can provide SE rights claimants with the relief they request whilst at the same time ensuring a level of respect for the democratic legitimacy of governmental choices about SE policy. The court in *Olivia Road* did not have to determine how the City should go about dealing with the buildings and their occupants – consultation between the parties produced a reasonable settlement of many of the issues in the case. The engagement order also ensured that the occupiers were not merely observers or adversaries in the process but active participants in it - an idea which bolsters democratic values. On one reading, the case was decided on procedural grounds and is, therefore, yet another example of weak review in an SE rights case. However, Sachs J's comments about the difficulty of separating procedure from substance in *PE Municipality*, cited with approval in *Olivia Road*, are relevant here. The CC's interim order in the latter case focused on a procedural value – it ordered that the parties engage meaningfully with one another. Some of the guidelines were detailed enough to add depth to the order: that the parties consult in an attempt 'to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable'<sup>157</sup> is an example here. Strictly speaking, this order offered only procedural relief to the occupiers. However, the result of the engagement order was a solution going to the substance of the issues raised by the occupiers – they did not have to vacate the buildings immediately and the settlement made provision for alternative accommodation for those who required it.

It should be noted that the efficacy of an engagement order of this nature is limited in the sense that it depends on the good faith of the parties involved. Furthermore, the CC's finding that any assessment of the City's plan for permanent housing solutions vis-à-vis the litigants and others in their situation would be premature, highlights the court's general reluctance to set hard and fast standards regarding the content of the SE rights and their preference for case-by-case analysis. The implications of this are discussed in some detail in section 5 of this chapter and in chapter 6 below. But some of the limitations of engagement

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<sup>156</sup> *Olivia Road* (note 140 above) at par. 35.

<sup>157</sup> See par.2 of the order in *Olivia Road* (note 140 above) at par. 5 of the judgment.

as a tool for the implementation of SE rights are well illustrated by the CC's 2009 decision *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others*,<sup>158</sup> and are worth discussing here.

The circumstances surrounding the litigation in *Joe Slovo* presented the CC with a set of quite different issues from those in *Olivia Road*. Like the occupants of the two buildings in *Olivia Road*, the occupiers of the Joe Slovo settlement in the Western Cape were facing eviction from their homes but this time the application for an eviction order was preceded by a drawn out period of consultation and negotiation between state authorities and the organisations representing approximately 20 000 residents of the informal settlement.<sup>159</sup> The question of whether engagement had been adequate was a major point of dispute between the parties.

People began occupying the area east of the city of Cape Town which would come to be known as the Joe Slovo settlement early in the 1990's. As the number of people moving into the area began to grow at a staggering rate, the City of Cape Town started to provide people in the settlement with certain basic services: a water supply, container toilets and basic cleaning services.<sup>160</sup> Despite this, people in Joe Slovo continued to live in unhygienic and dangerous conditions.<sup>161</sup> Following a very destructive fire in 2000, the City began to upgrade the settlement in 2002 by creating a database of residents, improving water, sanitation, health and cleansing services, providing for electricity and establishing residential blocks surrounded by walkways.<sup>162</sup> Government targeted the Joe Slovo settlement for reconstruction as part of its Breaking New Ground housing policy aimed at eliminating informal settlements country-wide.<sup>163</sup> This reconstruction would be implemented through the N2 Gateway project by a public company called Thubelisha Homes Ltd., the first respondent in the case. The project's official launch took place early in 2005 but the City had already begun the process of convincing Joe Slovo residents that they needed to move out of the area

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<sup>158</sup> Note 94 above.

<sup>159</sup> *Joe Slovo* (note 94 above) at pars. 8 and 28 (Yacoob J), par. 301 (O'Regan J) and par. 243 (Ngcobo J).

<sup>160</sup> *Joe Slovo* (note 94 above) at pars. 20-21 (Yacoob J) and par. 185 (Ngcobo J).

<sup>161</sup> *Joe Slovo* (note 94 above) at par. 24 (Yacoob J).

<sup>162</sup> *Joe Slovo* (note 94 above) at par. 278 (O'Regan J).

<sup>163</sup> *Joe Slovo* (note 94 above) at par. 25 (Yacoob J).

so that it could be developed towards the end of 2004.<sup>164</sup>

At first, Joe Slovo residents expressed approval for the Gateway project – as evidenced by some people agreeing to move away from Joe Slovo to government-appointed alternative accommodation in Delft, about 15 kilometres away. But the residents began to turn against the project due to what they alleged were government failures to live up to certain promises they had made to the residents.<sup>165</sup> In particular, the residents complained that government had breached an agreement that 70% of the new houses in the development would be allocated to eligible Joe Slovo residents. Furthermore, government had indicated that rentals in the first phase of the development would be between R150 and R300 per month – an amount which the residents could afford. In fact, rentals were between R600 and R1050 per month.<sup>166</sup> Residents resisted their removal from the settlement on the basis that government had backtracked on assurances. They objected to moving to Delft because of reports of a high crime rate, poor transport services and few employment prospects in the area.<sup>167</sup>

The court handed down a unanimous order, allowing for the Joe Slovo residents to be evicted under certain conditions. The order was based, to a large extent, on an order submitted to the court by the respondents – Thubelisha Homes Ltd., the national Minister for Housing and the provincial Minister for Local Government and Housing.<sup>168</sup> In terms of this order, the residents would have to vacate their homes according to a particular schedule; their eviction was made conditional on their relocation to temporary residential units which had to comply with certain specifications regarding size and quality; the parties would engage meaningfully with each other to try to reach agreement on the scheduling of the relocations; and the respondents agreed that they would set aside 70% of the houses yet to be built to eligible Joe Slovo residents.<sup>169</sup> The applicants did not consent to the order.<sup>170</sup> They claimed

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<sup>164</sup> *Joe Slovo* (note 94 above) at pars. 26 and 28 (Yacoob J).

<sup>165</sup> *Joe Slovo* (note 94 above) at pars. 15, 28, 31 (Yacoob J).

<sup>166</sup> *Joe Slovo* (note 94 above) at pars. 32-33 (Yacoob J).

<sup>167</sup> *Joe Slovo* (note 94 above) at par. 31 (Yacoob J) and par. 222 (Ngcobo J).

<sup>168</sup> *Joe Slovo* (note 94 above) at par. 7 (The Court); and par. 316 (O'Regan J).

<sup>169</sup> *Joe Slovo* (note 94 above) at par. 7 (The Court).

<sup>170</sup> O'Regan J noted, in her judgment, that the court took the applicants' comments into account in framing the order, *Joe Slovo* (note 94 above) at par. 316.

that they were not in unlawful occupation of the land and should, therefore, have been given formal notices of eviction. The applicants argued, further, that it was possible and preferable for the area to be upgraded whilst the residents were in occupation. In this way, the hardship of relocation could be avoided.<sup>171</sup> They wanted the court to hand down an order for further engagement between the parties, rather than eviction, at this stage.<sup>172</sup>

The judges were divided on the issue of whether the residents were unlawful occupiers but this disagreement did not affect the order.<sup>173</sup> It is not an aspect of the judgment I consider here – as noted above, my interest lies in the notion of meaningful engagement as an addition to the SE rights jurisprudence. The fact that there had been some level of engagement was not contested in the case but the quality and extent of that engagement was of some concern. All the judges acknowledged that there were deficiencies in the process of engagement: the state authorities did not provide the residents with even a formal notice before launching urgent eviction proceedings;<sup>174</sup> better co-ordinated and more thorough consultation with individual families could have avoided much of the ensuing conflict;<sup>175</sup> and there were ‘major failures in communication’.<sup>176</sup> Justice Sachs elaborated on what these failures were in his judgment:

The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself... [t]here were simply too many rather than too few protagonists on the side of the authorities. At different stages the occupants had to engage with national and then with provincial and finally with local entities. To complicate matters even further, Thubelisha, which had been created at national level to function at provincial and local levels, became forcefully involved as a protagonist.<sup>177</sup>

Despite this, the judges all held that flaws in the engagement process were not so

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<sup>171</sup> *Joe Slovo* (note 94 above) at par. 174 (Moseneke DCJ); and par. 107 (Yacoob J).

<sup>172</sup> *Joe Slovo* (note 94 above) at par. 316 (O’Regan J); and par. 401 (Sachs J).

<sup>173</sup> Yacoob J, with Langa CJ and Van der Westhuizen J concurring, found that the residents had never been in lawful occupation of the land (see pars. 77-79). All the other judges found, in essence, that the City had, by its actions, consented to the occupation of the land. However, by the time eviction proceedings were launched, the City had revoked its consent to the occupation (see par. 4, The Court). See also pars. 278-80 (O’Regan J); par. 160 (Moseneke J); and par. 359 (Sachs J).

<sup>174</sup> *Joe Slovo* (note 94 above) at par. 167 (Moseneke DCJ).

<sup>175</sup> *Joe Slovo* (note 94 above) at pars. 113 and 117 (Yacoob J); par. 247 (Ngcobo J). See also par. 301 (O’Regan J).

<sup>176</sup> *Joe Slovo* (note 94 above) at par. 378 (Sachs J).

<sup>177</sup> *Joe Slovo* (note 94 above) at pars. 378-9 (Sachs J).

serious as to make government action unreasonable and prevent the court issuing an order for eviction. What is interesting about the treatment of this issue in the judgment is that the requirement of *meaningful* engagement was watered down in some of the judgments to one of reasonable engagement or even mere engagement.<sup>178</sup> Justices O’Regan and Sachs dealt with the issue at some length in their judgments. Justice O’Regan actually held that there had been no meaningful engagement:

Nevertheless it cannot be denied that much of the heat that has been generated in this case has been generated because the respondents did not engage fully and meaningfully with the applicants and the other communities who have an interest in the housing project.<sup>179</sup>

For O’Regan J the question was whether the absence of meaningful engagement meant that the implementation of the housing plan in the case was unreasonable.<sup>180</sup> Justice Sachs found that there had been meaningful engagement<sup>181</sup> but noted that the nature and extent of engagement between the parties was only one factor to be taken into account in determining whether the implementation of the plan was reasonable.<sup>182</sup> Both judges were influenced by the fact that this was a pilot project, involving huge numbers of people and aimed at benefitting the applicants and others in a similar position by providing them with access to adequate housing.<sup>183</sup> They also referred to the fact that thousands of other people who had already left the area and were waiting for permanent housing in the new development would be adversely affected by further delays.<sup>184</sup> Engaging in a enquiry into proportionality, Sachs J stated that, in his view ‘the means used were not so disproportionately out of kilter with the goals of the meritorious Project as to require a court to declare them to be beyond the pale of reasonableness’<sup>185</sup> and ‘[i]n all the circumstances I cannot hold that the implementation as a whole was so tainted by inconsistency and unfairness as to fail the test of reasonableness’.<sup>186</sup>

One of the main reasons why the residents were arguing for a further process of engagement was that they wanted the upgrade to be conducted whilst they remained on site, allowing them to avoid the distress of relocation. *In situ* upgrading was stressed in

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<sup>178</sup> *Joe Slovo* (note 94 above) at par. 117 (Yacoob J); and pars. 301-2 (O’Regan J).

<sup>179</sup> *Joe Slovo* (note 94 above) at par. 301 (O’Regan J).

<sup>180</sup> *Joe Slovo* (note 94 above) at par. 302 (O’Regan J).

<sup>181</sup> *Joe Slovo* (note 94 above) at par. 379 (Sachs J).

<sup>182</sup> *Joe Slovo* (note 94 above) at par. 380 (Sachs J).

<sup>183</sup> *Joe Slovo* (note 94 above) at par. 302 (O’Regan J); and par. 380 (Sachs J).

<sup>184</sup> *Joe Slovo* (note 94 above) at par. 303 (O’Regan J); and par. 392 (Sachs J).

<sup>185</sup> *Joe Slovo* (note 94 above) at par. 381 (Sachs J).

government's Breaking New Ground housing plan and was consistent with international best practice<sup>187</sup> but the judges held that it was reasonable for government to opt for relocation in this case. There is little explanation for this choice in the judgment – simply a contention by the respondents that *in situ* upgrading would not be feasible.<sup>188</sup> The judges accepted this as a matter over which the state exercised significant discretion. They would not question whether relocation was the best approach as long as it was within the range of reasonable responses.<sup>189</sup>

In the subsequent case of *Abahlali Basemjondolo Movement SA and another v Premier of KwaZulu-Natal and others*,<sup>190</sup> Moseneke DCJ, writing for a majority of the judges, summarised the court's position on what 'proper' engagement entails:

Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.<sup>191</sup>

What is unclear from the jurisprudence is what an absence of such engagement means – *Olivia Road* implies that a resident or occupier is entitled to insist in those circumstances that proper engagement take place before a court may issue an eviction order but *Joe Slovo* indicates that a lack of meaningful engagement is just one more factor that plays a role in determining whether government action has been reasonable.

### **(b) Flexibility and the fate of the minimum core argument**

New statements on the minimum core obligation in CC jurisprudence clarify, rather than develop, the CC's approach to SE rights. The CC's most recent articulation of its position on

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<sup>186</sup> *Joe Slovo* (note 94 above) at par. 384 (Sachs J).

<sup>187</sup> *Joe Slovo* (note 94 above) at pars. 364 and 367 (Sachs J).

<sup>188</sup> *Joe Slovo* (note 94 above) at par. 253 (Ngcobo J).

<sup>189</sup> *Joe Slovo* (note 94 above) at par. 113 (Yacoob J); par. 174 (Moseneke DCJ); par. 253 (Ngcobo J); par. 295 (O'Regan J); and par. 367 (Sachs J).

<sup>190</sup> 2010 (2) BCLR 99 (CC). The Abahlali Basemjondolo Movement, a voluntary organization acting on behalf of tens of thousands of residents in informal settlements in KwaZulu-Natal, challenged the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007. Amongst other things, they argued that section 16 of the Act was unconstitutional because it made it considerably easier for government to evict people living in informal settlements (at pars. 1, 2 and 5). This amounted to a violation of section 26 (2) of the Constitution. A majority of the judges held that section 16 of the Act was inconsistent with section 26(2) of the Constitution (at pars. 92 and 118, Moseneke DCJ).

<sup>191</sup> *Abahlali Basemjondolo* (note 190 above) at par. 114.

minimum core obligations arose from the litigation in the *Mazibuko* case.<sup>192</sup> This was the first case in South Africa dealing with the right to have access to sufficient water, protected in section 27(1) (b) of the Constitution. The case was brought by a group of residents from Phiri Township in Soweto, Johannesburg. Amongst other things, they argued that the City's Free Basic Water policy infringed their section 27 rights.<sup>193</sup>

The litigation arose in the context of Johannesburg Water's Operation Gcin'amanzi (to save water) Plan.<sup>194</sup> About a tenth of all households in the City did not have access to a tap dispensing clean water within 200 metres of their homes.<sup>195</sup> Under apartheid policy, residents of Soweto and other black townships paid a monthly flat rate of R68 per household for their water supply. This amount was derived from a deemed monthly consumption rate of 20 kilolitres per household. The actual consumption rate was much higher. It was not clear whether this excess was due to higher consumption rates or leakages through corroded pipes. The water distributed to Soweto was completely out of proportion to the revenue generated by it. This was partly because a culture of non-payment for services, begun as a response to the apartheid government's oppressive policies, continued to hold sway.<sup>196</sup>

It was against this background that Johannesburg Water decided to overhaul the system of water provision, starting with Phiri Township in Soweto. The aims of the project were to 'reduce unaccounted for water, to rehabilitate the water network, to reduce water demand and to improve the rate of payment'.<sup>197</sup> The Phiri applicants challenged various aspects of the Plan. For the purposes of this thesis, the most important part of their case was the allegation that the City's monthly allocation of 6 kilolitres of water per household was unreasonable. The applicants wanted the court to quantify the amount of water that would be considered 'sufficient' under s 27(1) (b) and they argued that it should set that amount at 50

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<sup>192</sup> *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening)* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

<sup>193</sup> *Mazibuko* (note 192 above) at par. 4. This was one of two major arguments that the applicants made in this case. Their second claim was that the installation of pre-paid water meters by the City of Johannesburg and Johannesburg Water (Pty) Ltd., a company owned by the City, was unlawful (at par. 6). This latter argument is discussed in chapter 6.

<sup>194</sup> *Mazibuko* (note 192 above) at par. 13.

<sup>195</sup> *Mazibuko* (note 192 above) at par. 7.

<sup>196</sup> See *Mazibuko* (note 192 above) at pars. 10-12, and par. 166.

<sup>197</sup> *Mazibuko* (note 192 above) at par. 13.

litres of water per person per day.<sup>198</sup>

The Water Services Act 108 of 1997 governs access to, and provision of, water at a national level. ‘Basic water supply’ is defined in section 1 of the Act as ‘the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene’.<sup>199</sup> The Minister promulgated Regulations, acting under the authority granted to him in the Act. Regulation 3 (b) set the basic water supply at 25 litres per person per day or 6 kilolitres per household per month.<sup>200</sup> The applicants did not challenge this Regulation. Instead, they argued that it set a minimum standard and that the court was entitled to determine that a greater amount of water formed the content of the right in section 27 (1) (b).<sup>201</sup> The applicants argued that 50 kilolitres per person per day was the amount ‘necessary for dignified human life’, not the minimum core of the right.<sup>202</sup>

The court drew a parallel between this argument and those based on minimum core obligations made in earlier cases.<sup>203</sup> Although the amount of water advanced by the applicants went beyond the minimum core, their arguments were driven by a desire, similar to that underlying minimum core obligation arguments, that the court set out a standard by which to measure the government’s realisation of the right. The CC rejected this argument, stating that it ‘must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*’.<sup>204</sup> In the clearest explanation of its approach to SE rights to date, the court indicated that fixing a quantified content to the right of access to sufficient water could be a ‘rigid and counter-productive’ way of dealing with the right. An approach based on reasonableness, in contrast, allowed for the court to take account of variations in context and time in adjudicating SE rights.<sup>205</sup> According to O’Regan

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<sup>198</sup> See *Mazibuko* (note 192 above) at par. 44 for a summary of the arguments the applicants made against the Plan.

<sup>199</sup> *Mazibuko* (note 192 above) at par. 22.

<sup>200</sup> *Mazibuko* (note 192 above) at par. 23.

<sup>201</sup> *Mazibuko* (note 192 above) at paras. 44, 56 and 72.

<sup>202</sup> *Mazibuko* (note 192 above) at par. 56. This distinction supports a conception of the minimum core as protecting people’s interest in survival – see the discussion of David Bilchitz’s argument above.

<sup>203</sup> *Mazibuko* (note 192 above) at par. 56.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Mazibuko* (note 192 above) at par. 60.

J, for a unanimous court, the government's duty in respect of SE rights was to take reasonable and progressive action to secure the 'basic necessities of life' to all citizens.<sup>206</sup> And rights-holders were entitled to hold government accountable for the manner in which it chose to do this.<sup>207</sup> The content of the right had to be determined in light of the content of the obligations set out in section 27 (2).<sup>208</sup>

Summarising the court's approach to the state's positive obligations in respect of the SE rights in the Constitution to date, O'Regan J held that courts would 'at least' require government to take steps to realise those rights where no steps were being taken and would review unreasonable measures to ensure that they met the standard of reasonableness.<sup>209</sup> Furthermore, government had to regularly reassess its policies to check that those policies were capable of progressively realising the rights. Courts would find government action that did not make provision for those in desperate need to be unreasonable and would order government to remove any unreasonable limitations or exclusions from its SE rights policies.<sup>210</sup> The court noted that a challenge to the reasonableness of government action required government to explain its choices by providing the information it had considered in making those choices and describing the process it had followed in formulating its policy.<sup>211</sup>

In part, then, the judges rejected the applicants' argument regarding the quantification of 'sufficient water' in section 27(1) because it represented a marked departure from their approach to SE rights, developed in earlier cases, principally *Grootboom* and *Treatment Action Campaign*.<sup>212</sup> There were two other considerations weighing against acceptance of the applicants' argument. First, the court found that the expert evidence before it did not provide a single, clear answer to the question of what constituted 'sufficient water' in the context of this case. This was a debate the court felt ill-equipped to settle.<sup>213</sup> Second, the fact that the

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<sup>206</sup> *Mazibuko* (note 192 above) at par. 59.

<sup>207</sup> *Mazibuko* (note 192 above) at par. 59.

<sup>208</sup> *Mazibuko* (note 192 above) at par. 68.

<sup>209</sup> *Mazibuko* (note 192 above) at par. 67.

<sup>210</sup> *Mazibuko* (note 192 above) at par. 67.

<sup>211</sup> *Mazibuko* (note 192 above) at par. 71.

<sup>212</sup> This approach is predicated on a concern that judges act within the constitutional and institutional parameters of their function in a democratic society – see *Mazibuko* (note 192 above) at par. 61.

<sup>213</sup> *Mazibuko* (note 192 above) at par. 62.

applicants did not challenge the minimum standard set in Regulation 3 (b) weakened their position. The court held that, as a general rule, it will be difficult for an applicant to challenge the reasonableness of a government policy based on a particular minimum standard if the applicant does not question the reasonableness of that minimum standard.<sup>214</sup> The court's reasoning on this point was as follows:

In most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied.<sup>215</sup>

The court's statement that SE rights 'empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life'<sup>216</sup> is unsettling as it implies that the SE rights in the Constitution exist to secure only minimum levels of goods such as housing, health etc.<sup>217</sup> However, O'Regan J made this statement in the context of the rationale for the SE rights in the first place – to deal with apartheid's legacy of millions of people without access to the most basic necessities of life.<sup>218</sup> Moreover, her subsequent comment that a municipality which easily provides for the minimum standard (of water, housing, health care etc) to all in its jurisdiction, within its available resources, has not necessarily acted reasonably<sup>219</sup> provides some indication that the court does not view the SE rights provisions simply as minimum entitlements.

## (5) Conclusion

The most recent jurisprudence further entrenches reasonableness as the CC's preferred tool for dealing with SE rights claims. I have argued above that the CC's early jurisprudence, though informed by the values of human dignity and substantive equality, drew quite clearly on principles of review for unreasonableness in administrative law. There is no simple answer to the question of whether this means that the CC's approach in those cases may be labelled an administrative law model. In my view, it is most accurate to say that principles of

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<sup>214</sup> *Mazibuko* (note 192 above) at par. 76.

<sup>215</sup> *Mazibuko* (note 192 above) at par. 76. The court's reasons for finding the government allocation of water to be reasonable are discussed in detail in chapter 6.

<sup>216</sup> *Mazibuko* (note 192 above) at par. 59.

<sup>217</sup> David Bilchitz (note 8 above) at 194 makes a similar point about Yacoob J's reasoning in *Grootboom* (note 4 above).

<sup>218</sup> *Mazibuko* (note 192 above) at par. 59.

administrative justice provided the court with a framework within which to adjudicate SE rights.

The question then, is whether the administrative law framework inevitably leads to weak and ineffectual adjudication of SE rights. I have argued in chapter 3 above that judicial review in administrative law has been developed, both in South Africa and the U.K., to place increasingly onerous demands on government. At the same time, South African administrative law continues to suffer from a history of formalistic legal reasoning<sup>220</sup> and the potential for rigorous scrutiny of government action often goes unfulfilled. My argument in this thesis is that this unfulfilled potential in respect of SE rights cases is not a consequence of the CC's use of an administrative law framework or its preference for reasonableness as the primary tool through which to adjudicate SE rights. Given the various interests at stake, discussed at length in chapter 1, some level of flexibility is necessary in any judicial approach to SE rights. Even the most strenuous critiques of the CC's approach to SE rights make some allowance for this.<sup>221</sup>

The widespread support for the court's early judgments on SE rights is perhaps the best argument in favour of a reasonableness paradigm. Although many commentators in South Africa criticised the decisions, those criticisms were aimed at the CC's reasoning and its failure to use the opportunities the cases presented to do more, to set clearer standards. Few scholars objected to the actual outcome in these cases.<sup>222</sup> Some scholars argued, however, that the staggeringly slow implementation of the judgments in certain cases may be traced to the court's refusal to set clear guidelines on what government had to do to comply

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<sup>219</sup> *Mazibuko* (note 192 above) at par. 74.

<sup>220</sup> See Hoexter (note 131 above).

<sup>221</sup> See the discussion of David Bilchitz's minimum core approach above.

<sup>222</sup> The CC upheld rights claims in *Grootboom*, *Treatment Action Campaign* and *Khosa*, albeit on narrow grounds. Commentary on the outcome in *Soobramoney* is more complicated because, of the four cases, it was the only one in which resource scarcity was implicated in a serious way. The court could have reached a different conclusion by interpreting 'available resources' less narrowly. In other words, instead of limiting their consideration to the resources available to the hospital, undoubtedly fixed and limited, the court could have considered the resources available to the state (see Bilchitz, note 8 above at 227-30). But consideration of budgetary allocations is something the court has shied away from out of respect for the constitutional role of executive and legislative bodies. Given the complexity of the issues involved the fairest assessment of *Soobramoney* is perhaps that given by Scott and Alston (note

with its constitutional SE rights obligations.<sup>223</sup> My argument in this thesis is that this view is based on misplaced confidence in the capacity of courts to effect major changes in government policies through their judgments.<sup>224</sup> This confidence is not justified by the experience in jurisdictions like South Africa and India. Whilst the SE rights success stories in both these jurisdictions are linked to useful judicial decisions, themselves usually quite limited, real changes in government's provision of SE goods occur when a range of factors come together. These may include, for example, a well-defined SE rights issue; a resourceful civil society organisation which supports the particular issue; relatively few resource constraints; national and international exposure of problematic government action. When even narrow judicial decisions – like that in *Grootboom* – suffer huge problems of implementation, it is naïve to think that a more rigorous judgment which placed greater and clearer demands on government would somehow have ensured greater effectiveness in the development and implementation of the housing programme.

One of my arguments in this thesis is that the goal of transforming SE conditions for the majority of South Africans would be compromised if judges did not exercise a level of restraint. Judges are right to remember that they cannot predict the consequences of sweeping judgments and they are not experts at juggling SE priorities, especially when the information litigants place before them is limited to a narrow set of issues. CC judgments on SE rights show that the judges are alive to concerns about the limits of their role. The judgments contain many indications of the factors influencing the intensity of review. But the role and weight of these factors are not clearly articulated. In the absence of real engagement with the factors which inform how rigorously a court will interrogate government action, it is difficult to assess whether judicial caution in the context of SE rights claims is an appropriate

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25 above) at 243-4 that what was missing from the judgment was a 'more self-conscious justification' for the 'utilitarian ethics' it applied in the case.

<sup>223</sup>

Bilchitz (note 8 above) at 151.

<sup>224</sup>

As Dennis Davis points out, by the time the *Grootboom* case came before the CC, government's economic policy had shifted from one focused on reconstruction and development to one centred on economic growth (note 67 above at 697 and note 132 above at 315). See further T Madlingozi 'Post-Apartheid social movements and the quest for the elusive New South Africa' (2007) 34 *Journal of Law and Society* 77 at 78-81. Davis notes that it is unlikely that the Constitution can be read as prohibiting a particular kind of economic policy. But policy decisions may be limited by constitutional requirements, such as those in the SE rights provisions (note 67 above at 691, note 9). This indicates that, whilst CC judgments can force government bodies to take into account constitutional imperatives, the court cannot force a change to macroeconomic policy (see, further, Davis, note 67 above at 698).

response to the limitations of the judicial role or judicial avoidance of the obligations which that role entails. These ideas are explored further in chapter 6 below. The most recent SE rights cases shed further light on the CC's model of SE rights adjudication. Some of the issues which have emerged from these cases merit discussion here.

Justice O'Regan's account of the court's approach to SE rights in the *Mazibuko* case confirms, in unambiguous terms, a number of the criticisms made by commentators like David Bilchitz. For the CC, SE rights adjudication turns on the definition of state obligations vis-à-vis the rights, rather than a quantification of the content of the right.<sup>225</sup> The court has indicated that, of the obligations set out in sections 26 (2) and 27 (2), government's key duty is to take reasonable measures to give effect to the rights. Any findings as to the content of the SE rights in the judgments are incidental to an analysis of the extent of the state's obligations. In addition, the SE rights entitle a litigant primarily to procedural relief - insisting that government take some steps, getting those steps reviewed for reasonableness, insisting that government provide access to relevant information, holding government accountable for the *manner* in which it goes about realising SE rights. These points are not new - they flow from the CC's choice of reasonableness as the main tool through which to adjudicate SE rights. The *Mazibuko* judgment is simply the CC's clearest articulation of its approach to date. For the reasons set out above in relation to the court's earlier cases, my view is that an approach which uses the obligations in sections 26 (2) and 27 (2)<sup>226</sup> as its focal point is capable of placing onerous demands on government whilst, at the same time, allowing government the opportunity to make decisions about its SE priorities.

The fact that the CC's approach is heavily tilted toward procedural relief is more worrying. It is important to acknowledge the value of procedural protections - in acceding to judicial demands for information and greater transparency, government is often forced to confront and deal with deficiencies in its programmes.<sup>227</sup> Changes in government's water policy in the course of litigation in the *Mazibuko* matter is an example of this.<sup>228</sup> Procedural

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<sup>225</sup> *Mazibuko* (note 192 above) at par. 46.

<sup>226</sup> As noted above, reasonableness is the key such obligation in terms of the CC's jurisprudence.

<sup>227</sup> See Davis (note 67 above) at 710-11.

<sup>228</sup> *Mazibuko* (note 192 above) at par. 96.

relief can lead to substantive benefits, as illustrated by the *Olivia Road* decision, discussed earlier. But a categorical indication that the SE rights provisions in the Constitution only give rise to procedural benefits is problematic. I have argued above that this does not necessarily flow from the CC's choice of reasonableness as the main instrument through which to adjudicate SE rights claims. It has always been difficult to draw a bright line between procedure and substance in the judicial review of administrative action. This is especially so when the ground of review is unreasonableness. Review for unreasonableness often goes to the substance of a decision.<sup>229</sup> One of the main advantages of a reasonableness-based approach is its flexibility. Courts may vary the level of scrutiny to suit the circumstances of the case. If variability is to operate as a mechanism for balancing various interests in SE rights cases and not merely translate into weak review in all cases, it must allow courts to interrogate the substance of government's actions in appropriate cases. The question then is whether the *Mazibuko* decision is an indication that the CC judges view the SE rights provisions in the Constitution as giving rise to procedural relief only, irrespective of the context of the particular case. I address this question in chapter 6 below.

A related issue is whether the CC uses procedural remedies to their greatest effect. The potential for a requirement of meaningful engagement to compel government to find workable solutions to SE problems through consultation with rights-holders was somewhat diluted by indications in *Joe Slovo* that even unsystematic, haphazard consultation with stake-holders would suffice. The court has emphasised the notion of individual agency in its meaningful engagement jurisprudence. The act of engagement underscores the fact that rights-holders are active participants, rather than helpless victims, in the process of securing SE goods like housing and health care. This belies the fact that the parties to this kind of engagement are often not equally powerful or well-resourced. One of the arguments made by the residents in *Joe Slovo* was that, once the court had handed down an eviction order, further engagement would be compromised by a decidedly unequal relationship between government officials and the residents.<sup>230</sup> This was especially true of engagement on the question of whether the residents had to be relocated while the area was developed. This was

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<sup>229</sup> See chapter 3 above.

<sup>230</sup> *Joe Slovo* (note 94 above) at par. 402 (Sachs J).

one of the main areas of contention in the case and the eviction order removed any real incentive for government to consult with the residents on the possibility of on site upgrading of the Joe Slovo settlement. Furthermore, granting an eviction order in the face of major flaws in the engagement process sends a message to government agencies that they need not take the notion of meaningful engagement too seriously. Whether the urgency of the situation, the potential hardship to other interested parties, the foreseeable benefits to the residents themselves and the overall merit of the development are sufficient justification for the court's approach are questions I examine in chapter 6.

## Chapter Five

### Using reasonableness to enforce social and economic guarantees in the United Kingdom

#### (1) Introduction

As indicated earlier in this thesis, the respective sources of social and economic (SE) guarantees in South Africa and the U.K. are significantly different in nature. Whilst the South African Constitution contains directly justiciable SE rights, in the U.K., interests in goods like housing, medical treatment and social security are protected in a number of statutes. Decisions made in terms of social welfare legislation are subject to judicial review on the basis of the grounds developed in administrative law and discussed at length in chapter 3 of this thesis. The incorporation of the European Convention on Human Rights (ECHR) into domestic law through the Human Rights Act (HRA) of 1998 provides a second avenue through which courts in the U.K. make judgments on the SE entitlements of people in this country. Although the ECHR does not contain SE rights in the form of specific rights to food, water, health care and housing, for instance, courts have interpreted provisions such as the right to respect for family and private life, in Article 8, to include the protection of various SE interests.

Courts in both jurisdictions are grappling with the question of the appropriate constitutional role of the judiciary, albeit in very different contexts. South Africa has moved from a system of parliamentary sovereignty to one of constitutional supremacy, in which judges may strike down legislation or policy on the basis that it conflicts with fundamental rights protected in the Constitution. In the U.K., there has been significant academic questioning of whether parliamentary sovereignty is still the bedrock of the law it once was, related to changes in the way judges approach cases.<sup>1</sup> This questioning was intensified after

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<sup>1</sup> See, for example, J Jowell 'Parliamentary Sovereignty under the New Constitutional Hypothesis' (2006) *Public Law* 562 at 571, discussing the House of Lords decision in *R. (on the application of Jackson v Attorney-General)* [2006] 1 A.C. 262 (HL); S Palmer 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' (2000) 20(1) *Oxford Journal of Legal Studies* 63 at 63. See also E Palmer (2007) *Judicial Review, Socio-economic Rights and the Human Rights Act* (Hart Publishing: Oxford and Portland, Oregon) at 152; P Craig 'Ultra vires and the foundations of judicial review' (1998) 57 *Cambridge Law Journal* at 63; D Oliver 'Is the ultra vires rule the basis of judicial review?' (1987) *Public Law* 543 at 543.

the HRA came into force. Even under the HRA, however, judges are not empowered to strike down legislation or policy. And, whilst the centrality of parliamentary sovereignty has been challenged, there are a considerable number of decisions in which courts are careful to acknowledge its sustained importance. In the relatively recent case of *Hooper*, for example, Lord Hope held that, ultimately, if parliamentary intent cannot be interpreted consistently with Convention rights, the rights give way – parliamentary intent is paramount.<sup>2</sup>

In this chapter, I begin by discussing current U.K. debates regarding the constitutional protection of SE rights. In this discussion, I point to some of the significant differences between SE rights protection in South Africa and in the U.K. The discussion illustrates that, whilst one must be mindful of these differences, South African and U.K. contexts are presenting judges with very similar challenges. I move on to examine the approach of U.K. courts to the adjudication of cases in which SE rights are implicated. As my principal interest lies with the efficacy of reasonableness as a judicial tool for interpreting SE rights, the cases I am interested in are those in which judges have made use of some version of reasonableness. These are primarily cases in which courts apply administrative law grounds of review to test the legality of governmental decisions made in the implementation of SE legislative provisions, and cases based on article 8 of the HRA. With article 8 cases, courts are required to engage in a structured proportionality analysis when considering whether limitations of the right are legitimate. These cases provide a basis from which to consider the value of structured proportionality tests, as opposed to a consciously variable standard of reasonableness, in adjudicating SE rights.

I do not attempt an exhaustive discussion of cases in the two categories described above. I have selected cases that have become influential in the jurisprudence on SE rights and interests – cases which suggest a general approach to the issues raised in SE rights cases, rather than ones that reflect more narrowly on the particular dispute. The aims of this study

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<sup>2</sup> *R. (Hooper) v Secretary of State for Work and Pensions; R. (Withey) v Same; R. (Naylor) v Same; R (Martin) v Same* [2005] UKHL 29. See similar statements by Lord Scott at par.92 and Lord Brown at pars. 122 and 123. See also Lord Nicholls for the court in *In Re S (Minors) (Care Order: Implementation of Care Plan); In Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 2 AC 91 at pars. 25 and 35. The fact that Parliament did not intend courts to exercise a supervisory role over child care orders played a very significant role in the reasoning.

are as follows. First, I draw on the cases to show that U.K. courts are already engaging with SE rights issues. Second, I examine the extent to which reasonableness features as a judicial tool for dealing with cases in which SE rights are implicated. Third, I consider how rigorous a standard of review courts are willing to apply in these cases. Finally, I make some tentative points about the reasoning behind different levels of scrutiny. I build on these tentative conclusions in chapter 6.

## **(2) Bill of Rights debates: implications for the protection of social and economic rights in the United Kingdom**

Discussion of a U.K. Bill of Rights could trigger a more radical questioning of the centrality of parliamentary sovereignty in U.K. law but government's approach to the justiciability of any potential Bill of Rights has, thus far, been cautious. This caution is especially apparent in proposals about the place of SE rights in such a Bill of Rights. The fact that government has shown an interest in including SE rights, in any form, in a Bill of Rights is something of a change in direction – as Conor Gearty recently put it:

Under Gordon Brown, Labour has even shown a tentative interest in extending protection into the realm of social and economic rights: its discussion paper on a bill of rights and responsibilities was widely mocked when it appeared early last year and the idea has been shelved until after the election, but it reflected the mild leftward drift of a government that seemed to be heading towards an election that was already lost.<sup>3</sup>

But indications are that, even were such a Bill of Rights to be adopted at some point in the future, the role of courts in adjudicating SE entitlements would not be far removed from their current role in this area.<sup>4</sup>

In its 2008 report on a Bill of Rights for the U.K., Parliament's Joint Committee on Human Rights agreed with government that fully justiciable SE rights would risk courts intruding on the legislative mandate to exercise choices about social welfare policy and priorities.<sup>5</sup> The committee proposed a model falling somewhere between fully justiciable SE

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<sup>3</sup> 'Terms of art' *London Review of Books* Vol. 32, No. 5, 11 March 2010, p 27-29.

<sup>4</sup> Especially since the 'mild leftward drift' Gearty refers to is likely to be curtailed under the new coalition government.

<sup>5</sup> Joint Committee on Human Rights Report 'A Bill of Rights for the U.K.?', Twenty-ninth Report of Session 2007-08, published on 10 August 2008, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>, last accessed on 12 March 2010 at 47, par. 167.

rights and directive principles intended merely to guide government policy.<sup>6</sup> In terms of this model, courts would be assigned a role in giving effect to constitutionally protected SE rights but that role would be carefully circumscribed:

On this third model, implementation of the basic commitments spelled out in the Bill of Rights is still primarily through democratic processes rather than the courts, but with the possibility of a degree of judicial involvement in extreme cases... Individuals do not have legally enforceable rights against the State to full protection of the rights recognised by the Bill of Rights. But resort to the courts might be possible if one particular vulnerable group was being neglected altogether, because then the State is failing to take reasonable legislative and other measures, within available resources, to achieve progressive realisation of the rights. So there is scope for some judicial role in enforcing the constitutional provision, but the caveats<sup>7</sup> surrounding the definition of the rights mean that there is very little scope indeed for judicial interference with the setting of priorities.<sup>8</sup>

The Committee based this 'hybrid model' on its understanding of the South African Constitutional Court's (CC's) jurisprudence on SE rights.<sup>9</sup> On the Committee's assessment of the South African approach, the concept of unreasonableness borrowed from English administrative law sets a very high threshold for a judicial determination that one of the SE rights has been infringed. This ensures that courts may only intervene when there are 'very serious or large-scale violations' of SE rights.<sup>10</sup> In a further indication of how limited a role courts would have in implementing SE rights contained in a potential U.K. Bill of Rights, the Committee proposed that various terms be added to the South African Constitution's formulation of SE rights to ensure that the role of the courts is 'appropriately limited'.<sup>11</sup>

The use of South African jurisprudence in the Joint Committee's report is interesting for two reasons. First, the Committee's assessment of the jurisprudence, whilst not inaccurate, is selective. The terms 'progressive realisation'; 'within available resources'; and 'reasonable legislative and other measures' are based on the formulation of SE rights in

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<sup>6</sup> Note 5 above at 49, par. 172.

<sup>7</sup> Such as progressive, rather than immediate, realization of the rights, and a duty on that state only to take reasonable legislative and other measures and to act within its available resources.

<sup>8</sup> Note 5 above at 49, par. 172.

<sup>9</sup> Note 5 above at 53, par. 192. The report draws on information gleaned from a Committee visit to South Africa (19-23 November 2007), as well as informal discussions with Justice O'Regan, then of the South African CC – note 5 above at 8, pars. 8-9.

<sup>10</sup> Note 5 above at 48, par. 171.

<sup>11</sup> Note 5 above at 53, par. 192. For these additional qualifications, see note 5 above at 54, par. 192 'Judicial Review'.

international law.<sup>12</sup> The South African constitutional text does not place further limitations on the rights. The CC's decision to focus on the concept of reasonableness in adjudicating the rights allows it to respond to concerns about resource allocation and polycentricity in particular cases. As I have argued in chapters 3 and 4, the use of reasonableness – even reasonableness based on judicial review in administrative law – does not necessarily mean that the courts may 'respond only to very serious or large-scale violations'.<sup>13</sup> The fact that most of the South African SE rights cases successfully argued before the courts, have turned on large-scale violations, or the unjustifiable exclusion of vulnerable groups from SE entitlements, is a consequence of the South African social, economic and historical context. The nature of the cases is not an indication that the Constitution or the CC's model for SE rights adjudication is based on the principle that other, less serious cases, do not belong before the courts. Furthermore, not all of the South African cases deal with 'extreme' situations. *Port Elizabeth Municipality*, for example, turned on the most equitable means of conducting the eviction of about 68 people from privately owned land. It was not a large-scale violation or a case in which a vulnerable group had simply been excluded from SE benefits.<sup>14</sup> Most importantly, the Joint Committee's report fails to appreciate that, even when the SE rights violation is not as obvious as it was in cases like *Grootboom*<sup>15</sup> and *Treatment Action Campaign*,<sup>16</sup> and a case is argued unsuccessfully before the CC, the process of litigation often causes government to revisit and to amend its policies to more effectively take account of SE rights concerns.<sup>17</sup> This cannot happen if the constitutional text prevents the cases from even being brought before the courts.

The absence of any mention of the differences in context between the U.K. and South

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<sup>12</sup> Article 2, International Convention on Economic, Social and Cultural Rights (ICESCR).

<sup>13</sup> Note 5 above at 48, par. 171.

<sup>14</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>15</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>16</sup> *Minister of Health and others v Treatment Action Campaign and others (No. 2)* 2002 (10) BCLR 1033 (CC).

<sup>17</sup> *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening)* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) is a good example here, as is *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

Africa is a second interesting feature of the Joint Committee's Report.<sup>18</sup> Limited resources and poor infrastructure are a much more serious concern in South Africa, as the country moves from a system of first-rate service delivery for a minority of the population to a more equal distribution of resources. The majority of South Africans still live without the most basic of SE goods, such as safe and hygienic shelter and access to clean drinking water. In addition to making decisions about SE priorities, policy-makers also have to grapple with the absence of a functional infrastructure for the provision of SE goods.<sup>19</sup> It is in this context that the CC judges have felt themselves to be ill-equipped to apply the most searching standards of scrutiny when interrogating government action. But, as O'Regan J noted in the *Mazibuko* case, a municipality which easily provides for the minimum standard (of water, housing, health care etc.) to all in its jurisdiction, within its available resources, has not necessarily acted reasonably.<sup>20</sup> This is an indication that SE rights claims do not have to involve the most obvious, large-scale infringements of SE rights for them to be successfully argued before the court. Whether the CC has found the right balance between deference to government's democratic mandate and fulfillment of its own duty to give legal effect to the rights is something I consider in chapter 6. But, to interpret the CC's model as based on a principle that the only justiciable SE rights cases are those based on large-scale violations of SE rights or unjustifiable discrimination against groups in the provision of SE goods is a mistake.

In contrast to South Africa, the U.K. is the world's fourth-largest economy.<sup>21</sup> Whilst resources are naturally not limitless in the U.K., they are certainly less of a constraining factor in the delivery of SE rights. Further, provision of SE goods is not complicated by comparably poor service-delivery mechanisms. The source of the U.K. government's antipathy to judicially enforceable SE rights then, lies primarily with a desire to maintain a separation of governmental powers and with a lingering commitment to parliamentary

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<sup>18</sup> This is a point to which Ewing has alluded in 'Judicial Review, Socio-Economic Rights and the Human Rights Act; Weak Courts, Strong Courts: Judicial Review and Social Welfare Rights in Comparative Constitutional Law' Book Review (2009) 7(1) *International Journal of Constitutional Law* 155 at 160-1. He argues that the expense and time involved in the Committee's visit to South Africa would have been better spent on carefully examining the texts of Constitutions of countries closer to the U.K.

<sup>19</sup> As illustrated by *Mazibuko* (note 17 above), discussed in chapter 3 above.

<sup>20</sup> *Mazibuko* (note 17 above) at par. 74.

<sup>21</sup> Ewing (note 18 above) at 165.

supremacy.<sup>22</sup> The Joint Committee's list of ten factors that courts must consider when assessing the reasonableness of government measures to give effect to the SE rights includes caveats which are common to international law and the South African Constitution – the duty to take into account the availability of resources, for instance. The fact that there is a list of additional factors, and the nature of most of those additional factors, serve to strongly reinforce the idea that U.K. courts would have only a marginal role to play in giving effect to constitutional SE rights.

Common SE rights clauses include phrases like 'progressive realisation' and 'within available resources' as explicit acknowledgements that states are not expected to give effect to the full gamut of SE rights immediately. But, depending on how a court interprets them, these caveats could still require courts to ask searching questions of government: is government taking steps to progressively realise the rights? Is a particular governmental measure retrogressive? Do government measures make use of its available resources? The Joint Committee's formulation includes the following additional considerations, relevant in every SE rights case: 'the latitude inherent in a duty to achieve the realisation of the rights progressively'; 'the fact that a wide range of measures is possible to meet the Government's obligations'; and 'the availability of an alternative means of realising the rights is not, of itself, an indication of unreasonableness'.<sup>23</sup> These factors do not require the court to ask any questions of government. Instead, they require a court to make a number of assumptions in government's favour. These factors are not necessarily appropriate in every SE rights case. In South Africa, *Treatment Action Campaign*<sup>24</sup> is an example of a case where a wide range of measures to meet government's obligations simply did not exist in the circumstances of the case. The factors in the Joint Committee's proposed SE rights clause makes reasonableness less of a flexible device to be tailored to the requirements of particular cases and more a mechanism to guarantee weak review in all SE rights cases.

The caution over SE rights is even more pronounced in the Ministry of Justice 2009

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<sup>22</sup> See Ewing (note 18 above) at 162-3.

<sup>23</sup> Note 5 above at 54, par. 192 'Judicial Review'.

<sup>24</sup> Note 16 above, discussed in chapter 3 above.

Green Paper 'Rights and responsibilities: developing our constitutional framework'.<sup>25</sup> The Green Paper underlines government's view of parliamentary sovereignty as the foundation of the U.K. constitution.<sup>26</sup> The job of deciding how social entitlements are distributed rests with elected representatives, democratically accountable to their constituents.<sup>27</sup> Courts are an inappropriate forum for decision-making on SE matters in general:

Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.<sup>28</sup>

The paper makes it clear that new, individually enforceable SE rights would not form part of government proposals for a Bill of Rights. Instead, the paper encourages discussion on the benefits of distilling constitutional principles from existing welfare provisions.<sup>29</sup>

As indicated in chapter 1, limitations on what judges may do in the arena of SE rights implementation do not necessarily signify a lack of commitment to the protection of these rights. It is dangerously inaccurate to cast judges in the role of staunch protectors of SE rights and to assume that legislators and policy-makers see the rights as tiresome limitations on their ability to pursue their political agendas. As pointed out by Gearty, in the context of the HRA, '[t]he fact that the current generation of judges is largely liberal may yet prove as historically anomalous as the progressive Warren Supreme Court in the United States'.<sup>30</sup> So limiting the role of courts in implementing SE rights could serve to protect a future government's SE agenda from judges eager to preserve private economic interests, for example. But, at the same time, flaws in the political process mean that the rights of poor people often lose out to the interests of more vocal, economically powerful groups.<sup>31</sup> Most worryingly, judges, legislators and policy-makers may act together to preserve an

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<sup>25</sup> Ministry of Justice Green Paper 'Rights and responsibilities: developing our constitutional framework', March 2009, available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>, last accessed on 12 March 2010.

<sup>26</sup> Note 25 above at 57, par. 4.27.

<sup>27</sup> Note 25 above at 43, par. 3.52.

<sup>28</sup> Note 25 above at 43, par. 3.52.

<sup>29</sup> Note 25 above at 43, par. 3.53.

<sup>30</sup> Gearty (note 3 above). See also Ewing (note 18 above) at 163.

<sup>31</sup> Ewing (note 18 above) at 168. This argument is canvassed more fully in chapter 1 above.

‘inegalitarian status quo’.<sup>32</sup> In modern democracies, neither serious political will supporting SE rights nor a judicial commitment to their protection may be assumed. In these circumstances, important reasons exist for judges to play some role in SE rights implementation but, at the same time, for that role to be limited.

Whilst the differences in context need to be borne in mind, South Africa and the U.K. are facing very similar questions about the role of judges in giving effect to SE rights. Though South African judges are constitutionally mandated to adjudicate SE rights claims, they must do so taking the internal limitations in the SE rights provisions, as well as the limits of their broader constitutional role into account. In the U.K., government discussion of a future Bill of Rights to date is a strong indication that such a document is unlikely to give courts any further powers of review, especially in the area of SE rights. If the kind of Bill of Rights suggested in government discussion documents comes into being, decided cases with SE rights implications will provide a foundation upon which courts will build an approach to the adjudication of tightly circumscribed SE rights. If a Bill of Rights does not materialise from recent discussions, Article 8 of the HRA and judicial review of administrative decisions will continue to provide the primary means through which individuals may approach the courts to challenge governmental decision-making on SE rights and interests. Whatever happens, existing jurisprudence in this area will continue to be important.

### **(3) Relevant United Kingdom cases**

In the discussion that follows, I examine a selection of U.K. cases, decided both before and after the HRA came into affect, to identify patterns in the higher courts’ approach to cases with SE rights implications. I am particularly interested in the extent to which judicial attitudes to cases involving SE matters is changing, and in the levels of scrutiny courts use when assessing government action in this area.

*Cambridge Health Authority* represents the orthodox position on the justiciability of resource allocation decisions and continues to be referred to by judges as a starting point in the adjudication of similar SE rights issues. The case concerned a father’s application for

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<sup>32</sup> Gearty (note 3 above).

judicial review of the health authority's refusal to provide further treatment to his daughter. She was suffering from non-Hodgkin's lymphoma and common acute lymphoblastic leukaemia.<sup>33</sup> The court acknowledged that the interests of a young child in life itself was at stake but held that the only question for it was whether the decision was lawful.<sup>34</sup> On this question, the court found that the health authority had not exceeded its powers and that its decision was reasonable.<sup>35</sup> The judgment of Lord Bingham MR reinforced 'the non-justiciability of resource allocation decisions founded on *Wednesbury* reasonableness'.<sup>36</sup> He disagreed with the judge in the court of first instance who required the health authority to 'explain the priorities that have led it to decline to fund the treatment' noting that:

Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not *advancing before the court* [my emphasis].<sup>37</sup>

A different approach may not have affected the result of this case. The weight of the medical evidence indicated that the medical procedure would have had little chance of success.<sup>38</sup> But, the fact that the court was not willing to require from the health authority that it provide evidence supporting its claims illustrates just how limited a role was envisaged for judges acting in cases concerned with the allocation of health care services. The resource limitations on the health authority were taken as a given<sup>39</sup> and Lord Bingham MR expressed the view that it was not realistic to expect a health authority to demonstrate before the court, with reference to its accounts, that if treatment were provided to the child in question, another patient would be deprived of some comparable procedure.<sup>40</sup> Beyond stating that '[n]o major health authority could run its financial affairs in a way which would permit such a demonstration',<sup>41</sup> Lord Bingham MR did not indicate why he considered such an expectation to be utterly far-fetched. Moreover, the issue of transparency in this case was set up as a choice between two extremes: the health authority had no obligation to justify its choices or

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<sup>33</sup> *Regina v Cambridge Health Authority, ex parte. B* [1995] 1 W.L.R. 898 at 900.

<sup>34</sup> *Cambridge Health Authority* (note 33 above) at 905.

<sup>35</sup> *Cambridge Health Authority* (note 33 above) at 907.

<sup>36</sup> E Palmer (note 1 above) at 164. See also 207-10.

<sup>37</sup> *Cambridge Health Authority* (note 33 above) at 906.

<sup>38</sup> *Cambridge Health Authority* (note 33 above) at 905-6.

<sup>39</sup> *Cambridge Health Authority* (note 33 above) at 906.

<sup>40</sup> *Cambridge Health Authority* (note 33 above) at 906.

<sup>41</sup> *Cambridge Health Authority* (note 33 above) at 906.

had to engage in the medical equivalent of itemised billing, showing a direct, knock-on, adverse effect on one patient of providing treatment to another. An explanation for a particular policy need not contain that level of detail.

The Court of Appeal's approach in *North-West Lancashire Health Authority v A, D, and G*,<sup>42</sup> marked a departure from the established position represented by *Cambridge Health Authority*. The three applicants concerned challenged the health authority's refusal to provide funding for their gender reassignment surgery. Lord Justice Auld began from a similar position as that taken by the Court of Appeal in *Cambridge Health Authority*. He noted that decisions regarding allocation of resources and medical priorities rested within the health authority's judgment, provided it fulfilled its legislative obligation to 'meet the reasonable requirements of all those within its area for which it is responsible'.<sup>43</sup> The court accepted as rational the health authority's determination that transsexualism was an illness of low priority and that treatment for it would only be provided in 'exceptional circumstances'.<sup>44</sup> The court held that this rational assessment was unassailable 'provided the policy genuinely recognises the possibility of there being an overriding clinical need and requires each request for treatment to be considered on its individual merits'.<sup>45</sup> However, the authority was reluctant to accept gender reassignment surgery as a successful treatment for transsexualism. As the authority did not recognise the existence of an effective treatment which it would fund, the undertaking that treatment would be provided in exceptional cases that is, where there was some 'overriding clinical need', was meaningless.<sup>46</sup>

The Court of Appeal unanimously quashed the policies of the health authority to the extent that they concerned gender reassignment surgery and ordered the authority to reconsider its policy and the three decisions involved here on their merits. The court was prepared to leave a large amount to the discretion of the health authority, demanding simply that it act within the parameters of its own policy. Although the court did not direct the authority as to what priority the illness should take, it made an order requiring the authority

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<sup>42</sup> [2000] 1 WLR 977.

<sup>43</sup> *North-West Lancashire Health Authority* (note 42 above) at 991.

<sup>44</sup> *North-West Lancashire Health Authority* (note 42 above) at 991.

<sup>45</sup> *North-West Lancashire Health Authority* (note 42 above) at 991.

<sup>46</sup> *North-West Lancashire Health Authority* (note 42 above) at 993.

to give proper credence to its own acceptance that transsexualism was an illness.<sup>47</sup> Lord Justice Auld noted in passing that it could well be irrational for such an authority not to have a policy aimed at allocating resources according to its stated priorities (not in issue here as such policies were in place).<sup>48</sup> He went on to set out additional criteria a health policy would have to meet. A general policy was acceptable but there had to be space within that policy for judges to consider each case on its merits in determining whether there was some overriding clinical need.<sup>49</sup> In deciding on its priorities, the relevant health authority had to accurately ‘assess the nature and seriousness of each type of illness’; ‘determine the effectiveness of various forms of treatment for it’; and ‘give proper effect to that assessment and that determination in the formulation and individual application of its policy’.<sup>50</sup>

The reasons for the approach taken here are elaborated on in Lord Justice Buxton’s judgment. Noting that the only requirement was that the decision be ‘rationally based upon a proper consideration of the facts’,<sup>51</sup> he held that, in the face of a significant amount of medical opinion in support of the procedure, the health authority could not simply dismiss its efficacy without giving some reasons for this attitude.<sup>52</sup> Although the standard of review applied was still very much rationality, the case was an indication that the complexity of the matter at hand is not a bar to justiciability.

When one considers what might have given rise to the difference in approach in *Cambridge Health Authority*, a number of possibilities are apparent. For one thing, in the *Lancashire Health Authority* decision, the weight of medical evidence contradicted the health authority’s views on gender assignment surgery. Furthermore, the health authority’s approach to these cases was inconsistent with its own policy, in terms of which transsexualism was an illness for which it would provide treatment. Thus, the court in *Lancashire* was not called upon to question the health authority’s own assessment of its priorities. The tenor of the judgment in *Cambridge Health Authority* indicates that the court

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<sup>47</sup> *North-West Lancashire Health Authority* (note 42 above) at 994-5.

<sup>48</sup> *North-West Lancashire Health Authority* (note 42 above) at 991.

<sup>49</sup> *North-West Lancashire Health Authority* (note 42 above) at 991.

<sup>50</sup> *North-West Lancashire Health Authority* (note 42 above) at 991-2.

<sup>51</sup> *North-West Lancashire Health Authority* (note 42 above) at 997.

<sup>52</sup> *North-West Lancashire Health Authority* (note 42 above) at 998.

considered any interrogation of the Health Authority's justification for its policy to be tantamount to challenging that policy, something it was not prepared to do.

In *R. (on the application of Rogers) v Swindon NHS Primary Care Trust*<sup>53</sup> the Court of Appeal developed its approach in *Lancashire Health Authority*. The Court of Appeal had to review the refusal by the Primary Care Trust (PCT) to fund the appellant's treatment for breast cancer with an, as yet, unlicensed drug. The question for the court was whether the PCT had acted lawfully and rationally.<sup>54</sup> The court held that the PCT had acted irrationally as it had paid insufficient attention to its own policy. The policy made it clear that the sizeable cost was not relevant,<sup>55</sup> and that unlicensed drugs would be provided in exceptional circumstances. But the PCT did not place any medical evidence indicating that a distinction could be made in the clinical needs of breast-cancer sufferers before the court.<sup>56</sup> Thus, there was no basis on which the drug could be provided to some patients and not others, making nonsense of the notion of 'exceptional circumstances'.<sup>57</sup> There are obvious similarities between this case and *North-West Lancashire Health Authority*, discussed above and referred to as authority in *Rogers*.<sup>58</sup>

It should be noted that, as in *North-West Lancashire Health Authority* above, the judgment in *Rogers* was limited in the sense that the court left a large amount of the discretion as to how to formulate a lawful policy to the PCT.<sup>59</sup> Furthermore, the court made it quite clear that, had the issue of scarcity of resources been taken into account by the PCT, the policy could not have been attacked as irrational.<sup>60</sup> Syrett argues that, due to advances in medical technology, the rationing of health care resources has become more visible to the public where once it was 'practised in an "implicit" form as medical professionals, having

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<sup>53</sup> [2006] 1 W.L.R. 2649.

<sup>54</sup> *Rogers* (note 53 above) at 2651. For a fuller discussion of the facts, see the judgment of Sir Anthony Clarke MR at 2649 – 2653.

<sup>55</sup> *Rogers* (note 53 above) at 2661.

<sup>56</sup> *Rogers* (note 53 above) at 2660.

<sup>57</sup> *Rogers* (note 53 above) at 2672.

<sup>58</sup> *Rogers* (note 53 above) at 2673.

<sup>59</sup> *Rogers* (note 53 above) at 2673; see also K Syrett 'Opening eyes to the reality of scarce health resources? *R. (on the application of Rogers) v Swindon NHS Primary Care Trust and Secretary of State for Health*' (2006) *Public Law* 664 at 667.

<sup>60</sup> *Rogers* (note 53 above) at 2671 and Syrett (note 59 above) at 669-70.

internalised resource constraints, presented allocative decisions to patients as matters of clinical judgment'.<sup>61</sup> This development demands that there be a more transparent system in place, with guidelines for making necessary assessments.<sup>62</sup> Both this case and *Lancashire Health Authority* may be viewed as requiring transparency, rather than something more substantive, from public bodies. In particular, when scarcity of resources is a concern, as it always is in matters of public health, the point at which a court is willing to intervene may be determined by whether the authority concerned is willing to admit the role that scarcity of resources plays.<sup>63</sup> What this also means is that, in any case in which a public body simply raises scarcity of resources, the court may be unwilling to intervene.

In *Regina v. Secretary of State for Social Security ex parte. Joint Council for the Welfare of Immigrants; Regina v Secretary of State for Social Security ex parte. B*,<sup>64</sup> decided two years before *Lancashire*, the Court of Appeal was willing to apply a more rigorous standard of review in a judgment with implications for the allocation of public funds outside the context of health care. The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations of 1996 excluded from the definition of 'asylum seeker' those who sought asylum at any point later than upon their entry into the U.K.<sup>65</sup> and those who were in the country pending appeals after their claims for asylum had been rejected by the Secretary of State for the Home Department.<sup>66</sup> Consequently, these individuals would no longer be entitled to 'urgent cases payments'.<sup>67</sup> The Regulations were aimed at 'discouraging unfounded applications from those who are actually economic migrants' whilst, at the same time, making sure that genuine asylum seekers continue to find a safe haven in the country.<sup>68</sup>

In his dissenting judgment, Neill LJ considered the judicial role in cases like this, where subordinate legislation enacted in terms of one statute impacts on fundamental rights

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<sup>61</sup> Syrett (note 59 above) at 668.

<sup>62</sup> Syrett (note 59 above) at 668. See also 671.

<sup>63</sup> Syrett (note 59 above) at 671.

<sup>64</sup> [1997] 1 W.L.R 275.

<sup>65</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 281.

<sup>66</sup> The Regulations did allow for some exceptions to this - *Joint Council for the Welfare of Immigrants* (note 64 above) at 283.

<sup>67</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 281, 283.

<sup>68</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 280.

granted in another statute or under the common law. He held that judges are empowered to intervene in these cases where the interference with the right is disproportionate to the objective sought to be achieved<sup>69</sup> but engaged in a cursory proportionality analysis. Whilst acknowledging the ‘very serious effect’ the Regulations would have on significant numbers of genuine asylum seekers, Neill LJ stated that Parliament had entrusted the allocation of resources in this area to the Secretary of State and the balance opted for could not be said to be unlawful, given the purpose of the legislation and its results. This reasoning supports Julian Rivers’ observation that British courts tend to treat proportionality as a question of necessity (asking whether the decision or Regulation was necessary to achieve the desired objective) rather than as a question of balancing.<sup>70</sup> In a true balancing exercise, fundamental rights may sometimes be so important as to trump the governmental objective. With an enquiry into necessity, the only relevant question is whether the governmental objective may be achieved in any other way. In such a process, the government objective is often upheld, irrespective of its relative importance or the detrimental impact on individuals.<sup>71</sup>

In contrast, Simon Brown LJ, writing for the majority, pointed out that the Regulations had an untenable impact on many genuine asylum seekers, forcing them to remain in the U.K. with no means of financial support<sup>72</sup> or to return to the countries in which they had experienced serious persecution and from which they were attempting to escape.<sup>73</sup> Simon Brown LJ was well aware that he was taking the jurisprudence in the area a step further as this was not a case in which the state authority had interfered directly with existing fundamental rights. Rather, the judgment here required the Secretary of State to maintain some provision of benefits to asylum seekers in order to protect those among them who would turn out to have genuine claims to have their rights protected.<sup>74</sup> But, he went on to hold that the Regulations were ‘so uncompromisingly draconian in effect that they must indeed be held ultra vires.’<sup>75</sup> He observed that the Regulations:

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<sup>69</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 282-3.

<sup>70</sup> J Rivers ‘Proportionality and Variable Intensity of Review’ (2006) 65(1) *Cambridge Law Journal* 174 at 190.

<sup>71</sup> See discussion of Rivers’ argument in section 4 of this chapter.

<sup>72</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 286.

<sup>73</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 283 – 4.

<sup>74</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 292.

<sup>75</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 293.

contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation.<sup>76</sup>

Simon Brown LJ used a standard of proportionality in making his determination. In a balancing of the Secretary of State's right to limit benefits in order to discourage economic migrants,<sup>77</sup> and the serious impact of the legislation on genuine refugees, the seriousness of the adverse impact on affected parties weighed more heavily for Simon Brown LJ. Despite the difference in their judgments on the outcome of the case, both Neill LJ and Simon Brown LJ reviewed the Regulations on the basis of whether they were a disproportionate interference with rights protected in other legislation or in the common law. This is most clearly articulated in Neill LJ's judgment. He noted that the Secretary of State was acting within the powers granted to him under the enabling statute. So the basis for a finding that the Regulations were *ultra vires* had to be a lack of proportionality between the purpose of the Regulations and their impact.<sup>78</sup> The judges derived their consideration of proportionality from ordinary principles of administrative law, not the ECHR.

The role that fundamental human rights have to play in determining the level of scrutiny to be applied has naturally been much more clearly articulated in cases in which the HRA is relied upon. In *Regina (Razgar) v Secretary of State for the Home Department*,<sup>79</sup> an Iraqi man had entered, and was seeking asylum in, the U.K. Matters were complicated by the fact that he had come to the U.K. from Germany and the U.K. was, therefore, under a treaty obligation to return him to Germany. However, he resisted removal on the basis of his Article 8 right under the ECHR.<sup>80</sup> He argued that returning to Germany would be detrimental to his mental health. He was being treated for mental health problems in the U.K. and claimed that he would commit suicide if returned. His application was successful before the lower courts and the Secretary of State appealed the decision to quash the certificate ordering his removal to Germany on the basis that Mr Razgar's claim was 'manifestly unfounded'. Lord Bingham held that the first question before the Court was: 'Can the rights protected by Article 8 be engaged by the foreseeable consequences for health or welfare of removal from the United

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<sup>76</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 292.

<sup>77</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 291-2.

<sup>78</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 282-3.

<sup>79</sup> [2004] 2 A.C. 368.

<sup>80</sup> *Razgar* (note 79 above) at 378.

Kingdom pursuant to an immigration decision, where such removal does not violate article 3?'<sup>81</sup> This question of principle arose from recent U.K. and European Court of Human Rights jurisprudence on Articles 3 and 8.<sup>82</sup>

There is an interesting line of cases on Article 3, in which potential immigrants about to be sent back to the state in which they were nationals, or from which they had arrived in the U.K, sought to stay in the country because they would otherwise lose access to health care they had been receiving. This line of cases includes *D v United Kingdom*,<sup>83</sup> *Bensaid v United Kingdom*,<sup>84</sup> and *N v Secretary of State for the Home Department (Terence Higgins Trust intervening)*.<sup>85</sup> In order to qualify as torture or inhuman or degrading treatment under Article 3, the treatment concerned (that is, the consequences of sending the individual back) would have to meet an extreme level of severity. Only one of these cases, *D v United Kingdom*, has resulted in a successful Article 3 claim.<sup>86</sup>

In *Razgar*, Lord Bingham held that, in principle, Article 8 could be engaged in cases where removal could have consequences for the *health* of the claimant, despite the fact that Article 3 is not engaged.<sup>87</sup> On the issue of the scope of review, Lord Bingham noted that in proceedings reviewing the Secretary of State's decision to certify a removal order, the court's role was merely supervisory. However, due to the fact that this case involved irrevocable action, potentially infringing fundamental human rights, the level of scrutiny was high.<sup>88</sup> As the question before the court was whether the claim was manifestly unfounded, the court had to determine the likelihood of success on appeal. In doing that, it had to consider each of the questions that would be asked on appeal – essentially determining whether the right would be infringed by the removal and if so, whether this limitation of the right was in accordance with the law, 'necessary in a democratic society in the interests of national security, public safety

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<sup>81</sup> *Razgar* (note 79 above) at 378. Article 3 of the ECHR provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

<sup>82</sup> Discussed in *Razgar* (note 79 above) at 378-83.

<sup>83</sup> (1997) 24 EHRR 423.

<sup>84</sup> (2001) 33 EHRR 205

<sup>85</sup> [2005] 2 A.C. 296

<sup>86</sup> The Article 3 jurisprudence is discussed further in chapter 6.

<sup>87</sup> *Razgar* (note 79 above) at 383. No arguments were made before the court on welfare and this was, thus, a question left undecided.

<sup>88</sup> *Razgar* (note 79 above) at 389.

or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’ and ‘proportionate to the legitimate public end sought to be achieved’.<sup>89</sup>

Lord Bingham was of the view that as long as the proposed removal was carried out in terms of a ‘lawful immigration policy’ it would be found to be necessary in the sense used above unless there was ‘bad faith, ulterior motive or deliberate abuse of power’.<sup>90</sup> Thus, the intensity of review at this stage was low. Moving on to the proportionality enquiry, Lord Bingham noted that proportionality was always a balancing exercise between individual rights on the one hand, and the interests of the community on the other. In this exercise, the question of the seriousness of the consequences of the limitation of rights had inevitably to be considered.<sup>91</sup> The Secretary of State had not acknowledged that Article 8 could apply in this case and had not dealt with the question of proportionality. The possibility that an adjudicator would decide in Mr Razgar’s favour could not be ruled out and a majority of the Law Lords, thus, dismissed the appeal.<sup>92</sup> Due to the reliance on the HRA, proportionality was quite clearly of concern here. However, it is interesting to note Lord Bingham’s view that a lawful policy would only give rise to a lack of proportionality between means and end in rare cases<sup>93</sup> and that proportionality as an enquiry *always* pits the individual’s rights against societal or community interests. Again, this view bears out Rivers’ point that, for British courts, proportionality is often a ‘state-limiting’ rather than a balancing exercise for British courts.<sup>94</sup>

#### **(4) Lessons from the United Kingdom jurisprudence**

As I have sought to argue in chapters 3 and 4, an approach that builds on reasonableness

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<sup>89</sup> *Razgar* (note 79 above) at 389.

<sup>90</sup> *Razgar* (note 79 above) at 389-90.

<sup>91</sup> *Razgar* (note 79 above) at 390.

<sup>92</sup> *Razgar* (note 79 above) at 390-1.

<sup>93</sup> *Razgar* (note 79 above) at 390. The House of Lords indicated that this comment was merely Lord Bingham’s view on the matter and should not be interpreted as adding a requirement of exceptionality to these kinds of cases in *Huang v Secretary of State for the Home Department*; *Kashmiri v Secretary of State for the Home Department* [2007] 2 WLR 581 at 593. The House of Lords did not comment on the substance of Lord Bingham’s comment that lawful policies would only be disproportionate in exceptional cases.

<sup>94</sup> See the discussion of Rivers’ argument in section 4, below.

review in administrative law is potentially very useful in balancing the need to make SE rights meaningful with respect for the balance of powers amongst the branches of government. Some level of flexibility in a judicial approach is necessary and desirable but, at the moment, the combination of a lack of predictability and a tendency to weak review apparent in the later, more complex South African SE rights cases discussed in chapter 4 are a concern. This tendency to weak review is also a feature of the U.K. jurisprudence on SE rights. The circumstances in which courts are willing to intervene tend to be extreme - in *Joint Council for the Welfare of Immigrants*, for example, the impugned Regulations would have left a significant number of people destitute - or to involve a glaring omission on government's part. *Lancashire Health Authority* and *Rogers* are examples of this kind of obvious flaw as the authorities in both these cases had not applied their own policies in a rational manner.

In the South African context, some commentators have suggested that, even if the CC persists with its reasonableness based approach, a more rigorous standard of review may be assured if section 36, the general limitation clause, is applied in SE rights cases. A large part of the South African CC's jurisprudence on SE rights has focused on the identically worded sections 26 (2) and 27 (2), internal limitations on the rights. The court has not applied the Constitution's general limitation clause, section 36,<sup>95</sup> to test if infringements of the SE rights are justifiable.<sup>96</sup> The debate over the continued relevance of section 36 in SE rights cases stems from a concern that the internal limitation of the rights in sections 26 (1) and 27 (1) means that the Court always defines the rights in light of the considerations in sections 26 (2) and 27 (2). The Court is, thus, able to avoid setting out the content of the rights with any exactitude.<sup>97</sup> Furthermore, section 36 requires that a court consider the proportionality of the

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<sup>95</sup> Discussed in chapter 3.

<sup>96</sup> The rights to social security (section 27) and equality (section 9) were both raised in *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC), discussed in chapter 4 above. The Court used an equality analysis to find that both sections 9 and 27 had been violated. The majority, per Mokgoro J, did not move on to a full-blown section 36 analysis, preferring to apply the internal limitations in section 27 (2) and indicating that reasonableness in that section was not significantly different from reasonableness in section 36 at pars. 80; and 83-4.

<sup>97</sup> D Davis 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 *South African Journal on Human Rights* 301 at 310, note 35; C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights

governmental act being challenged in every case. Finally, in a section 36 analysis, the burden of proof is reversed. Once the claimant shows a *prima facie* infringement of a constitutionally protected right, it is up to the state to show that the infringement is reasonable and justifiable in terms of section 36.

Three points must be borne in mind here. First, the CC has cautioned against an overly technical approach to the burden of proof in SE rights cases. In *Port Elizabeth Municipality*, Sachs J stated, for a unanimous court:

The court cannot fulfil its responsibilities...if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law... What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes.<sup>98</sup>

Second, CC jurisprudence indicates that section 36 will only be applied when SE rights are indirectly enforced through other rights in the Constitution,<sup>99</sup> and then sometimes only in a most superficial sense.<sup>100</sup> To date, it has only been the *Khosa* case in which an SE right was indirectly enforced through another right.<sup>101</sup> Third, and most importantly, in a consideration of proportionality under section 36, one does not inevitably escape the conceptual and

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Jurisprudence' (2006) 123 *South African Law Journal* 264 at 282-3 and K Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *South African Journal on Human Rights* 448. See also S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 at 28.

<sup>98</sup> Note 14 above at par. 32.

<sup>99</sup> See Davis' discussion (note 97 above) of *Khosa* at 309-10; and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at 312-313; and 325. In the High Court decision *Residents of Bon Vista Mansions v South Metropolitan Local Council* (2002) 6 BCLR 625 (W), Budlender AJ held that section 27 (2) did not apply when the negative duty to respect the right in section 27 (1) was limited. In other words, when individuals or groups were deprived of a pre-existing right of access to water, for example, the internal limitations were not relevant. Budlender AJ went on to engage in a justification analysis akin to that set out in section 36 although, as pointed out by Iles (note 97 above) at 460 note 72, he did not categorise it as such. See pars. 15-18; 20-32 of the judgment; and M Pieterse 'Towards a useful role for section 36 of the Constitution in social rights cases? *Residents of Bon Vista Mansions v South Metropolitan Local Council*' (2003) 120 *South African Law Journal* 41 at 45. The CC has not yet expressed a view on this reading of the section.

<sup>100</sup> *Khosa* (note 96 above) at pars. 80; and 83-4.

<sup>101</sup> *Khosa* (note 96 above) at pars. 68-77. The applicants in the case relied on both their right to social security, protected and section 27 of the Constitution and their right to equality, protected in section 9. Justice Mokgoro applied an equality analysis, interpreting the term 'reasonable' in section 27 (2) through the lens of the equality clause, in her judgment for the majority. See the discussion of *Khosa* in chapter 4 above.

practical difficulties associated with the reasonableness approach, as it has been applied so far.

There are divergent approaches to proportionality. Julian Rivers argues that although 'state-limiting' approaches to proportionality appear, at first sight, to grant more extensive rights-protection, British courts tend to uphold the government purpose as important and test simply for efficiency, assuming that 'whatever it takes to achieve a government aim is justified'.<sup>102</sup> Furthermore, the necessity test may often be reduced to the question of whether a decision is unreasonable in the *Wednesbury* sense,<sup>103</sup> where some theory of judicial deference is at play. This is supported by Lord Bingham's view in *Razgar* above that there would have to be 'bad faith, ulterior motive or a deliberate abuse of power'<sup>104</sup> for a decision made under a lawful immigration policy to fail the necessity test. In the South African context, the balancing test is often applied superficially and does not, of itself, guarantee greater protection of rights. Moreover, even where the Court places rigorous demands on government, usually by demanding that the state opt for the least restrictive means of limiting the right in terms of section 36, the government objective is not always placed under great scrutiny and there is little predictability about the intensity of review.<sup>105</sup> The point is that proportionality is itself applied at varying levels of intensity<sup>106</sup> by South African and U.K. courts. We need to go further to try to ascertain how courts decide on the level at which they will interrogate government action if we are to make sense of judicial approaches to cases

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<sup>102</sup> Rivers (note 70 above) at 190.

<sup>103</sup> Rivers (note 70 above) at 178, citing H Wade and C Forsyth (2004) *Administrative Law* at 366.

<sup>104</sup> *Razgar* (note 79 above) at 389-90.

<sup>105</sup> See, for example, Ngcobo J in *Jordan v S* 2002 (6) SA 642 (CC) at pars. 25 and 26 and Rósaan Kruger's critique of the judgment 'Sex work from a feminist perspective' (2004) 20 *South African Journal on Human Rights* 138 at 146. Ngcobo J held that it was not for the court to assess the efficacy of legislative choices on how to deal with 'social ills' like 'prostitution and brothel keeping'. See also Chaskalson P (as he then was) in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at par. 90 compared with O'Regan J's reasoning at par. 125. One of the issues under consideration in *Solberg* was whether certain provisions of the Liquor Act 27 of 1989, preventing the sale of alcohol on Sundays, Good Friday and Christmas Day by the holder of a grocer's licence, violated the right to freedom of religion protected in section 14 of the interim Constitution. Chaskalson P accepted that the purpose of the legislation was the restriction of the sale of alcohol on the relevant days, rather than the compulsion of sabbatical observance. O'Regan J held that, even if the purpose was the restriction of alcohol consumption, the Act was flawed because (a) it only prevented certain types of alcohol being sold and (b) it did not restrict or prevent the sale of alcohol on 'non-religious public holidays... when the roads are particularly full and the restriction of consumption would appear to be particularly desirable'.

<sup>106</sup> See Rivers (note 70 above).

involving SE rights.

There has been some consideration of the factors that determine the intensity of review in United Kingdom administrative law. Lord Justice Laws suggested the following guidelines in *International Transport Roth GmbH v Home Secretary*:<sup>107</sup>

- (1) greater deference should be paid to Parliament than to subordinate legislative or executive acts;
- (2) there is less scope for deference in the case of unqualified, or apparently unqualified rights;
- (3) greater deference should be paid when a matter lies within the constitutional responsibility of the executive (e.g. defense of the realm) than within the constitutional responsibility of the courts (e.g. criminal justice);
- (4) greater deference should be paid where the question turns on matters of executive expertise (e.g. macro-economic policy).

These factors are of some value to cases on SE rights or cases having SE implications, but they beg a range of questions. By their very nature, SE rights cases will more often and more seriously implicate state resources and matters of policy and could quite easily be classified as falling into category (4) above. What would ‘greater deference’ in the context of such cases then require? If we read this to mean that the courts should apply some kind of gross unreasonableness or rationality test in all such cases, we make nonsense of the protection of SE rights. The factors above were also set out in relation to a particular jurisdictional and factual context and we must be wary of simplistic legal transplants. Much would depend on the constitutional system and subject matter involved. However much some scholars argue that U.K. law appears to have moved away from a system centred on Parliamentary supremacy and adopted protection of the rule of law as its fundamental constitutional principle, this ‘new constitutional hypothesis’ has so far stopped short of recognising rights to SE goods as a constitutional principle.<sup>108</sup> When it comes to distribution of such goods then, the U.K. Parliament enjoys a higher level of discretion than its South African counterpart.<sup>109</sup> This point is well supported by Simon LJ’s judgment in *Joint Council*

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<sup>107</sup> [2003] Q.B. 728 at 765 – 767, as cited in Rivers (note 70 above) at 204.

<sup>108</sup> Jowell (note 1 above) at 573, 576 and 578. But, see S Fredman ‘Human rights transformed: positive duties and positive rights’ (2006) *Public Law* 498 at 517 where she argues that *R. (on the application of Limbuela) v Secretary of the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396 (HL) ‘recognises that the commitment to make provision for the *basic* welfare of everyone within the jurisdiction is just as much part of the unwritten constitution as the common law civil liberties referred to by Dicey [my emphasis]’.

<sup>109</sup> See Jowell (note 1 above) at 578.

*for the Welfare of Immigrants*. Whilst the fact that Parliament had been ‘closely involved in the making of the impugned Regulations’ was of some concern to the judge, ultimately his view was that Parliamentary sovereignty was not threatened by judicial intervention in this case because the Regulations were only secondary legislation.<sup>110</sup> His conclusion was that:

Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs.<sup>111</sup>

This reasoning also implies that, where Parliament has imposed statutory duties on public bodies in relation to the provision of SE goods like housing and health care, the courts have an unassailable mandate to give effect to those duties. The role of the courts in such cases is less susceptible to criticism on the basis that they are usurping the powers of democratically elected legislators because their responsibility to act derives directly from the will of those legislators.

The role of legislative intent in the adjudication of politically sensitive matters in the U.K. is complicated by a series of cases in which judges have distinguished between directly enforceable rights and target duties.<sup>112</sup> *R. (on the application of G) v Barnet London Borough Council*,<sup>113</sup> turned on the interpretation of section 17 (1) of the Children’s Act of 1989:

It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children’s needs.<sup>114</sup>

The case dealt with the duty on local authorities to provide accommodation to children in need. The main issue for the court was whether the section placed an obligation on local authorities to determine what the specific needs of a child classified as ‘in need’ were and then to provide for those needs, according to this assessment.<sup>115</sup> Writing for a majority of the

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<sup>110</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 292-3.

<sup>111</sup> *Joint Council for the Welfare of Immigrants* (note 64 above) at 293.

<sup>112</sup> Lord Woolf LJ, as he then was, used the term ‘target duty’ in *R. v Inner London Education Authority Ex p. Ali* (1990) 2 Admin L.R. 822, as cited in H Woolf, J Jowell and A Le Sueur (2007) *De Smith’s Judicial Review* (Sweet and Maxwell: London) at 259; and J King ‘The justiciability of resource allocation’ (2007) 70 (2) *Modern Law Review* 197 at 214.

<sup>113</sup> [2004] 2 A.C. 208.

<sup>114</sup> See the opinion of Lord Nicholls in *Barnet LBC* (note 113 above) at 220-1.

<sup>115</sup> See the opinion of Lord Nicholls in *Barnet LBC* (note 113 above) at 216.

Law Lords, Lord Hope held that, properly construed, section 17 (1) imposed a general duty on local authorities vis-à-vis all children in their areas. This general duty acted as a guide to local authorities in their performance of more specific duties.<sup>116</sup> Lord Hope was influenced by the fact that, if the section were interpreted to give rise to specific, individually enforceable rights, the cost involved in providing for the children's assessed needs could not be taken into account. He noted that Parliament must have been aware of the fact that local authorities would have to exercise a judgment about how best to spend limited resources.<sup>117</sup>

The jurisprudence on target or general duties suggests that they are to be treated as akin to the directive principles of state policy in the Indian or Irish Constitutions.<sup>118</sup> The principal concern with classifying these duties as 'target duties' is that this waters down their status from statutory obligations to mere aspirations.<sup>119</sup> This removes one of the main tools available to judges in the U.K. in dealing with concerns about the democratic legitimacy of their decisions. When judges enforce statutory obligations, they are acting in compliance with the intent of democratically elected legislators. One could argue that questions of legitimacy continue to be relevant in respect of generally phrased duties if the specificities of those duties fall to be decided by the courts. A statute's clarity on the content of obligations owed may, consequently, be relevant in determining how intensely a court will scrutinise administrative action. Allowing government bodies some flexibility in determining how general or broadly phrased obligations are to be fulfilled would be permissible, particularly where the availability of resources is a concern. However, to allow the generality of the obligation to lead to its non-enforceability before the courts undermines the legislative intention to impose a duty in the first place.<sup>120</sup> Affording a local authority or other decision-maker the widest possible scope in how a generally phrased duty is to be met would be tantamount to a doctrine of non-enforceability in respect of all such duties. Instead, judges should treat the generality of the duty as just one of the factors relevant in determining how rigorously they will interrogate the impugned decision and the appropriate remedy to be awarded.

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<sup>116</sup> Lord Hope in *Barnet LBC* (note 113 above) at 239.

<sup>117</sup> Lord Hope in *Barnet LBC* (note 113 above) at 235.

<sup>118</sup> On this point, see De Smith (note 112 above) at 260.

<sup>119</sup> De Smith (note 112 above) at 260. See also King (note 112 above) at 215.

<sup>120</sup> See De Smith (note 112 above) at 260.

The Northern Ireland Court of Appeal adopted this kind of approach in *Family Planning Association of Northern Ireland v The Minister for Health, Social Services and Public Safety*.<sup>121</sup> The respondent Minister and his Department had a statutory obligation

- (a) to provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness;
- (b) to provide or secure the provision of Personal Social Services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland.<sup>122</sup>

The appellant body argued that the term ‘integrated health services’ included ‘reproductive health services involving the lawful termination of pregnancies as part of the “prevention, diagnosis and treatment of illness”’ and challenged the respondent’s failure to provide this.<sup>123</sup> Drawing on *Ex p. Ali*<sup>124</sup> and *Barnet LBC*,<sup>125</sup> Nicholson LJ held that the statutory provision imposed a target, and not an absolute, duty.<sup>126</sup> However, the fact that the duty was phrased in broad terms did not mean it was unenforceable before the courts.<sup>127</sup> The duties allowed the relevant public body a ‘considerable degree of tolerance’ in deciding how the provision should be implemented. Failure to give effect to the target duty would not necessarily amount to a breach of the statute.<sup>128</sup> In many cases involving general duties, the appropriate remedy would be to ask the relevant body to ‘consider what steps they should take to fulfil the target duty, rather than ordering them to perform a specific act’.<sup>129</sup> Lord Justice Nicholson upheld the appeal and indicated that the respondent Department had a duty to investigate whether certain steps were necessary to fulfil its duties.<sup>130</sup>

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<sup>121</sup> [2004] NICA 39, cited in H Woolf, J Jowell and A Le Sueur (2009) *De Smith’s Judicial Review (6ed), 1st Supplement* (Sweet and Maxwell: London) at 73-4.

<sup>122</sup> Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972, Nicholson LJ in *Family Planning Association of Northern Ireland* (note 121 above) at par. 11

<sup>123</sup> Lord Justice Nicholson in *Family Planning Association of Northern Ireland* (note 121 above) at par. 12.

<sup>124</sup> Note 112 above.

<sup>125</sup> Note 113 above.

<sup>126</sup> *Family Planning Association of Northern Ireland* (note 121 above) at paras. 14-18; 25-30.

<sup>127</sup> *Family Planning Association of Northern Ireland* (note 121 above) at par. 40.

<sup>128</sup> *Family Planning Association of Northern Ireland* (note 121 above) at par. 41.

<sup>129</sup> *Family Planning Association of Northern Ireland* (note 121 above) at par. 44.

<sup>130</sup> Nicholson LJ referred to the possible need for guidelines to medical professionals regarding the laws on abortion; and to the question of whether current provisions for aftercare following an abortion were adequate. See par. 115 of the judgment.

In the result, the case was limited in the sense that Nicholson LJ did not impose any mandatory steps on the respondent Department. But the principle that target duties may not simply be treated as non-enforceable is important. In determining what was required of the Department, Nicholson LJ was influenced by the fact that this was not a case in which the Department could be said to be doing all it could to remedy any breach of its obligations at the time the matter reached the courts.<sup>131</sup> At the same time, Article 4 of the Order had to be read in the context of surrounding provisions, all of which accorded to the Department a significant amount of discretion in choosing how to give effect to its duties.<sup>132</sup> These factors suggested that the Department was entitled to some flexibility but that it had to show it was taking appropriate steps. Ultimately, the judgment suggests that it is the statutory and factual context in which the case arises, rather than the form in which the duty is phrased, that will determine the court's approach to target duties.<sup>133</sup>

The factors set out by Laws LJ in *International Transport Roth GmbH* are useful as a general starting point from which to consider the specificities of SE rights cases and cases having clear SE implications in each jurisdiction. They may be expanded upon with reference to the relevant case law. Transparency is emphasised in many of the cases discussed in this chapter. Where a public body is entrusted with the duty to form a policy, it may be held to account for lack of evidence to support that policy. In other words, where the policy contains internal inconsistencies or where there are obvious, unexplained contradictions between the policy and other, relevant evidence (such as medical opinion in the context of health care) it is likely that a court will find decisions taken in terms of the policy, or the policy itself, to be unreasonable. This implies intense scrutiny of the policy but a fairly cautious demand for transparency and coherence. An even more basic requirement is that, where there is an obligation on a public body to design a policy, it must have a policy in place. Where the statutory duty is framed in very broad terms, courts may grant public bodies a high degree of discretion in determining how to implement that duty. But recent jurisprudence suggests that,

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<sup>131</sup> *Family Planning Association of Northern Ireland* (note 121 above) at par. 41.

<sup>132</sup> *Family Planning Association of Northern Ireland* (note 121 above) at pars. 31-6.

<sup>133</sup> An approach advocated both in De Smith (note 112 above) at 260-1 and by King (note 112 above) at 215-6.

in these circumstances, courts could, at the very least, order these bodies to investigate whether their actions were adequate.

Whilst the capacity to force government's hand when it comes to designing effective policy or to interrogate steps taken by public officials in implementing such policy should not be underestimated, an approach that goes no further than demanding that a set of procedures be followed will be inadequate in many cases. In *Grootboom*,<sup>134</sup> for example, although one issue was the state's failure to give the litigants the requisite notice before eviction, the primary concern was with the fact that these litigants did not have basic shelter and services. It would have been a serious failure of justice had the Court ignored this latter concern.

The seriousness of the invasion of the right, with references to fundamental human dignity and essential attributes of humanity, appear in many of the South African and U. K. cases. In the *Grootboom*, *TAC* and *Khosa* cases, discussed in chapter 4 above, the relatively low impact on resources played a key role in enabling the CC to find government policy deficient. In the U.K. case of *Rogers*, whilst the cost implications were sizeable, the Primary Care Trust's policy made it clear that this was not a relevant consideration. Other factors may already be playing a role but are less visible in the case law on SE rights. The level of review to be applied must also turn on whether there are wider communal interests to be considered. If a court order enforcing the right would improve the situation of a few at the expense of a larger group of people,<sup>135</sup> a court may find that it does not have the institutional expertise to pronounce on the matter or that a lower standard of scrutiny should be applied. If a court has already handed down an order, which government has failed to implement, this may afford judges a wider scope for intervention in a subsequent case.

The number of people affected is also relevant but its role in determining the level of review is ambiguous. If a law or policy has a detrimental impact on a large group of people, a court is likely to find the invasion of rights to be serious. However, where a large group is

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<sup>134</sup> Note 15 above.

<sup>135</sup> The court's concern not to reward 'queue-jumping' that is, providing housing and land to people who have occupied land illegally whilst others in need continue to wait for state housing hints at this factor. See *Modderklip* (note 99 above) at pars. 33 and 50. See also *Grootboom* (note 15 above) at par. 2 where the court rejected 'self-help' as a solution to housing and land problems.

involved, one would expect greater resources to be implicated, giving cause for judicial caution. Clearly, adjudicating SE rights cases is never going to be a simple calculation of ‘factors in favour of greater scrutiny’ against ‘factors against greater scrutiny’. The factors themselves may be differentially weighted, both within each individual jurisdiction and in comparison with other jurisdictions. They could intersect and interact in complex ways in a single case. But continued engagement with them holds the promise of providing clearer, more coherent guidelines for future cases.

### **(5) Conclusion**

The South African cases discussed in chapter 4 and the U.K. cases discussed here show that courts are playing a role in enforcing SE rights. Debates about justiciability have been overtaken by national and international sources of SE rights and interests, which demand some level of judicial review. The discussion in chapter 3 and the examination of *Joint Council for the Welfare of Immigrants* in this chapter indicate that judges in the U.K. may not be as wary of proportionality as their South African counterparts. But the extreme nature of the lack of proportionality between legislative purpose and adverse impact in *Joint Council for the Welfare of Immigrants*, coupled with the fact that the court was dealing with subordinate legislation meant that the application of proportionality was not a huge departure from a generally deferential approach when it comes to decisions in which the allocation of public funds is implicated. Furthermore, *Razgar* is an indication that, even in a structured proportionality analysis, courts may choose not to interrogate the governmental purpose too rigorously.

If we accept that a model for the adjudication of SE rights requires some variability or flexibility, as I have argued we must, the question is whether a particular standard of review was legitimate in the circumstances of the cases. Variability means that some level of uncertainty will have to be borne. But, by examining the cases, we may be able to identify the factors which determine levels and intensity and to assess whether a particular level was justified by the circumstances of the case. This is a task to which I turn in chapter 6 below, drawing on the South African and U.K. cases.

## **Chapter Six**

### **Factors influencing the method and intensity of review in social and economic rights adjudication**

#### **(1) Introduction**

The fiercely divergent responses South African social and economic (SE) rights adjudication has elicited in academic commentary to date is one of its most interesting features. This difference in views arises from a tension that provides one of the main strands of argument in this thesis. Courts have a role to play in implementing SE rights such as access to adequate housing, health care, education and social security but they must exercise this role in a manner which respects the democratic mandate and expertise of the legislature and executive in setting political and economic priorities for the state. One of the arguments made throughout this thesis is that this tension cannot be viewed as a battle between rights-protection and pragmatism, between those who wish to extend the greatest possible protection to SE rights and those who wish to defer to legislative and executive social and political choices at every juncture. The need for judges to constantly consider their role in this area stems not just from pragmatic concerns over whether other arms of government will implement judgments they perceive as going too far, for example, but from normative concerns with what respect for democratic values and effective protection of SE rights requires from judges in these circumstances.

As argued earlier in this thesis, the variability of the intensity of review, developed in the context of judicial review of administrative action, is potentially the most useful tool judges have through which to balance various interests in SE rights adjudication. However, variability lends itself to a degree of uncertainty. The lack of clarity regarding what elements of a case lend themselves to high degrees of judicial intervention or restraint is a problem for potential litigants, scholars, advocacy groups, legislators, administrators and judges themselves. Consequently, some attempt to identify and categorise the many factors which may legitimately influence the intensity of review is necessary. This chapter is aimed at such identification and categorisation in the context of the adjudication of SE rights.

In line with various scholars cited earlier in this thesis, I take the view that, whilst we need to engage, at both conceptual and functional levels, with the question of how to adjudicate politically sensitive cases, a general theory of judicial restraint is neither possible nor desirable. As was stated by Lord Steyn in *R. (on the application of Daly) v Secretary of State for the Home Department*,<sup>1</sup> ‘In law context is everything’.<sup>2</sup> In the context of SE rights, Dennis Davis has questioned the usefulness of a theory of deference:

But, other than offering some guidance to courts to “defer” to greater levels of institutional competence when it comes to the formulation of social and economic policy and the allied question of the distribution of limited resources, a theory of deference fails to capture the positive, dialogic role that a court is required to play within the scheme of socio-economic rights.<sup>3</sup>

Davis’ criticism applies, to some extent, to the nature of the Constitutional Court’s (CC’s) approach to deference. He argues that ‘the Constitutional Court has followed, albeit carefully, a reading of deference embraced by apartheid jurisprudence’.<sup>4</sup> His concern about the relationship between a theory of deference and the dialogic role of the court is a more fundamental attack on the notion of a theory of deference. To be of any use, engagement with the notion of deference must go beyond a mere instruction to courts to always defer to government’s expertise in policy-making on SE matters and resource allocation. In this chapter, I use the discussion of factors influencing the intensity of review in the case law as the basis for a more substantial analysis of what deference means for the adjudication of SE rights disputes.

If one accepts that there are sound reasons for judicial restraint or deference in certain cases, some engagement with the notion of deference is necessary. The focus then shifts to the factors which may usefully and appropriately be used to decide the level of deference or restraint required. And, in the development of any guidelines for the extent of judicial intervention in SE rights cases, the primary concern must be with how best to foster an ongoing dialogue between state institutions, civil society and the courts to provide the most effective protection of the rights whilst acknowledging their place within a broad societal

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1 [2001] UKHL 26; [2001] 2 A.C. 532.

2 Daly (note 1 above) at par. 28.

3 D Davis ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “Deference Lite”?’ (2006) 22 *South African Journal on Human Rights* 301 at 319-20.

4 Davis (note 3 above) at 327.

project of redistribution and transformation.<sup>5</sup> A properly contextualised examination of the factors which influence judges in determining how restrained or how interventionist an approach to take in particular cases, including some consideration of how these factors interact, would not only ‘capture’ the dialogic role of the courts but could also facilitate it.

In this chapter, I draw upon South African and U.K. cases and academic commentary to suggest a framework within which judges may decide on the intensity of their scrutiny in cases with political repercussions. It is particularly important to recognise that the formal constitutional context is only one aspect that impacts on what judges do. The timing of the case and the factual and political environment within which it arises are also significant. As a result, a framework cannot function as a formula with key variables producing an answer to the question of how intense judicial scrutiny should be. Any framework cannot hope to be more than a guide to judicial approaches.

## **(2) Principles guiding the intensity of review in South African and United Kingdom cases**

### **(a) Relevant cases and the comparative framework: setting the terms of the analysis**

In this section, I examine selected South African CC and UK higher court judgments to identify a range of factors influencing the intensity of review in cases with implications for SE policy. I then draw on these factors to suggest that there are four principal issues which affect the intensity of the review: the constitutional balance of powers; relative institutional expertise; the severity of the impact of the government action or inaction; and, to a limited extent at least, state conduct.

In analysing the cases, I took the emerging South African CC approach to SE rights

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5 On the dialogic role of courts in protecting SE rights, see Davis (note 3 above) at 320 and 323-4. See also J Jowell ‘Parliamentary Sovereignty under the New Constitutional Hypothesis’ (2006) *Public Law* 562 at 579 on dialogue between the judiciary and Parliament more generally.

as my starting point. The question I was most eager to answer was what factors influenced the judges in their decisions about how rigorously they could or would scrutinise government action. The identification of relevant factors is complicated by the fact that the role of these factors is not made explicit in the judgments. Whilst judges will cite resource scarcity as a reason for courts to exercise restraint in a particular case, for example, they might also mention the severe impact on affected parties as a reason for rigorous scrutiny in the same case. In reaching a conclusion judges do not often reveal their weighting of various factors. Questions about whether judges engage in a balancing of the range of factors relevant in the case or whether a particular factor may act as a ‘trump’ are not addressed in the judgments. As a result, in the analysis below, I draw upon the factors in the context of each judgment and in the light of the conclusions which judges have reached to try to establish what their reasoning process on the interaction of the various factors is. The discussion of the U.K. cases points to a number of parallels in the approaches of South African and U.K. judges to the issue of how rigorous judicial intervention should be in cases with SE rights implications.

What follows in the remainder of this section, then, is a close examination of important cases with the limited purpose of pinpointing factors influencing the intensity of judicial review. In section 3, I begin to analyse the factors and consider their relative importance in the jurisprudence.

#### **(b) Constitutional balance of powers and relative institutional expertise in the cases**

Many of the competing considerations at play in SE rights cases were highlighted in *Soobramoney*,<sup>6</sup> the CC’s first judgment in the area. In this case, concerns about the polycentric nature of the claim and scarcity of resources appeared to be the most significant reasons for the judges’ decision to exercise restraint. It was an undisputed fact that the hospital’s budget did not provide for the additional dialysis machines and trained nursing staff required to extend access to dialysis treatment to Mr Soobramoney and others in the

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<sup>6</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC). For a discussion of the facts, see chapter 4 above.

same position.<sup>7</sup> But counsel for Mr Soobramoney argued that the state should increase the hospital's budget for this purpose.<sup>8</sup> In turn, the Provincial Department of Health showed that it had already overspent on its budget and that scarcity of resources in the health sector was a national problem.<sup>9</sup> The judges were not prepared to interpret section 27 (3) to mean that anyone requiring life-prolonging treatment, which they found the dialysis treatment in Mr Soobramoney's case to be, had an unqualified right to receive it as this could compromise the state's ability to fulfil its primary obligation to provide health care to all under sections 27(1) and (2). The effect of a finding of this nature would be to prioritise the treatment of those with terminal illnesses over others and this was a policy decision the court did not feel able to make in the absence of a clearly expressed governmental intent to that effect.<sup>10</sup> To allow the claim would have necessitated a 'dramatically increased health budget' thereby placing at threat the other needs the state has to meet.<sup>11</sup> The medical expertise supported government's concern that admitting everyone in the same position as Mr Soobramoney for the treatment could place patients who qualified for treatment under the established guidelines at risk because of increased pressure on facilities.<sup>12</sup> The judges were aware of the grave impact of the refusal to provide the treatment on Mr Soobramoney and his family but held that complex policy decisions about the health budget and functional decisions on health priorities should be left to the provincial health administration.<sup>13</sup>

Justice Sachs wrote a concurring judgment in which he expanded on the approach in the main judgment. He went to some effort to ensure that the main judgment not be seen simply as capitulating to an argument based on the limited nature of state resources. Justice Sachs noted that Chaskalson P's<sup>14</sup> main judgment did not 'merely toll the bell of lack of resources.' Instead, it recognised that the interdependency of rights meant that access to life-prolonging medication and treatment had to be viewed within the context of the other, equally valid claims of large numbers of people. Balancing such claims amounted to an

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<sup>7</sup> *Soobramoney* (note 6 above) at par. 2.

<sup>8</sup> *Soobramoney* (note 6 above) at par. 23.

<sup>9</sup> *Soobramoney* (note 6 above) at par 24.

<sup>10</sup> *Soobramoney* (note 6 above) at par. 19.

<sup>11</sup> *Soobramoney* (note 6 above) at par. 28.

<sup>12</sup> *Soobramoney* (note 6 above) at par. 26.

<sup>13</sup> *Soobramoney* (note 6 above) at pars. 29 and 31.

<sup>14</sup> President of the Court from 1994 until 2001 and Chief Justice of South Africa from 2001 until 2005.

attempt, not to limit rights, but to most effectively protect the rights of all people within the country.<sup>15</sup> Summing up, Sachs J noted that courts were not the appropriate place to resolve the ‘agonising personal and medical problems that underlie these choices’. For reasons related to both institutional capacity and ‘appropriate constitutional modesty’ their role in the circumstances of this case had to be more restrained.<sup>16</sup>

The *Treatment Action Campaign* case<sup>17</sup> also concerned a governmental decision to restrict access to medical treatment but in a very different context and with an infinitely different outcome. A number of factors came together in this case to encourage the court to interrogate government action more rigorously. The court’s rejection of the minimum-core based argument made in the case may be traced to concerns with its relative lack of expertise and to the problem of polycentricity.<sup>18</sup> In its reasoning process, the court drew a distinction between judicial determinations which have budgetary implications and those that are themselves directed at rearranging budgets. The latter, the judges held, were inappropriate for a court to engage in because of the potential for such determinations to have multiple SE effects.<sup>19</sup> The court has, similarly, flagged its discomfort with being the ‘court of first and last instance’ on whether government has acted reasonably. In *Olivia Road*,<sup>20</sup> Yacoob J, handing down judgment for a unanimous court, refused to evaluate the City’s plan for permanent housing solutions, preferring that the court limit itself to the specific circumstances of the occupiers who had brought the case in the first place.<sup>21</sup> In the same case, the court rejected a request that it assess government’s plan as it applied to the thousands of other people living in inner city Johannesburg on the basis that such an evaluation would be premature and ‘comes close to an abstract evaluation which is undesirable at the best of

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<sup>15</sup> Sachs J in *Soobramoney* (note 6 above) at paras. 52-54. See also Chaskalson P in *Soobramoney* (note 6 above) at par. 31.

<sup>16</sup> Sachs J *Soobramoney* (note 6 above) at paras. 57-8.

<sup>17</sup> *Minister of Health and others v Treatment Action Campaign and others (No. 2)* 2002 (10) BCLR 1033 (CC). For the facts of the case, see chapter 4 above.

<sup>18</sup> *Treatment Action Campaign* (note 17 above) at paras 37-8. See also *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 at paras. 32-3.

<sup>19</sup> *Treatment Action Campaign* (note 17 above) at par. 38. The court also made this point in *Grootboom* (note 18 above) at par. 66.

<sup>20</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC), discussed in chapter 4.

<sup>21</sup> *Olivia Road* (note 20 above) at par. 34.

times'.<sup>22</sup>

Judges in the U.K. have also made clear their reluctance to hand down judgment on claims which are overbroad and not sufficiently tailored to the factual circumstances before them. In *R. (on the application of Burke) v General Medical Council*,<sup>23</sup> for example, Mr Burke sought judicial review of the guidance issued by the General Medical Council (GMC) on the withdrawal of artificial nutrition and hydration. Lord Phillips, who handed down judgment for the court, stated that Mr Burke's challenge implicated parts of the GMC's guidelines which were not at all relevant to his situation. He held that the relief prayed for went far beyond what was needed to 'ally any apprehensions Mr Burke might have in respect of his personal situation'.<sup>24</sup> The court pointed to the danger of courts engaging in matters which are not attached to a factual context within which the determinations must be made. Without such a factual context or practical problem, the court could set out principles without fully appreciating their consequences.<sup>25</sup>

For overlapping reasons of a relative lack of expertise and respect for a constitutional balance of powers, then, the court in *Treatment Action Campaign*, rejected arguments based on the concept of a minimum core obligation. However, the court had no problem subjecting government policy to relatively intense scrutiny and finding government's decision to restrict access to nevirapine to pilot sites to be unreasonable. There are several reasons for this. The court referred to the severity of the impact of government's decision to restrict access to the drug. It was clear that, for a lengthy period, the drug would not be available to mothers and babies who did not have access either to private health care or to the pilot research sites in which the drug was being provided.<sup>26</sup> But the consequences for Mr Soobramoney and his family were also grave. What explains the difference in the judges' approach? Most obviously, *Treatment Action Campaign* was not a case directed at rearranging budgets as the

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<sup>22</sup> *Olivia Road* (note 20 above) at par. 35.

<sup>23</sup> [2005] EWCA Civ 1003; [2005] 3 WLR 1132.

<sup>24</sup> *Burke* (note 23 above) at par. 16.

<sup>25</sup> *Burke* (note 23 above) at par. 21.

<sup>26</sup> *Treatment Action Campaign* (note 17 above) at par. 17. The severity of the harm to the individual or group, as a factor influencing the intensity of review, is discussed further below.

cost of the drug was being borne by pharmaceutical companies for a period of five years.<sup>27</sup> Thrown into the balance was also the fact that *Treatment Action Campaign* involved the once-off provision of nevirapine to save lives, not ongoing treatment to prolong life. Furthermore, the weight of medical evidence in this case directly contradicted government's stance. Finally, there was a very public outcry against government's approach to the HIV/AIDS crisis in general.<sup>28</sup>

In South Africa, the constitutional imperatives to both give effect to SE rights and respect the constitutional balance of powers means that the CC has had to consider the nature of the question before it more carefully. In a jurisdiction where courts are required to resolve SE rights disputes, the fact that a case has SE implications cannot act as a bar to justiciability. The extent to which the CC will interrogate matters of SE policy depends on their level of political or social sensitivity. In the U.K. too, courts are increasingly willing to delve into the nature of the political question in deciding whether it is amenable to judicial intervention. Thus, Lord Justice Laws noted in *Begbie*:

The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power. There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision.<sup>29</sup>

Decisions about SE policy, particularly those that involve choices about the equitable distribution of resources still lie very much within the domain of elected officials.<sup>30</sup> These include the questions of whether the state provides funds to enable everyone to have a

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<sup>27</sup> *Treatment Action Campaign* (note 17 above) at par. 71.

<sup>28</sup> T Roux 'Principle and pragmatism on the Constitutional court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106 at 123.

<sup>29</sup> *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1131.

<sup>30</sup> See, for example, *R. (Hooper) v Secretary of State for Work and Pensions*; *R. (Withey) v Same*; *R. (Naylor) v Same*; *R. (Martin) v Same* [2005] UKHL 29 at par. 32.

home;<sup>31</sup> and the circumstances in which the state will provide support to asylum-seekers, for example.<sup>32</sup> But, in interpreting legislation providing for such benefits, judgments have been quite nuanced. Courts do not simply balk at any resource implications. Instead, they consider how great the resource implications are; whether they may be quantified;<sup>33</sup> and the possible knock-on effect for responsibilities the government agent has in respect of other individuals and groups.<sup>34</sup> Furthermore, courts have often balanced these considerations against how severe the impact of the governmental act was on the individuals concerned; and the extent of government's culpability in that end result.<sup>35</sup> These two aspects of judicial analysis are discussed further below.

The court in *Treatment Action Campaign* was able to go quite far in rejecting government's reasons for limiting access to nevirapine because the resource implications were fairly limited and predictable. As noted above, the case was politically very controversial but the open public support for the roll-out of nevirapine facilitated the court's interventionist stance. The role of public opinion as a factor influencing intensity of review is ambiguous, however. In the South African context, the court has not been afraid to make decisions which are clearly not supported by the majority of the population. In his discussion of principle and pragmatism in the CC, Theunis Roux points to *S v Makwanyane*,<sup>36</sup> in which

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<sup>31</sup> *Anufrijeva and another v Southwark London Borough Council; R. (N) v Secretary of State for the Home Department; R (M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406; [2004] 2 WLR 603 (CA) at par.19 .

<sup>32</sup> *R (Limbuella) v. Secretary of State for the Home Department; R (Tesema) v. Same; R (Adam) v. Same* [2005] UKHL 66 at pars. 13-14. The case involved a review of the Secretary of State's decision to refuse three asylum-seekers support on the basis that they had not made their claims for asylum 'as soon as reasonably practicable' after entry into the U.K. Section 55 (1) of the Nationality, Immigration and Asylum Act of 2002 prohibited the provision of support to late applicants. But section 55 (5) (a) allowed for the Secretary of State to provide support for late applicants where this was necessary to avoid a breach of their Convention rights. The individuals concerned were arguing that Convention rights - Article 3 specifically - entitled them to support, despite their late applications. The facts of the case are set out in the opinion of Lord Hope.

<sup>33</sup> See *N v Secretary of State for the Home Department (Terence Higgins Trust intervening)* [2005] 2 A.C. 296 at pars. 49 and 53.

<sup>34</sup> *In Re S (Minors) (Care Order: Implementation of Care Plan); In Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 2 AC 91 at par. 43.

<sup>35</sup> See *Anufrijeva* (note 31 above) at par. 47 and *Limbuella* (note 32 above) at pars. 46-7.

<sup>36</sup> 1995(3) SA 391 (CC).

the CC overturned legislation allowing for capital punishment; and *Fourie*,<sup>37</sup> the case in which the CC held that the restriction of marriage to heterosexual couples, both in the common law and in the Marriage Act 25 of 1961 amounted to unfair discrimination on the basis of sexual orientation and was therefore unconstitutional.<sup>38</sup> The judges could afford to go against the glaring public support for the death penalty because they had the backing of the ruling party – the ANC had not been able to reach consensus on the issue in the constitutional negotiations partly because of disagreement between party leadership and supporters on this issue.<sup>39</sup> When it comes to gay and lesbian equality, the large majority of South Africans would have preferred to have retained laws criminalizing sodomy and preventing same-sex marriage in the country's legal system. However, this issue had effectively already been dealt with in the constitutional negotiation process. The explicit prohibition of discrimination on the basis of sexual orientation in section 9 of the Constitution meant that the CC did not really have to decide on the substance of issues like same-sex marriage – to have these laws on the statute books was a blatant violation of section 9. But in *Fourie*, the court was divided on the question of what remedy to hand down. A majority of the judges suspended the order of invalidity to give Parliament the opportunity to remedy the provisions in an appropriate manner.<sup>40</sup> The issue of remedies is, strictly speaking, beyond the scope of this thesis but the question of what factors inform judges in handing down more or less interventionist remedies is a useful one to consider here. Judges may sometimes not have a real choice about the substance of their decision and judicial attitudes about restraint and activism are then often played out in the remedies they choose to hand down. In respect of the *Fourie* case, Roux has argued that the CC's more cautious approach arose from the fact that there was a divergence of opinion on same-sex marriage within the ANC ruling elite itself. This made it more important for the court to structure its order 'in a

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<sup>37</sup> *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

<sup>38</sup> Roux (note 28 above) at 118-22.

<sup>39</sup> Roux (note 28 above) at 120.

<sup>40</sup> *Fourie* (note 37 above) at pars. 160-161. See Roux (note 28 above) at 121. Compare the CC's approach in *Olivia Road* (note 20 above) at par. 51 where the judges opted to read a phrase into the relevant piece of legislation. The court reasoned that, in this case, there were not a 'myriad ways' in which the Legislature could cure the section – a as result, the court was not closing off legislative options.

way that would embed the decision in democratic politics'.<sup>41</sup>

In the South African political context, with one dominant political party, public support for a particular judicial outcome could act to protect the court's institutional security against threats, if only implied, from a government wanting its policies upheld – as was the case in *Treatment Action Campaign*. On the other hand, as suggested by Roux in the discussion above, the court may choose to ignore the weight of public opinion in favour of a principled outcome when it can rely on the backing of the ruling party. Even more interesting is the balance that courts have to strike in the absence of public support and in circumstances where there is a lack of consensus in the ANC's leadership. In such circumstances, the need to appeal to democratic legitimacy, to be seen to be acting with this in mind, is most pressing. This discussion also points to a disconnection between traditional conceptions of democratic decision-making and newer concerns with actual public participation and social consensus. On a traditional conception of democracy, the weight of public opinion impacts upon legislation and policies at the level of elections: people vote the party whose policies they support into power and the legislation and policies emanating from the resulting government are deemed to have public support. As was elaborated on in chapter 1, this vision of what democracy means no longer holds much sway. This also makes the question of how one measures public opinion – or democratic legitimacy, for that matter – much more complex.

In recent cases and scholarship, the question of whether there is some kind of social consensus and how to measure this is answered not simply by reference to the fact that a particular piece of legislation has been passed. The degree of public participation in the decision-making process is also relevant for a court deciding how rigorously to scrutinise government action.<sup>42</sup> Drawing on the House of Lords' approach to article 8 in the context of housing legislation in *Kay v Lambeth London Borough Council*,<sup>43</sup> counsel for the Secretary of State in *Huang* argued that any appellate immigration authority should assume that the Immigration Rules and directives struck the appropriate balance between competing interests because, having passed through Parliament, they had the seal of democratic approval. The

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<sup>41</sup> Roux (note 28 above) at 123.

<sup>42</sup> See C Hoexter (2007) *Administrative Law in South Africa* (Juta: Cape Town) at 143.

<sup>43</sup> [2006] 2 AC 465.

Lords rejected this argument as it applied to immigration cases. They held that national housing policy was a product of democratic debate and significant consideration in which various interests were fully represented before Parliament. Immigration Rules, however, are not actively debated before Parliament and, in any event, the interests of non-nationals wishing to stay in the country are not represented there.<sup>44</sup> The level of support within Parliament may itself also be relevant. In his dissenting judgment in *R. v Gloucestershire County Council and another, ex parte Barry*, Lord Lloyd acknowledged that the Act in question had begun its existence as a private member's Bill but that it had subsequently received strong all-party support.<sup>45</sup>

When it comes to relative expertise, judicial approaches are also less categorical than they used to be. Courts no longer necessarily accept, as a matter of form, that their relative lack of expertise when it comes to matters of SE policy precludes any engagement with the issues before them. Rather, courts may interrogate whether they were in as good a position as the original decision-maker to make the determination. Sometimes, the court will fall short. In the context of child care proceedings, for example, the House of Lords has held that, in comparison to the local authority, courts do not have the 'close, personal and continuing knowledge of the child'.<sup>46</sup> In the context of the 'socially sensitive' area of immigration in the U.K., however:

The Court of Appeal held that the IAT had misdirected itself by not considering that Article 8 ECHR added anything to the Community law concept of public policy with which it had engaged; the IAT had therefore failed to consider whether deportation was a disproportionate interference with the right to respect for private life. Both parties to the appeal agreed that proportionality was a matter of law; and that proportionality under Article 8 was the same as under E.U. law: namely, no greater interference than was strictly necessary to justify the pressing social need engaged in. The Court of Appeal concluded that as the appeal to them was on a point of law, and applying the law to the facts found by the IAT, it was as well

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<sup>44</sup> *Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* [2007] 2 W.L.R. 581 at 591-2.

<sup>45</sup> *R v Gloucestershire County Council and another, ex parte Barry* [1997] A.C. 584 at 600-1. Lord Lloyd, with Lord Steyn concurring, held that Parliament's silence on the relevance of resources in assessing the needs of disabled persons under the Chronically Sick and Disabled Persons Act 1970 highlighted the legislative intention to treat resources as irrelevant in this determination.

<sup>46</sup> *In Re S (Minors)* (note 34 above) at par. 27.

placed as that Tribunal to determine whether deportation was proportionate and concluded that it was not.<sup>47</sup>

This approach was made easier by the fact that the court was dealing with a point of law. But judges have also been less than deferential when other forms of expertise are involved. In the South African case of *Khosa*,<sup>48</sup> Justice Ngcobo stated in his dissenting judgment that policymakers held the expertise required to predict future conditions and that courts should be slow to reject any reasonable estimates they made.<sup>49</sup> However, the majority engaged seriously with governmental estimates on the additional cost in social welfare spending that would result from an extension to benefits to adult<sup>50</sup> permanent residents. They found that, even on the higher estimates, the extension would entail an increase of less than two percent on the current spending.<sup>51</sup>

Another issue that tends to arise in the cases is the question of who actually holds the expertise in a particular case. As already noted, medical evidence was presented in both *TAC* and *Soobramoney*. The difference was that, in the former case, the vast weight of medical evidence contradicted government's assertions. On the questions of the efficacy and safety of the drug, the court followed the medical expertise. Expert evidence by social workers is a common feature of UK cases concerning people with special needs such as children or people with disabilities, for instance. In their reasoning, judges have referred to their own,<sup>52</sup> as well as government officials',<sup>53</sup> relative lack of expertise.

### **(c) The severity of the impact of the decision or policy on affected individuals and groups**

The high levels of political sensitivity in a case, often manifested in large and indeterminate

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<sup>47</sup> N Blake 'Importing proportionality: clarification or confusion?' (2002) *European Human Rights Law Review* 19 at 22, discussing *B v. SSHD* (2000) Imm. A.R. 478; *R. (Farrakhan) v. SSHD* October 1, 2001-10-11; *R. v. SSHD, ex p. Isiko* [2001] Imm. A.R. 291.

<sup>48</sup> *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

<sup>49</sup> *Khosa* (note 48 above) at par. 128.

<sup>50</sup> Government had already indicated that it would be extending the benefits to children of permanent residents. *Khosa* (note 48 above) at par. 62.

<sup>51</sup> *Khosa* (note 48 above) at par. 62.

<sup>52</sup> See *The Queen on the application of W v Lincolnshire County Council* [2006] EWHC 2365 at par. 23.

<sup>53</sup> See the dissenting opinion of Lord Lloyd (Lord Steyn concurring) in *Barry* (note 45 above) at 598-9. Lord Lloyd noted that the assessment of the needs of a disabled person was up to the professional judgment of the social worker and that resources could not assist in determining the need.

resource and policy implications, may narrow judicial options when it comes to the intensity of review. Relative lack of information or experience could have the same effect. In those cases, a certain amount of what Sachs J has referred to as ‘active judicial management’<sup>54</sup> could allow a court to require that government engage in mediation or ‘meaningful engagement’<sup>55</sup> with those whose rights or interests are affected even if it decides it is inappropriate to find particular legislation or policies to be unreasonable. However, where debates about constitutional capacity and institutional expertise produce no clear result for or against rigorous judicial scrutiny of governmental acts, courts have been swayed by the severity of the impact of the acts on individuals and groups. Thus, in *Grootboom*, for example, the court was influenced by the fact that people in desperate need were to be left homeless without any help and with no end in sight to this situation.<sup>56</sup> In his dissenting judgment in *Khosa*, Ngcobo J held that the limitation of the rights of permanent residents was for a limited period of time and that it was within the power of these individuals to change their situation.<sup>57</sup> He was referring to the fact that the South African Citizenship Act 88 of 1995 allowed a person to become a naturalised citizen after five years in the country and to apply for naturalisation (and by implication, social benefits) in exceptional circumstances, before five years had elapsed.<sup>58</sup> However, in her judgment for the majority, Mokgoro J noted that the naturalisation process, including what counted as ‘exceptional’, was left up to administrative discretion and was, therefore, not within the control of the individuals affected here.<sup>59</sup> The extent to which state action, whether through legislation, policies or administrative decisions, closes off options for affected individuals is also relevant. In *Jaftha*, for example, legislation allowed for a person’s house to be sold in execution to satisfy a trifling debt without the matter first coming before a court for consideration.<sup>60</sup> In finding this to be unconstitutional, the South African CC was influenced by the fact that once the individuals in the case had lost their state-provided houses through sale in execution of their debts, they could never again apply for state assistance to buy a house.<sup>61</sup>

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<sup>54</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at par. 36.

<sup>55</sup> See *Olivia Road* (note 20 above).

<sup>56</sup> *Grootboom* (note 18 above) at par. 65.

<sup>57</sup> *Khosa* (note 48 above) at par. 119.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Khosa* (note 48 above) at par. 56.

<sup>60</sup> *Jaftha v Schoeman and others; Van Rooyen v Stoltz and others* 2005(2) SA 140 (CC) at par. 1.

<sup>61</sup> *Jaftha* (note 60 above) at par. 39.

Courts in the UK have employed the severity of the consequence for the individuals concerned in a similar way. In *Limbuella*, Lords Bingham and Brown referred to the fact that the three asylum-seekers had no alternative sources of support and were left destitute. For those affected there was no foreseeably swift end to this situation.<sup>62</sup> Thus, the seriousness of the interference with the right is measured, in part, by its duration and predictability. As Baroness Hale put it in *Limbuella*:

It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading'.<sup>63</sup>

The question of alternative remedies is also relevant to a determination of how seriously affected the individual or group is. In *Barry*, the majority held that an individual who was unhappy with the manner in which resource limitations had impacted on the assessment of his or her needs could apply for review on the basis of *Wednesbury* unreasonableness.<sup>64</sup> In his dissenting opinion, however, Lord Lloyd felt that this remedy was inadequate as it reduced the 'minimum obligation under section 2 of the Act of 1970 to the level of *Wednesbury* unreasonableness'.<sup>65</sup> In the later case of *Tandy*, the court agreed, saying that *Wednesbury* review was a 'very doubtful form of protection' as it is very difficult to review decisions on how a local authority chooses to allocate scarce resources.<sup>66</sup>

#### **(d) State conduct**

The behaviour of the state, the extent of its culpability in the deprivation of rights or interests, features in some of the cases. The question of how the state conducted itself has sometimes

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<sup>62</sup> *Limbuella* (note 32 above) at pars. 9 and 99. See also, the reference to the 'dictates of humanity' in *Anufrijeva* (note 31 above) at pars. 35 and 48.

<sup>63</sup> *Limbuella* (note 32 above) at par. 78. See also Lord Scott at par. 71.

<sup>64</sup> *Barry* (note 45 above) at 605.

<sup>65</sup> *Barry* (note 45 above) at par. 596.

<sup>66</sup> *R v East Sussex County Council, ex parte Tandy* [1998] 2 W.L.R. 884; [1998] A.C. 714 at 749. As is clear from my argument elsewhere in this thesis, I do not believe that review for unreasonableness need be a weak remedy. But a continued judicial attachment to the *Wednesbury* test for unreasonableness means that this point regarding alternative avenues for the individual to remedy his or her situation remains relevant.

allowed courts to be more searching in their approach. In both *Grootboom*<sup>67</sup> and *Olivia Road*,<sup>68</sup> the fact that the government officials had not even attempted to engage with the occupiers concerned to try to resolve the problem was relevant to the judicial outcome. In *R v. Secretary of State for Social Security ex parte. Joint Council for the Welfare of Immigrants; Regina v Secretary of State for Social Security ex parte. B.*<sup>69</sup> the fact that it was state action which deprived the relevant class of people from benefits and prevented them from seeking employment contributed to the finding that their situation was untenable.

However, the jurisprudence on Article 3 of the ECHR in UK courts points to a need to be circumspect when considering the significance of state responsibility for harm. Article 3 gives rise to a primarily negative obligation: the state must refrain from acts of torture; or inhuman or degrading treatment or punishment. But, the right may also be engaged when the state is required to take positive action to prevent others from inflicting the harm.<sup>70</sup> Thus, the state may be directly or indirectly responsible for the invasion of the right.<sup>71</sup> In either case, once it is established that the state is responsible, the obligation is absolute.<sup>72</sup>

In the Court of Appeals decisions of *Limbuella*<sup>73</sup> and *Gezer*,<sup>74</sup> Lord Justice Laws attempted to deal with the complexities of state responsibility in this area through a ‘spectrum analysis’:

In my judgment the legal reality may be seen as a spectrum. At one end there lies violence authorized by the state but unauthorised by law. This is the worst case of category (a) and is absolutely forbidden. In the British state, I am sure, it is not a reality, only a nightmare. At the other end of the spectrum lies a decision in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the

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<sup>67</sup> *Grootboom* (note 18 above) at par. 87.

<sup>68</sup> *Olivia Road* (note 20 above) at par. 19.

<sup>69</sup> [1997] 1 W.L.R 275. The court was called upon to review Regulations which provided that those who sought asylum at any point later than upon their entry into the United Kingdom and those whose claims for asylum had been rejected by the Secretary of State for the Home Department, and were in the country pending their appeals would no longer be entitled to ‘urgent cases payments’ (at 281).

<sup>70</sup> See Baroness Hale in *Limbuella* (note 32 above) at par. 77. See also *D v United Kingdom* (1997) 24 EHRR 423 at par. 49.

<sup>71</sup> The European Court of Human Rights indicated in *D* (note 70 above) at par. 49 that a court could even be called upon to consider Article 3 cases in which the state is neither directly nor indirectly responsible for the interference with the right. A certain amount of flexibility is required.

<sup>72</sup> See Lord Hope in *Limbuella* (note 32 above) at par. 53.

<sup>73</sup> *R. (on the application of Limbuella) v Secretary of the Home Department* [2004] QB 1440 at paras. 59-70.

<sup>74</sup> *R (Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730 at paras. 24–29.

circumstances in which he finds himself in consequence of the decision. In that case the decision is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the state's right to implement the policy on article 3 grounds.<sup>75</sup>

The House of Lords was divided on the utility of the analysis. Lord Hope and Baroness Hale signaled their discomfort with it.<sup>76</sup> In part, Lord Hope's concerns stemmed from a worry that the analysis would act to downgrade the absolute nature of the Article 3 right by allowing considerations of proportionality in through the 'backdoor' when the interference with the right arose from lawful government policy.<sup>77</sup> By contrast, Lord Brown found the analysis to be helpful, not as a means of classifying each and every case along a spectrum or continuum, but as a means of underlining the various factors that come into play in such cases.<sup>78</sup> All three Law Lords agreed that the lawfulness of the state policy did not detract from the absolute nature of the obligation on the state. The real questions are: is the harm severe enough to be classified as 'torture' or 'inhuman or degrading treatment or punishment'; and is the state responsible for the harm? Whether the harm occurred as a result of lawful state policy is irrelevant.<sup>79</sup> The Law Lords, following European court jurisprudence, accepted, however, that the question of whether the harm has resulted from intentionally inflicted acts of the state is relevant in a determination of whether the high threshold for a violation of Article 3 has been met.<sup>80</sup>

In *Limbuella*, this high threshold was met because of the degradation inflicted by a government policy that effectively denied asylum seekers who were lawfully in the country access to state support and, at the same time, prevented these people from seeking employment to support themselves.<sup>81</sup> In the case of *N*, where the court held that deporting an illegal immigrant who was HIV positive back to Uganda where she would no longer receive the kind of medical care that was keeping her alive and functional in the U.K. did not violate Article 3, some of the reasoning focused on the fact that she was not the victim of

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<sup>75</sup> *Limbuella* Court of Appeals (note 73 above) at par. 70.

<sup>76</sup> See Lord Hope at pars. 53-55; and Baroness Hale at par. 77 in *Limbuella* (note 32 above).

<sup>77</sup> *Limbuella* (note 32 above) at par. 55.

<sup>78</sup> *Limbuella* (note 32 above) at par. 89.

<sup>79</sup> Lord Hope at pars. 53 and 55; and Lord Brown at pars. 90 and 92 in *Limbuella* (note 32 above).

<sup>80</sup> See *N* (note 33 above) at par. 62; and Lord Hope in *Limbuella* (note 32 above) at par. 48.

<sup>81</sup> Lord Hope in *Limbuella* (note 32 above) at par. 59

intentionally inflicted harm by the state or by non state agents.<sup>82</sup> Viewed in this way, then, the Law Lords appear to be saying that the harm contemplated by Article 3 is exceptionally severe and, in circumstances where the affected individuals are not being singled out through direct state action, it is less likely that the harm will be considered to amount to degrading or inhuman treatment or punishment. The problem with this argument is that it does not entirely explain the difference in approach to HIV positive persons who wish to stay in the U.K. rather than give up the comparatively high level of medical care and return to their home countries. In the context of the U.K., only *D* was brought successfully. In neither *N* nor *D* was the state directly responsible for the harm. *N* was in a better state of health than *D* but this was only due to the treatment she was receiving in the U.K. There was no doubt that she would die within a matter of months after returning to Uganda. The real difference between the cases, then, as pointed out by Lord Brown was that the case of *D* concerned a purely negative obligation. In *N*, the fact that the appellant was asking for positive action – access to ongoing medical treatment – was key. The resource and policy implications of a decision that *N* and, therefore, others in her situation could not be deported were potentially huge.<sup>83</sup> In *D*, the humanitarian considerations of the case and the fact that comparatively little was required of the state, operated against *D*'s deportation. In *N*, the humanitarian considerations were balanced against the resource and policy implications involved in determining whether the state was responsible.

Despite some expansion of the Article 3 jurisprudence, the right still applies in a very limited set of circumstances. The cases indicate that, when the state has been indirectly responsible for the harm, this is relevant to a determination of whether the high threshold set for a violation of the right has been met. At the same time, judges need to be careful not to interpret indirect responsibility to exclude any state obligation.

### **(3) The relationship between the factors: relative weight and relevance**

In analysing the South African CC's approach and considering how it may be further developed, guidelines for judicial restraint and intervention are key. In each case it decides,

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<sup>82</sup> Baroness Hale in *N* (note 33 above) at par. 62.

<sup>83</sup> *N* (note 33 above) at pars 88-93.

the CC has to provide some justification for the degree of restraint it shows or the intensity of review it applies. This justification is not always clearly articulated. I have identified four main factors which impact on the intensity of review in cases with SE implications: the constitutional balance of powers; relative institutional expertise; the severity of the impact of the governmental decision or policy; and the conduct of the state. I turn now to the issue of the relative weight of these factors in the adjudication of disputes.

**(a) Constitutional balance of powers**

Modern democracies all uphold a balance of powers between the different arms of government. How this balance is struck differs from country to country. Courts must pay attention to the manner in which this balance of powers is formally protected in their jurisdictions. So, in the U.K., for example, much of the jurisprudence above is informed by the principle of parliamentary supremacy. The expansion of judicial review in administrative law and the incorporation of the ECHR through the HRA have raised questions about the continuing significance of parliamentary supremacy in the U.K. But courts are still very wary of interfering in ‘macro-political’ or high policy areas like foreign policy, social welfare and national security. In the area of SE rights, then, it is for Parliament to decide whether to provide state funds for housing for all or to decide what benefits asylum-seekers are entitled to. Once Parliament has set out certain statutory duties, however, the courts are required to give effect to them.<sup>84</sup> In South Africa, courts are explicitly required to pronounce on the constitutionality of SE legislation and policy. But they must assess government action within the bounds of reasonableness, progressive realisation and available resources. This is a reflection that the legislature and executive are the ultimate architects of long-term SE policy because of the fact of limited resources and the sheer enormity of the task of redistributing wealth and services in the country. For these reasons, the constitutional balance of powers is a factor in both South African and UK jurisprudence. In determining the appropriate balance of powers, UK courts will look to Parliamentary intent as an important concern whereas South African courts will look to the Constitution itself.

But, due to shifts in understandings of what an appropriate balance of powers

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<sup>84</sup> But, see the discussion of ‘target duties’ in section 4 of chapter 5.

requires, courts in both jurisdictions are increasingly willing to look to actual political legitimacy, rather than a formal notion of institutional separation of powers. So, courts will draw a distinction between cases which involve rearranging of budgets and those which have minor implications for the allocation of resources. Courts have also been influenced by factors such as the extent to which a particular policy or rule or regulation was the subject of parliamentary debate, how much support it had in Parliament and, certainly in South Africa, the level of public support for a particular policy (if this is clear). These, more nuanced questions require that courts interrogate real levels of political legitimacy, rather than simply assume that such legitimacy exists simply because of an institution's formal political pedigree. In *Treatment Action Campaign*, public support for a particular judicial intervention in the face of significant resistance on the part of the South African government facilitated a relatively far-reaching judgment in which the court overturned existing government policy.

In determining whether close interrogation of government policy would interfere with the constitutional balance of powers, courts in both jurisdictions have taken into account, not just the subject matter of the dispute but the extent to which the case has a genuinely polycentric impact. So, for example, if a small and definable group of people is affected, the court will be more willing to intervene. Furthermore, decisions about resource allocation are easier for judges to make when they are simply enforcing what the state has already agreed to; or if the impact on resources is, according to government's own estimation, small. U.K. courts have used Parliamentary intent to enforce duties on the state, even where these duties are not plainly identified in legislation. Once Parliament has explicitly decided to provide certain services and goods, judgments ordering that government take particular steps to fulfil that duty are not as easily susceptible to criticisms about courts overstepping the boundaries of their role.

#### **(b) Relative institutional expertise**

In these cases, the court exercises caution (in respect of justiciability, intensity of scrutiny or type of remedy), not out of concern for its rightful constitutional place but out of a sense of its own practical limitations. It can be difficult to separate this issue from the constitutional balance of powers as the court's relative lack of expertise in a particular area may, to some

extent, be due to the fact that such area has been historically ‘out of bounds’ for it. But there are a number of cases in which courts adopt a cautious approach, even where they are constitutionally permitted to intervene in the area concerned, because, on their own assessment, they lack the kind of expertise, relative to another institution, needed to make a proper determination. Generally, concerns about expertise arise when resources are proven to be scarce; broad policy issues are involved, the court cannot safely predict the consequences of a particular order; or a determination of the case requires medical or social expertise that the court does not have.

Again, courts are no longer merely accepting that they have insufficient expertise to hand down judgments impacting on SE policy. Instead, the question of expertise impacts on how far a court is willing to go in scrutinising governmental decisions. Furthermore, some courts are harnessing the expertise of independent bodies in acknowledgement of the fact that other governmental institutions may themselves lack experience when compared with individuals or groups who have researched and worked in the area of social welfare for a long time. Whether a court may itself call on such expertise is politically and practically controversial – politically, because many such individuals and groups are invested in a particular approach that may be at odds with what elected representatives feel to be necessary; practically, because the setting up of a credible socio-legal investigative body is likely to prolong a decision in any case. But courts are regularly presented with evidence by medical experts, social workers etc. and have to decide what weight to attach to such evidence. A court’s willingness to intervene is influenced by whether there is agreement between other expert parties (relevant state bodies or medical authorities, for example).

Is there a distinction to be drawn between expertise, on the one hand, and information on the other? Sometimes, the court refuses to make a determination, not because some other arm of government has a more specialised and overarching understanding of the issues but because it simply does not have the information before it to make a finding. In such cases, utilising judicial procedures to get that information is less controversial as it is not a question of disagreeing with legislative or executive views. Courts will also be reluctant to pronounce on matters not contained to the factual scenario before them.

**(c) Severity of consequences of government action/inaction**

As the relative weight of the factors is never made explicit in the judgments, determining whether the first two – constitutional balance of powers and relative institutional expertise – act as ‘trumps’ in the judicial process is complex. In *Soobramoney*,<sup>85</sup> for example, though the consequences of the hospital’s policy could not have been more severe for Mr Soobramoney and others in his position, the court found that policy to be reasonable in the circumstances. The serious resource and policy implications in the case – potentially involving what the court later referred to as the rearranging of budgets<sup>86</sup> – outweighed the harsh impact of the hospital’s policy. One could conclude from this that the first two factors are more heavily weighted in any consideration of whether judicial intervention is appropriate and, if so, how intense the review of the governmental decision should be. But this assessment is complicated by the fact that the approach of court has evolved. In the later case of *Khosa*,<sup>87</sup> the court was prepared to make an order which did require a shift in the budgetary allocation.

One explanation for the difference in the outcome of the cases is that the court considered the estimated less than two percent increase in the social security budget required in *Khosa* to be something government could easily absorb.<sup>88</sup> The cost implications of ordering that dialysis treatment be provided to Mr Soobramoney and everyone in his position may have been much higher but this was not explored in the judgment. So, the court’s difficulty lay not so much with the seriousness of the cost implications but with the fact that those implications were not clearly defined and predictable on the evidence before it. This is an indication that concerns about the constitutional balance of powers or with the court’s relative lack of expertise in certain areas will no longer be treated as reasons for the court not to intervene or to apply only a very low level of scrutiny to the impugned governmental action. A different outcome, taking other factors like the impact of government’s action into account, may be possible where expert evidence before the court shows that resource and policy implications are definite and predictable.

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<sup>85</sup> Note 6 above.

<sup>86</sup> *Treatment Action Campaign* (note 17 above) at par. 38.

<sup>87</sup> Note 48 above at pars. 60-2.

<sup>88</sup> *Ibid.*

In the context of the U.K., whilst the severity of the consequences of the government action weighed heavily in the judgments in *Limbuella*<sup>89</sup> and *D v United Kingdom*,<sup>90</sup> the same did not apply in the string of Article 3 cases following *D v United Kingdom*, in which individuals attempted to claim leave to remain in the U.K. because of the access to medical treatment they were receiving in this country, which would not be available to them in their home countries.<sup>91</sup> The rationale for this, more constrained, approach to asylum claims based on access to medical care focused very much on the positive nature of the duties which would be imposed on government should these claims succeed. In *D v United Kingdom*, the state's obligation extended only to allowing the individual concerned to die with dignity. Successful claims in the other cases would have required ongoing medical treatment for the individuals and others in a similar position. But the court's finding in *Limbuella* also imposed positive duties with cost implications on government, with the court holding that the high threshold for a breach of Article 3 had been met because government policy could leave people destitute for an indefinite period of time.<sup>92</sup> Again, as with the South African CC's judgments, and although this was not made explicit in the cases, the cost implications of ongoing medical care were certainly indeterminate, and most likely greater than that of state support for the basic welfare of asylum seekers waiting for their applications to be decided. This is the most plausible explanation for the difference between *Limbuella* and *D v United Kingdom*, on the one hand, and the medical treatment cases referred to above.

Following the decision in *Limbuella*, it would be very difficult for a government agency to claim that it has no obligation purely on the basis that such an obligation would entail positive action, such as the provision of social welfare benefits to a particular group or class of people. For South African courts, the text of both sections 26 and 27 make it clear that the state has positive duties vis-à-vis SE rights. This is certainly how the CC has interpreted the provisions. In both jurisdictions, then, serious and/or indeterminate resource

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<sup>89</sup> Note 32 above.

<sup>90</sup> Note 70 above.

<sup>91</sup> See *Bensaid v United Kingdom* (2001) 33 EHRR 205; *N v Secretary of State for the Home Department (Terence Higgins Trust intervening)* (note 33 above); and *JA (Ivory Coast), ES (Tanzania) v Secretary of State for the Home Department* [2009] EWCA Civ 1353.

<sup>92</sup> Lord Hope in *Limbuella* (note 32 above) at par. 59.

or policy implications tend to outweigh any other consideration for a court deciding on how rigorously it will scrutinise governmental action and what remedy it will hand down. Where those implications are not severe, however, courts will take other factors into account.

Increasingly, courts are referring to minimum standards of dignity and minimum essential levels of social welfare. They are finding the interference with rights in certain cases to be so severe that the court must intervene, even where the judgment may tread on legislative and executive toes. In such cases, the court is still likely to be quite cautious in the level of scrutiny applied and the remedy handed down. There is also a balancing of broader societal needs against the extent and duration of interference with the right. The court itself engages in this balancing. Individual needs sometimes give way to broader needs of society.

The court will also consider whether the affected parties have the opportunity to mitigate the negative impact in some way – to apply for an exemption from the law or regulation, for example. The question of whether the negative impact exists for a foreseeable short or finite time is also relevant, as is the question of whether the individuals concerned have some alternate, effective remedy open to them to pursue.

#### **(d) State conduct**

The South African CC has explored the issue of what attempts the state made to resolve the dispute before the legal proceedings commenced. This question has become a factor in determining whether state action or inaction is constitutional. The significance of this factor is, however, unclear. The outcome in the *Olivia Road* case strongly suggested that governmental attempts at the eviction or ejection of homeless people from land or buildings could not proceed in the absence of meaningful engagement with affected parties. But, as discussed in chapter 4, the CC's decision in *Joe Slovo* indicates that some attempt at engagement, even if relatively superficial, may suffice in the particular circumstances of the case. This is discussed further in section 4 of this chapter.

In Article 3 cases in the U.K., judges have suggested that, where the state is indirectly responsible for the harm, the threshold for a violation of the right is higher. In those

circumstances, the question of whether the obligation on the state demands ongoing redistribution of resources, for example, may need to be balanced against the harm. In cases of direct responsibility, however, state conduct is not relevant and courts have been wary of allowing any kind of balancing of interests to dilute the right. Article 3 cases form a small part of the jurisprudence, however. What is important to note is that the manner in which the state has conducted itself has some relevance to the intensity of review.

#### **(4) The South African Constitutional Court's evolving approach: balancing the factors**

In this section of the chapter, I draw on two of the South African CC's recent and most complex judgments on SE rights – *Joe Slovo*<sup>93</sup> and *Mazibuko*<sup>94</sup> – in order to gauge whether the CC is striking an appropriate balance amongst the factors I have identified above, in its model of SE rights adjudication. I have chosen to anchor the discussion in these two cases because, as two of the court's three latest pronouncements on SE rights, they provide a good indication of how the CC's approach has developed.<sup>95</sup> They are also by far the most complicated cases on SE rights the court has had to deal with.

##### **(a) *Joe Slovo***

In terms of the balancing of the various considerations at play, the first two factors – constitutional balance of powers and relative institutional capacity – weighed very heavily in the case. The judges were not prepared to interrogate the government's decision to relocate residents of the informal settlement, rather than engage in on site upgrading, despite the fact that minimal relocation is a key aspect of government's own Housing Code and is recognised as international best practice.<sup>96</sup> As Ngcobo J put it:

It is not for the courts to tell the government how to upgrade the area. This is a matter for the

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<sup>93</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

<sup>94</sup> *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening)* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

<sup>95</sup> The third of the most recent judgments is *Abahlali Basemjondolo Movement SA and another v Premier of KwaZulu-Natal and others* 2010 (2) BCLR 99 (CC), discussed briefly in chapter 4 above. I do not use the case in this section as I do not believe that it added to the developing SE rights jurisprudence in any significant way.

<sup>96</sup> See Moseneke DCJ at par. 174; Ngcobo J at pars. 201 and 205 and Sachs J at par. 367 in *Joe Slovo* (note 93 above).

government to decide. The fact that there may be other ways of upgrading the area without relocating the residents does not show that the decision of the government to relocate the residents is unreasonable. It is not for the courts to tell the government how best to comply with its obligations. If, in the best judgement of the government it is necessary to relocate people, a court should be slow to interfere with that decision...<sup>97</sup>

The N2 Gateway pilot project involved huge numbers of people. The resource implications were, therefore, considerable and delays were adding to the overall cost of the project.<sup>98</sup> The consequences of government's decision to relocate residents in order to upgrade the settlement were undoubtedly severe. It required people to uproot their lives, took them away from transport routes and cost-effective access to their jobs, and placed them in an area with an extraordinarily high crime rate and with little security for their homes, goods and persons.<sup>99</sup> But residents remaining in the Joe Slovo settlement were not the only ones affected by government's decision and the court's judgment. Broader societal considerations also played a significant role in the judgment. As O'Regan J pointed out, thousands of Joe Slovo residents had already agreed to move. They had, in fact, been moved to Delft and were eager to return to the, now upgraded, settlement.<sup>100</sup> Further delays would impact negatively on this group of people.

Whilst these considerations were important and finding the right balance of the various interests at stake in the case was no easy task, the CC's approach was problematic in a number of respects. For one thing, the delays, rising costs and miscalculations<sup>101</sup> associated with the N2 Gateway housing project were not primarily a consequence of a lack of co-operation by residents. These problems arose directly from flaws in the project. Although residents' behaviour added to these problems, the state's top-down approach<sup>102</sup> to engaging with affected parties played a significant contributing role in the failure to find mutually

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<sup>97</sup> Note 93 above at par. 253.

<sup>98</sup> See Sachs J at par. 392 in *Joe Slovo* (note 93 above).

<sup>99</sup> Centre on Housing Rights and Evictions (COHRE) 'N2 Gateway Project: housing rights violations as "development" in South Africa' (2009: Geneva) at 21-22, available at <http://www.cohre.org/store/attachments/090911%20N2%20Gateway%20Project%20Report.pdf>, last accessed on 4 May 2010 at 29-30.

<sup>100</sup> *Joe Slovo* (note 93 above) at par. 303.

<sup>101</sup> Alluded to at pars. 371- 372, Sachs J in *Joe Slovo* (note 93 above).

<sup>102</sup> Sachs J at pars. 378-9 in *Joe Slovo* (note 93 above).

satisfactory solutions.<sup>103</sup>

The state's responsibility for the failings in the N2 Gateway pilot project was made clear in a report by the Auditor-General of South Africa, released in May 2009 when argument in the *Joe Slovo* case had already been heard. Although the report was completed almost a year earlier, it was only made public when the CC's judgment in the case was pending.<sup>104</sup> The report raised a significant number of concerns about the project going ahead, when key requirements set out in the Housing Act,<sup>105</sup> the social housing policy and the memorandum of understanding drafted by the various role-players had not been met.<sup>106</sup>

The Auditor-General's Report identified R19 977 804 as 'fruitless and wasteful expenditure' which could have been avoided if the stakeholders had exercised 'reasonable care' in the planning stages of the project.<sup>107</sup> There were also various problems with the process through which the first project manager was appointed. Amongst other things, the company selected to manage the project did not comply with the formal requirements for the proposal, was ranked only 6 by the evaluation committee, lacked the expertise needed to fulfill a variety of project management duties and was paid a fee, unrelated to actual performance, greatly above the norm.<sup>108</sup> There were also grave inadequacies in the quality of the houses that had been constructed in Phase 1 of the project.<sup>109</sup> In an ensuing parliamentary hearing, the Director-General in the national department of human settlements, Itumeleng Kotsoane, stated that many of the project's failings could be attributed to political influence. The outcome of the hearing was that the three levels of government would enter into a new agreement within two months.<sup>110</sup>

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<sup>103</sup> See par. 113 of Yacoob J's judgment where he accepts as 'undoubtedly true' the assertion that more thorough consultation with affected parties could have prevented the standoff between housing authorities and residents. See also Ngcobo J at par. 247.

<sup>104</sup> COHRE Report (note 99 above) at 21-2.

<sup>105</sup> 107 of 1997.

<sup>106</sup> Auditor-General of South Africa, Report of the Auditor General on the Special Audit of the N2 Gateway Project at the National Department of Housing (2008) at pars. 6.2.1(a) and (b), available at <http://www.pmg.org.za/files/docs/N2gatewayreport.pdf>, last accessed on 4 May 2010.

<sup>107</sup> Auditor-General's Report (note 106 above) at par. 6.4.1 (d) (ii); COHRE Report (note 99 above) at 22.

<sup>108</sup> Auditor-General's Report (note 106 above) at par. 6.6.1 (a); COHRE Report (note 99 above) at 22.

<sup>109</sup> Auditor-General's Report (note 106 above) at par. 6.9.1.

<sup>110</sup> COHRE Report (note 99 above) at 22.

The report was not available to the court when it deliberated on the *Joe Slovo* judgment so the CC cannot be criticised for failing to take it into account. However, there were many indications in the submissions before the court that the N2 Gateway Project was fundamentally flawed and that the delays and escalating costs were more a consequence of poor management than uncooperative residents. The enormous disparity between what residents were initially told they would have to pay in rentals for housing and the figures they were later given, attributed, at least in part, to building costs being higher than predicted was one worrying signal that there were serious defects in the budgeting and management of the project.<sup>111</sup> The suggestion that the plan would not be able to house as many people as was initially promised by government was another such signal.<sup>112</sup> Despite these questions about the state's conduct in the case, the CC chose not to interrogate the implementation of the project too closely. The judges allowed the state's nominal acceptance of the need for meaningful engagement and the overall worthiness of the project to outweigh concerns about its impact on the residents. The argument that other, affected parties – particularly those who had already moved to Delft and were waiting to be allocated permanent housing – had also to be considered was, on the face of it, very convincing. However, the idea that an order allowing for eviction of the residents would speed things up rested on the assumption that the primary cause of the delay was the residents' unwillingness to move. As discussed above, this was not the case.

The CC attempted to mitigate the harsh effects of its judgment through a carefully crafted order, discussed in chapter 4 above. But granting the evictions in the first place removed much of the 'sting' from the CC's orders that further engagement take place and that the state take steps to improve the transport situation for people in Delft, for example.<sup>113</sup> Arguably, the CC finally recognised the systemic problems with the state's conduct in respect of the N2 Gateway Project when, on 24 August 2009, it decided to stay the execution of its order until further notice.<sup>114</sup> As Pierre de Vos points out, though, the CC handed down

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<sup>111</sup> Sachs J at pars 371-2, *Joe Slovo* (note 93 above).

<sup>112</sup> O'Regan J at par. 295, *Joe Slovo* (note 93 above).

<sup>113</sup> *Joe Slovo* (note 93 above) at par. 7.

<sup>114</sup> P de Vos 'Sanity and humanity prevails - for now', 8 September 2009, *Constitutionally Speaking* blog, available at <http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/>, last accessed

its second order in the case quietly.<sup>115</sup> As this was an order, unattached to a judgment, the court did not make its reasons for staying the execution of the evictions clear. Thus, the poor management of the N2 Gateway project, although made explicit in the parliamentary hearing, did not feature as part of the court's reasoning on why the evictions should not yet take place. And so the relevance of state conduct as a factor influencing the intensity of review was disregarded in the *Joe Slovo* litigation as a whole.

**(b) *Mazibuko***

A tendency to focus on the first two factors – constitutional balance of powers and relative institutional capacity – was, again, evident in the court's approach in *Mazibuko*. This tendency was most pronounced in the judges' rejection of the applicants' argument that the court should set out the quantity of water which forms the content of the right to water in section 27 (1) (b) of the Constitution.<sup>116</sup> The court's reasoning on this matter is examined at some length in chapter 4 of this thesis. To summarise, the court likened the argument to that based on minimum core obligations, which had been made in the earlier cases of *Grootboom* and *Treatment Action Campaign*. O'Regan J held, for a unanimous bench, that the expert evidence was not sufficiently clear to allow the court to determine what the content of the right was.<sup>117</sup> The court lacked the institutional capacity to make this determination itself and would, therefore, defer to government in this regard. Furthermore, the court found that, as a general approach, quantifying the content of the right could counteract the desired flexibility of a reasonableness-based approach and prevent a proper study of context.<sup>118</sup> Most importantly, in clarifying its general approach to SE rights adjudication, the court in *Mazibuko* stressed accountability and process concerns as principal state obligations,<sup>119</sup> noting that judges 'would not seek to draft policy or to determine its content'.<sup>120</sup>

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on 4 May 2010; and 'Evictions suspended: shack dwellers reprieved', *The Sowetan*, 4 September 2009, available at <http://www.sowetan.co.za/News/Article.aspx?id=1060093>, last accessed on 4 May 2010.

<sup>115</sup> Ibid.

<sup>116</sup> *Mazibuko* (note 94 above) at pars. 51 – 68.

<sup>117</sup> *Mazibuko* (note 94 above) at par. 62.

<sup>118</sup> *Mazibuko* (note 94 above) at par. 60.

<sup>119</sup> *Mazibuko* (note 94 above) at par. 59.

<sup>120</sup> *Mazibuko* (note 94 above) at par. 65.

In arguing for the usefulness of a reasonableness-based approach to SE rights adjudication in chapter 4, I noted that such an approach does not preclude judicial acceptance of the notion of minimum core obligations or other content-driven methods for adjudicating SE rights claims in appropriate cases. In its earlier jurisprudence, the CC left open the possibility of recognising minimum core obligations if the evidence of the content of those obligations was sufficiently clear and if the analysis was properly contextualised, rather conducted in the abstract.<sup>121</sup> In addition, as discussed in chapters 4 and 5, both the South African CC and courts in the U.K. have employed the idea of minimum essential levels of welfare in finding government action to be unreasonable. But the South African CC's association of quantifying the content of SE rights with policy-making in *Mazibuko* strongly suggests a more generalised antagonism to delineating the content – minimum or otherwise – of SE rights, on the basis that this would involve the court in policy-making and therefore upset the constitutional balance of powers.

The difference between the court's earlier and later jurisprudence on this matter is made apparent by the nature of the applicant's arguments in the case. In contrast to the earlier cases, the applicants in *Mazibuko* were able to produce specific international evidence of the quantity of water required for various household uses. As indicated earlier, the court dealt with this evidence by finding that there was no agreement between the experts on what amount of water was 'sufficient' – what counted as 'sufficient' depended on the uses to which the water was put.<sup>122</sup> But the applicants' expert witness, Gleick, had put forward evidence detailed enough to show the quantity of water required for various different uses relevant to the case.<sup>123</sup> General Comment 15 on the ICESCR provides that '[t]he quantity of water available for each person should correspond to World Health Organization (WHO) guidelines'.<sup>124</sup> As to what those guidelines are, the Comment refers to a 2002 WHO study by Howard and Bartram as well as the findings of the expert witness used by the applicants in

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<sup>121</sup> *Grootboom* (note 18 above) at paras. 33. See also *Treatment Action Campaign* (note 17 above) at par. 34.

<sup>122</sup> *Mazibuko* (note 94 above) at par. 62.

<sup>123</sup> Heads of argument submitted by the applicants, available at <http://www.constitutionalcourt.org.za/Archimages/13710.PDF>, last accessed on 5 May 2010 at par. 345.

<sup>124</sup> At par. 12.

the *Mazibuko* case, Gleick.<sup>125</sup> As the *amicus curiae* pointed out in their submissions, whereas Gleick's evidence indicated that 50 litres per person per day was the 'minimum necessary for a healthy life that allows basic hygiene and consumption needs to be met', Howard and Bartram suggested that 20 litres per person per day constituted 'basic access' to water<sup>126</sup> However, Howard and Bartram indicated that this basic level of access entailed a "'high" level of health concern'. Furthermore, Howard and Bartram did not include water-borne sanitation – the kind relevant to the case – in their calculations.<sup>127</sup> The applicants also referred to a more recent (2005) WHO study conducted on the amount of water required for daily domestic use, which put the figure at 50 litres per person per day if cleaning and washing were included.<sup>128</sup>

Justice O'Regan did not engage with these submissions in her judgment for the court. Instead, she referred only briefly to two affidavits presented by the first and second respondents, which drew on research by the WHO before concluding that what amounted to sufficient water was unclear and context-dependent. As noted in chapter 4, the applicant's submissions on this matter were weakened by the fact that they ultimately did not challenge the minimum standard of 25 litres per person per day set out in Regulation 3 (b), promulgated in terms of the Water Services Act 108 of 1997.<sup>129</sup> Instead, applicants argued that 50 litres per person per day went beyond a mere interest in survival and encapsulated 'what is necessary for dignified human existence'.<sup>130</sup> The court was, predictably, even less amenable to quantifying the content of the right as a whole than it has been to set minimum standards, especially since the applicants had, in effect, accepted that government was providing the minimum essential level of the right.

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<sup>125</sup> General Comment No. 15 of the ICESCR at par. 5, note 14.

<sup>126</sup> Heads of argument submitted by the *amicus curiae* in the case, available at <http://www.constitutionalcourt.org.za/Archimages/13809.PDF>, last accessed on 5 May 2010 at pars. 82-3.

<sup>127</sup> *Amicus curiae* heads of argument (note 126 above) at par. 83.

<sup>128</sup> Applicants' heads of argument (note 123 above) at par. 350.

<sup>129</sup> *Mazibuko* (note 94 above) at par. 72.

<sup>130</sup> Applicants' heads of argument (note 123 above) at par. 355. See also pars. 379-80 and 383, Applicants' heads of argument (note 123 above); and *Mazibuko* (note 94 above) at par. 56.

A challenge to the amount of 25 litres per person per day as a minimum standard may have strengthened the applicants' case. The Committee on Economic, Social and Cultural Rights has defined the minimum core of the right to water to be an amount which is 'sufficient and safe for personal and domestic uses to prevent disease'.<sup>131</sup> The Committee has described personal and domestic uses as including 'drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene'.<sup>132</sup> So the applicants could have made a convincing argument that 25 litres per person per day, which did not include water-borne sanitation, did not provide the minimum amount needed for personal and domestic uses to prevent disease.

But the fact that applicants did not challenge the amount of 25 litres per person per day, as a minimum standard, should not have detracted from their argument that 50 litres per person per day is what was required for a dignified existence, where that water was being used for water-borne sanitation, as well as other personal and domestic uses – as was the case in Phiri. This was not a case in which the court lacked information. The court could have concluded, based on the available evidence, that 50 litres per person per day was, indeed, what was required for the various uses identified here and relevant to Phiri. This finding would have been relevant to an enquiry into reasonableness. Even if the court went on to find that, for reasons of limited resources, the government could not provide this amount immediately, the recognition of the amount needed for the relevant personal and domestic uses would have been a significant indication of how far government needed to go in the progressive realization of the right. And, at the very least, government would have had to provide support for its claim that it did not have the resources to provide the 50 litres per person per day.

Another worrying feature of the *Mazibuko* decision was the court's failure to properly consider the severity of the consequences of government's decision to install pre-paid meters for the applicants and others in their position. There were 3 levels of service provision under Johannesburg Water's Operation Gcin'amanzi (to save water) Plan:

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<sup>131</sup> General Comment 15 of the ICESCR at par. 37.

<sup>132</sup> General Comment 15 of the ICESCR at par. 12 (a).

The first level is the most basic and consists of a communal tap and communal ventilated pit latrines; the second level is a yard standpipe and a sewer connection or shallow communal sewer system with a pour-flush toilet; and the third level is a full metered water connection on each stand and a conventional water-borne sewerage system.<sup>133</sup>

Residents of Phiri Township were asked to choose between the second level (a yard standpipe) or a pre-paid meter.<sup>134</sup> If residents refused both a yard standpipe and a pre-paid connection, their water supply would be cut off.<sup>135</sup> During the implementation process, a majority of the residents opted for pre-paid meters.<sup>136</sup> There were undoubtedly problems in the implementation process – for example, Mrs Mazibuko, one of the applicants in the case, who passed away during the course of the litigation, had alleged that she was not given a choice between a yard standpipe and a pre-paid connection. When she refused a pre-paid connection, her water supply was cut off for a period of over six months, until she applied for a pre-paid connection to be installed.<sup>137</sup> The court held that these problems were not so severe as to render the implementation of the programme, as a whole, unreasonable. Furthermore, O'Regan J held that should those people occupying the house Mrs Mazibuko had resided in wish to change from a pre-paid meter to a yard standpipe on the basis that the latter option had not been presented to Mrs Mazibuko, 'that request would no doubt be considered by the City'.<sup>138</sup>

Residents of Phiri were not given the option of the third level of service provision, operated on the basis of a credit meter system.<sup>139</sup> There were certain disadvantages associated with the credit meter system. Customers with credit meters paid higher tariffs for water supply than those with pre-paid meters. Interest could be charged for arrear payments and defaulters names could be registered with the credit bureau.<sup>140</sup> And, of course, water supply could be cut off, as a consequence of non-payment. However, the discontinuation of the water supply could only be effected after officials had complied with a range of requirements ensuring a fair procedure.<sup>141</sup> With the pre-paid connections, water supply would stop once

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<sup>133</sup> *Mazibuko* (note 94 above) at par. 107.

<sup>134</sup> *Mazibuko* (note 94 above) at par. 14.

<sup>135</sup> *Mazibuko* (note 94 above) at par. 17.

<sup>136</sup> *Mazibuko* (note 94 above) at par. 15.

<sup>137</sup> *Mazibuko* (note 94 above) at par. 16.

<sup>138</sup> *Mazibuko* (note 94 above) at par. 134.

<sup>139</sup> *Mazibuko* (note 94 above) at par. 155.

<sup>140</sup> *Mazibuko* (note 94 above) at pars. 141, 152-3.

<sup>141</sup> *Mazibuko* (note 94 above) at par. 116.

the free basic water supply had been exhausted, unless and until the consumer purchased credit for further water supply.<sup>142</sup>

The court ruled, in favour of the respondents, that the municipality did not need to provide pre-paid customers with reasonable notice and an opportunity to be heard before their water supply was stopped. Justice O'Regan reasoned as follows:

A customer in Johannesburg who has a pre-paid water meter understands that the water meter will provide a certain quantity of water which may be exhausted; and that...the customer should purchase new credit to recommence the water supply or wait for the beginning of a new month. To require the City to provide notice and an opportunity to be heard each time a pre-paid allowance is about to expire, as the applicants contend, would be administratively unsustainable and in most cases serve no useful purpose.<sup>143</sup>

In effect, then, the court did not consider the suspension of the water supply to have that severe an impact on the affected individuals. Partly, this was because there was something the affected parties could do to ameliorate any harsh effects – pay for usage of water over and above the free basic amount of 25 kilolitres per person per month. This reasoning was flawed in two respects. First, it assumed that the free basic allocation was reasonable. As argued above, the court did not take all the evidence, especially that concerning usage for water-borne sanitation into account when it concluded that 25 kilolitres per person, per month amounted to 'sufficient' water. Justice O'Regan found that, based on average household sizes, the existing free basic water allocation was sufficient for 80% of households in Johannesburg, even if 'sufficient' were taken to mean 50 litres per person per day.<sup>144</sup> But, as she recognised in the judgment, the average household size in the townships of Johannesburg was higher than that in the rest of the city. Often, more than one household relied on the same water connection. Sometimes, this meant that 20 people, rather than the average of 3.2 people were dependent on one source for their supply of water.<sup>145</sup>

The court also found that the negative consequences of the municipality's policy could be softened through the indigent persons policy which the municipality had introduced and revised in response to criticism both before and during the litigation proceedings.<sup>146</sup> In

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<sup>142</sup> *Mazibuko* (note 94 above) at par. 117.

<sup>143</sup> *Mazibuko* (note 94 above) at par. 123.

<sup>144</sup> *Mazibuko* (note 94 above) at par. 89.

<sup>145</sup> *Mazibuko* (note 94 above) at par. 87.

<sup>146</sup> *Mazibuko* (note 94 above) at pars. 92-3.

terms of this policy, an additional 4 kilolitres per month would be provided free of charge to those households registered as indigent.<sup>147</sup> The court recognised that the City's approach may be unfair because the application procedure was too complex or because people were unaware of it, for example. However, an alternative universalist approach to providing the additional 4 kilolitres per household each month would benefit people who did not require the excess water, which would be costly and wasteful.<sup>148</sup>

The problem with this reasoning is that it pays insufficient attention to the actual consequences for people who had used up their free basic water allocation and could not afford to pay for more. The fact that only one-fifth of the households eligible to be registered as 'indigent' were actually on the register<sup>149</sup> is an indication that the introduction of the indigent persons policy was ineffective. The burden of knowing about, and following, a complex application procedure to be included on the register should not be placed on vulnerable people with few resources. However one analyses it, Johannesburg Water's plan to overhaul the system of water provision in Phiri Township resulted in people with pre-paid meters being cut off from their water supply for potentially months at a time while they tried to somehow find the money to pay for more water. As was pointed out by the *amicus curiae* in the case, this policy applied regardless of how dire the need for water was.<sup>150</sup> The *amicus*' evidence of the negative effect of the installation of pre-paid meters on public health was not considered in the judgment.<sup>151</sup>

The CC's finding that the City's water policy was reasonable, given the need to ensure that water was supplied in a sustainable fashion,<sup>152</sup> which allowed for cost recovery<sup>153</sup> was a departure from earlier indications in *Grootboom* that the urgency of the need is relevant to a determination of reasonableness:

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 aimed at achieving realisation of the right. It

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<sup>147</sup> *Mazibuko* (note 94 above) at par. 93.

<sup>148</sup> *Mazibuko* (note 94 above) at pars. 99-102.

<sup>149</sup> *Mazibuko* (note 94 above) at par. 98.

<sup>150</sup> Applicants' heads of argument (note 123 above) at par. 119.

<sup>151</sup> See Applicants' heads of argument (note 123 above) at pars. 120-1.

<sup>152</sup> *Mazibuko* (note 94 above) at par. 164.

<sup>153</sup> *Mazibuko* (note 94 above) at par. 111.

may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation 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.<sup>154</sup>

At the very least, the court should have required more stringent justification for the City's refusal to give the residents of Phiri Township the choice of credit meters. A culture of non-payment in the townships was certainly an important consideration<sup>155</sup> but more serious attempts at debt recovery would have been less invasive than suspending the water supply. Availability of resources is, of course, also a relevant consideration but the court accepted, without any real discussion, that limited resources meant that government had a great deal of leeway in deciding its water supply policy. Resources will always be limited. In the *Khosa* decision, the CC actually interrogated government's claim that it could not afford to extend certain social grants to permanent residents and found this claim to be exaggerated.<sup>156</sup> But questions such as whether better attempts to recover debt would be more cost-effective than installing pre-paid meters and whether the fact that a universalist approach to providing the extra 4 kilolitres a month was more cost effective than keeping an indigent persons register, given the fact that the City's representative had indicated before the court that a universalist system would be cheaper to administer,<sup>157</sup> were not examined by the court. The *amicus curiae* noted in their submission to the court that resource constraints were not raised as an issue by the government before the High Court. They also pointed out that the latest evidence before the court indicated that respondents had the requisite resources to provide the relief claimed by the applicants and that it was, in fact, their intention to provide it.<sup>158</sup> The court did not examine this submission.

### (5) Conclusion

The South African CC's latest judgments reveal a disturbing trend. In its earlier cases, the court was prepared to uphold the rights to housing, health care, social security etc. where government did not have a plan in place, where that plan simply could not be justified on the available evidence or where the plan did not take account of a significant segment of the

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<sup>154</sup> *Grootboom* (note 18 above) at par. 44.

<sup>155</sup> *Mazibuko* (note 94 above) at par. 166.

<sup>156</sup> *Khosa* (note 48 above) at par. 62.

<sup>157</sup> *Mazibuko* (note 94 above) at par. 99.

<sup>158</sup> *Amicus curiae* heads of argument (note 126 above) at par. 107.

population. Where government had not bothered to engage with affected parties at all, this weighed against the reasonableness of their policies or, at least, persuaded the court to order that such engagement take place before government could proceed with any action.

The *Joe Slovo* and *Mazibuko* cases involved more convoluted issues. Government in both cases had devised fairly elaborate programmes for housing and had initiated a process of engagement with affected parties. But, as the South African jurisprudence develops, the fact that government has devised a comprehensive plan and consulted with stake-holders should not prevent a court from rigorously scrutinising the reasonableness of that plan or the nature and quality of the engagement with affected individuals. In determining how intense a standard of scrutiny to apply, courts need not only to consider the under-utilised factors of the severity of the consequences of government action on affected parties and state conduct, but also to attribute appropriate weight to these factors. Where the impact on individuals is severe, there should be room for serious scrutiny of claims of limited resources, for example.

The fact that the CC has not followed this approach in its latest decisions has little to do with its choice of a reasonableness-based approach to SE rights adjudication and more to do with its own attitude to judicial restraint. In *Mazibuko*, for example, the fact that the government's expert evidence did not include water-borne sanitation as part of the calculation of what was required for household water use could have been dealt with on the basis that a relevant consideration had been overlooked – an important part of any enquiry into reasonableness. The question of whether the government's policy in the case, whatever its laudable motives, nonetheless imposed excessively harsh burdens on individuals could have been useful in the case and is, as argued in chapter 3, increasingly part of a reasonableness enquiry in the judicial review of administrative action. This enquiry was also relevant to the eviction of the residents of Joe Slovo and their relocation to Delft. The point is that reasonableness, as a concept, provides the tools needed to rigorously scrutinise government action. The court chose not to employ these tools in *Joe Slovo* and *Mazibuko*.

As judges in South Africa and elsewhere grapple with more complex SE rights matters, they could feel themselves to be limited by their constitutional role and relative

institutional expertise. The cases I have discussed in this chapter show how the issues of constitutional balance of powers and institutional capacity may be interrogated, rather than simply accepted as reasons for non-intervention or extremely limited intervention. On one level, cases like *Joe Slovo* and *Mazibuko* indicate that, once a court has decided, for a range of reasons including the current political climate, that a high level of deference to governmental action or policy is required, there is little litigators can do to persuade them to overturn the challenged policy or action. In this chapter, I have sought to argue that greater attention by judges and litigators to the factors influencing the intensity of review would be helpful. By this I mean that litigators need to make explicit arguments linking the intensity of review to the under-used factors of state conduct and the impact of government action on individuals. By making these arguments explicit, the ideas that the extent to which the state has contributed to the problem is relevant and that the harshness of the impact could outweigh laudable government motives would have a chance of taking root in the jurisprudence on SE rights. Furthermore, grounding the arguments in familiar aspects of a reasonableness enquiry, such as the need to consider relevant factors and discount irrelevant factors, could help, rather than hinder, SE rights cases by showing that what is being required of the courts is not unusual.

Arguments suggesting alternative approaches to that being employed by the South African CC are attractive because they create the impression that by merely changing the form, one will alter the substance, of decisions on SE rights. This is a comforting, but false, assumption. Whatever approach they adopt to SE rights, judges will be guided by their own sense of what their appropriate constitutional role is and by the need to secure sufficient goodwill in their dealings with government. The best approach available in trying to move the jurisprudence forward is to employ the types of argument that take account of these imperatives. It is hoped that such arguments will persuade courts to re-evaluate their own assumptions about their constitutional role and expertise.

## Conclusion

For a number of democracies around the world, the last two decades have seen a steady expansion in judicial powers of review in cases where human rights are implicated. Along with the proliferation of human rights treaties at an international level has come corresponding pressure on states to incorporate human rights provisions into domestic legislation. Human rights treaties do not always require that states provide judicial remedies for breaches of their provisions but, increasingly, courts are seen as important tools in the implementation of treaty obligations at a national level. Moreover, national experiences of human rights protection increasingly inform the development of international human rights law. Despite this, the capacity of courts to interrogate and overturn governmental acts on the basis that these acts conflict with fundamental human rights is the subject of a great deal of controversy. The contentious nature of judicial review in human rights matters is even more pronounced when it comes to social and economic (SE) rights. This is due largely to the perception that SE rights adjudication, by definition, involves courts in politically sensitive matters that are outside both their constitutional mandate and institutional expertise.

The presence of justiciable SE rights in the South African Constitution raises as many questions as it answers. The existence of the rights means that, unlike many other national courts, South African courts cannot treat SE rights matters as non-justiciable. But debates about the appropriateness of judicial intervention in this area continue to be relevant in developing a model of SE rights adjudication because of the constitutional imperative to maintain a balance of governmental powers and the adoption of specific limits to the states obligations with respect to these rights. The task of constructing an approach to SE rights adjudication fell to the CC.

Academic commentators expressed concern over the court's approach – in particular, with the decision to measure governmental efforts to implement SE rights against a standard of reasonableness. Reasonableness, they argued, was too vague and too deferential a standard to facilitate strong protection of SE rights. This argument was based mainly on the genesis

of the reasonableness standard through judicial review of administrative action. In this thesis, I have argued that there is nothing intrinsically vague or weak about reasonableness as a standard for review.

One of the principal advantages of using reasonableness as a tool through which to adjudicate SE rights is the flexibility of the standard – the idea that it may be applied at varying levels of intensity, depending on what is required in any given case. This flexibility allows a court to respond to legitimate concerns about the limits of both its constitutional role and its institutional capacity. Even arguments for purportedly more robust approaches to SE rights such as that based on defining minimum core obligations vis-à-vis each of the rights acknowledge the need for some flexibility.

Ultimately, even approaches aimed at getting courts to clearly define the content of the rights turn on the question of justification – on calling government to account for decisions made on SE rights and being able to set those decisions aside when adequate justification is not forthcoming. My argument in this thesis has been that an approach based on reasonableness is capable of achieving exactly that. In addition, I have argued that employing reasonableness as the means through which to assess government action does not prevent courts from defining the content of SE rights – minimum or otherwise – in appropriate cases. But criticisms of the CC’s jurisprudence on SE rights cannot simply be dismissed. There is a lack of clarity over when the court will apply a rigorous standard of review in evaluating government action and when it will adopt a more cautious approach.

With much of the court’s early SE rights jurisprudence, concerns over the court’s approach did not extend to the actual outcome of the cases. Whatever the flaws in the court’s emerging model of SE rights adjudication, it did not shrink from finding government action to be unreasonable and ordering it to remedy the deficiencies. Thus, in cases like *Grootboom*<sup>1</sup> and *Treatment Action Campaign*,<sup>2</sup> the court found in favour of those claiming their rights had been violated – even if they did not go as far as some commentators would have liked in

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<sup>1</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>2</sup> *Minister of Health and others v Treatment Action Campaign and others (No. 2)* 2002 (10) BCLR 1033 (CC).

defining the content of the rights of access to adequate housing and access to health care services, respectively. I have argued in this thesis that the protracted debates about the court's approach in these early cases arose from a fear that this approach would not be equal to the task of adjudicating more complex cases, which were likely to come before the court as government's SE rights policies developed. By more complex cases, I mean those in which the resource and policy implications are greater and in which government action is less obviously flawed. On one level, the court's most recent jurisprudence shows the critics' fears to be well-founded. The court's willingness to defer to government in cases like *Joe Slovo*<sup>3</sup> and *Mazibuko*<sup>4</sup> despite glaring inadequacies in the implementation of the relevant government programmes, as well as extremely severe consequences for the affected individuals is worrying and difficult to explain on the basis of its earlier judgments.

But the central argument in this thesis is that inconsistency in the CC's approach and disquieting signs of an overly deferential attitude to governmental decision-making have little to do with the choice of reasonableness as the centrepiece of the court's model of SE rights adjudication. Any approach to SE rights adjudication must allow for some degree of flexibility so that courts may strike an appropriate balance amongst interests in rights-protection and respect for democratic principles of decision-making. More importantly, courts should not treat these two sets of interests as being in constant competition with each other. In jurisdictions with justiciable bills of rights, courts play a role in implementing fundamental rights – including SE rights in jurisdictions where they are justiciable. But this role is limited to pronouncing on disputes when they are brought before the courts and creating a body of jurisprudence against which government action may be measured and by which government bodies may themselves assess their progress in giving effect to rights. The most productive work in ensuring that fundamental human rights are implemented is done through civil society organisations and government agencies engaging with each other. This engagement is often antagonistic but is aimed, ultimately, at interested parties finding common ground in what many commentators have referred to as an ongoing dialogue. When

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<sup>3</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

<sup>4</sup> *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening)* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

courts are called upon to settle rights disputes, they must do so in a manner that preserves the integrity of this dialogue in order to facilitate effective, sustainable protection of rights.

A level of flexibility in any approach to SE rights adjudication, then, is needed not only to protect the governmental interest in a balance of institutional powers. It is also a fundamental requirement of effective rights-protection. But allowing for flexibility involves leaving room for courts to decide, on a case-by-case basis, how rigorously to scrutinise governmental action. In order to mitigate the effects of this uncertainty, we must engage with the factors, often not explicitly discussed in the judgments, which determine how deferential or how interventionist a court will be in a particular case. In this thesis, I have argued for the identification of, and engagement with, these factors rather than for the development of a theory of deference. This is because the idea of a theory of deference has problematic connotations. It assumes that it is possible to construct one theory to cater for all cases in which a court is called upon to deal with politically sensitive matters. It also implies that a single theory is capable of capturing the myriad interests courts are required to balance in such cases and allow courts to decide on the intensity of review in some kind of formulaic way. I have argued that the factors I have identified in this thesis should be seen as guidelines which allow courts to take into account a range of issues in deciding on their approach in a particular case and assist those bringing the cases to argue them most effectually.

I argued that the range of factors informing the intensity of judicial review fits within four categories: constitutional balance of powers; relative institutional expertise; severity of the consequences of the government action or inaction; and state conduct. The later South African jurisprudence reveals a tendency on the part of the CC to focus on the first two factors at the expense of the latter two. As the SE rights jurisprudence has developed, so has government's SE policy and programmes. Large housing and other projects have, by definition, significant resource implications. At the same time, government's construction and implementation of its programmes has become more sophisticated, with more of an effort made to engage with affected persons and to meet the requirements of reasonableness developed in the CC's SE rights decisions.

The problem is that, as both the jurisprudence and government programmes evolve, large projects aimed at implementing various SE policies, in which government has made some attempt to meet constitutional benchmarks will become more common. Unless the court is prepared to balance concerns about its constitutional mandate and relative institutional expertise against the severity of the impact of government's programme, and to seriously consider any role the state may have had in exacerbating the problem, the complexity of the case will begin to function as an automatic reason for weak review. This contradicts the idea of a variable reasonableness-based approach, in which judges balance a host of factors against each other to decide on how intensely to scrutinise government action. For example, if courts accept nominal engagement as opposed to meaningful engagement as constitutionally adequate or if they exercise weak review simply because the project concerned involves large sums of money and large numbers of people, the adverse impact on those affected by the policy will be routinely ignored and government will not be pressed to move beyond a kind of box-ticking approach to the implementation of SE rights.

The task of balancing various factors to determine how closely to scrutinise government action is a complicated one. Courts are in a constant dialogue with the other arms of government. The Indian case-study and the history of the *Treatment Action Campaign* case in South Africa show how finely balanced the relationship between governmental institutions is. The political climate and the attitude of other arms of government to the judiciary may push the court to take a more pragmatic approach to certain SE rights cases. So far in South Africa, CC judgments going against government decisions, legislation and policy have been respected. The future of SE rights and the rule of law depend on this continuing to be the case. But a move in the direction of knee-jerk deference will also lose the court its integrity and weaken the values of accountability and transparency on which the rule of law is based. It is my argument that continued discussion of, and engagement with, the factors I have identified in the final chapter of this thesis – by both those bringing the cases and those deciding them – will allow for the jurisprudence to develop in a way that gives proper weight to the impact of government's SE programmes on affected parties and considers the state responsibility for any failings or delays in the implementation of those programmes.

In the years since the South African Constitution came into force, the idea of justiciable SE rights has become less of a novelty. But many jurisdictions continue to be wary of the idea of courts pronouncing on rights so closely aligned with politically sensitive matters. As the South African jurisprudence has evolved, the CC has shown that adjudication of SE rights need not pose a serious threat to the preservation of a constitutional balance of powers. Furthermore, in jurisdictions without directly justiciable SE rights – such as the U.K. – courts are, in fact, handing down judgments with SE implications. The lesson from all of this is that the focus needs to shift away from the question of whether SE rights are justiciable to the question of how courts may approach the interpretation of these rights whilst recognising the limitations of their constitutional remit. Critics of the South African model tend to assume that alternative approaches will automatically result in a more consistent jurisprudence and stronger protection for SE rights. My argument in this thesis has been that a range of factors impact on the intensity of review in SE rights cases. These factors will be relevant and important, whatever the approach adopted. Reasonableness allows courts the flexibility to consider the host of issues relevant to SE rights adjudication. The most effective way of creating greater legal certainty and consistency in the judgments as well as ensuring that the experiences of those affected by SE programmes are not ignored is for both judges and litigators to engage with these underlying factors. Through this engagement, the role of these factors in the judgments will become more explicit and commentators will be able to more accurately assess whether the CC is striking the right balance between all the interests at stake in SE rights cases.

## BIBLIOGRAPHY

### Articles

K Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: civil and political rights and socio-economic rights' (2001) *African Human Rights Law Journal* 185.

T Allan 'Constitutional dialogue and the justification of judicial review' (2003) 23 *Oxford Journal of Legal Studies* 563.

\_\_\_\_\_ 'The constitutional foundations of judicial review: conceptual conundrum or interpretive inquiry?' (2002) *Cambridge Law Journal* 87.

J Allison 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53(2) *Cambridge Law Journal* 367.

M Asimow 'Administrative Law under South Africa's Interim Constitution (1996) 44 *American Journal of Comparative Law* 393.

\_\_\_\_\_ 'Administrative Law under South Africa's Final Constitution: the Need for an Administrative Justice Act' (1996) 113 *South African Law Journal* 613.

L Berat 'The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 39 *International Journal of Constitutional Law* 64.

D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

\_\_\_\_\_ 'South Africa: right to health and access to HIV/AIDS drug treatment' (2003) 1(3) *International Journal of Constitutional Law* 524.

\_\_\_\_\_ 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 118 *South African Law Journal* 484.

N Blake 'Importing proportionality: clarification or confusion?' (2002) *European Human Rights Law Review* 19.

T Bollyky 'R if C>P+B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' (2002) 18 *South African Journal on Human Rights* 161.

E Christiansen 'Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321.

A Cockrell "'Can You Paradigm?'" – Another Perspective on the Public Law / Private Law Divide' (1993) *Acta Juridica* 227.

H Corder 'Without deference, with respect: a response to Justice O'Regan' (2004) *South African Law Journal* 438.

\_\_\_\_\_ 'Administrative justice: a cornerstone of South Africa's democracy' (1998) 14 *South African Journal on Human Rights* 38.

\_\_\_\_\_ 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 33.

P Craig '*Ultra Vires* and the foundations of judicial review' (1998) 57(1) *Cambridge Law Journal* 63

I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138.

S Dam 'Veneet Narain v Union of India: "a court of law and not justice" – is the Indian Supreme Court beyond the Indian Constitution?' (2005) *Public Law* 239 – 248.

D Davis 'Socioeconomic rights: do they deliver the goods?' (2008) 6 *International Journal of Constitutional Law* 687-711.

\_\_\_\_\_ 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 *South African Journal on Human Rights* 301.

\_\_\_\_\_ 'To defer and when? Administrative law and constitutional democracy' (2006) *Acta Juridica* 23.

\_\_\_\_\_ 'Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5(5) *ESR Review* 3.

\_\_\_\_\_ 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 *SAJHR* 475.

J de Ville 'Deference as respect and deference as sacrifice: a reading of *Bato Star Fishing v Minister of Environmental Affairs*' (2004) 20 *South African Journal on Human Rights* 577.

B De Villiers 'Directive principles of state policy and fundamental rights: the Indian experience' (1992) 8 *South African Journal on Human Rights* 29 – 49.

P De Vos 'Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence' (2001) *Acta Juridica* 52.

R Dixon 'Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391.

E Douglas 'Incorporating socio-economic rights in a British bill of rights: pragmatic progression or a step too far?' (2007) 4(1) *Justice Journal* 88.

D Dyzenhaus 'The left and the question of law' (2004) 17 *Canadian Journal of Law and Jurisprudence* 7.

M Elliott 'The Human Rights Act and the standard of substantive review' (2001) 60(2) *Cambridge Law Journal* 301.

K Ewing '*Judicial Review, Socio-Economic Rights and the Human Rights Act; Weak Courts, Strong Courts: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*' Book Review (2009), 7(1) *International Journal of Constitutional Law* 155.

O Ferraz 'Poverty and human rights' (2008) *Oxford Journal of Legal Studies* 585.

S Fredman 'Human rights transformed: positive duties and positive rights' (2006) *Public Law* 498.

\_\_\_\_\_ 'From Deference to Democracy: the role of Equality under the Human Rights Act 1998' (2006) *Law Quarterly Review* 53.

L Fuller 'The forms and limits of adjudication' [1978] 92 *Harvard Law Journal* 353.

M Galanter and J Krishnan "'Bread for the Poor": access to justice and the rights of the needy in India' 2004 (55) *Hastings Law Journal* 789-834.

C Gearty 'Terms of art' *London Review of Books* Vol. 32, No. 5, 11 March 2010.

N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451.

T Hickman 'The courts and politics after the Human Rights Act: a comment' (2008) *Public Law* 84.

T Hickman 'The reasonableness principle: reassessing its place in the public sphere' (2004) *Cambridge Law Journal* 166.

C Hoexter 'Judicial policy revisited: transformative adjudication in administrative law' (2008) 24 *South African Journal on Human Rights* 281.

\_\_\_\_\_ 'The future of judicial review in South African administrative law' (2000) *South African Law Journal* 484.

K Iles 'Limiting socio-economic rights: beyond the internal limitations clauses' (2004) *South African Journal on Human Rights* 448.

N Jheelan 'The Enforceability of Socio-Economic Rights' (2007) 2 *European Human Rights Law Review* 146.

J Jowell 'Parliamentary Sovereignty under the New Constitutional Hypothesis' (2006) *Public Law* 562.

\_\_\_\_\_ 'Judicial deference: servility, civility or institutional capacity?' (2003) *Public Law* 592.

\_\_\_\_\_ 'Beyond the Rule of Law: Towards Constitutional Review' (2000) *Public Law* 671.

J King 'Publication Review *Poverty and fundamental rights: the justification and enforcement of socio-economic rights* by David Bilchitz' (2008) *Public Law* 820.

\_\_\_\_\_ 'The pervasiveness of polycentricity' (2008) *Public Law* 101.

\_\_\_\_\_ 'The justiciability of resource allocation' (2007) 70 (2) *Modern Law Review* 197.

M Kirby 'Judicial Activism' (1997) 23 *Commonwealth Law Bulletin* 1224-37.

J Krishnan 'Scholarly discourse, public perceptions and the cementing of norms: the case of the Indian Supreme Court and a plea for research' (2007) William Mitchell Legal Studies Research Paper Series Working Paper No. 77, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003811), last accessed on 1 August 2010.

\_\_\_\_\_ 'Social policy advocacy and the role of the courts in India' 2003 (21) *American Asian Review* 91-124, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=682326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682326), last accessed on 14 May 2009.

\_\_\_\_\_ 'The rights of the new untouchables: a constitutional analysis of HIV jurisprudence in India' (2003) 25 *Human Rights Quarterly* 719-819.

R Kruger 'Sex work from a feminist perspective' (2004) 20 *South African Journal on Human Rights* 138.

A Le Sueur 'The rise and ruin of unreasonableness' (2005) 10(1) *Judicial Review* 32

D Longley and R James 'Judicial review and tragic choices: Ex parte B' (1995) *Public Law* 367.

P Lenta 'Democracy, rights, disagreements and judicial review' (2004) 20 *South African Journal on Human Rights* 1.

\_\_\_\_\_ 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544.

A Lever 'Is judicial review democratic?' (2007) *Public Law* 280.

S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1.

\_\_\_\_\_ 'Basic rights claims: how responsive is 'reasonableness review'? 2003 *ESR Review* 5(5) 7.

\_\_\_\_\_ 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359.

T Madlingozi 'Post-Apartheid social movements and the quest for the elusive New South Africa' (2007) 34 *Journal of Law and Society* 77, available at [http://www.up.ac.za/dspace/bitstream/2263/2543/1/Madlingozi\\_Post-apartheid\(2006\).pdf](http://www.up.ac.za/dspace/bitstream/2263/2543/1/Madlingozi_Post-apartheid(2006).pdf), last accessed on 30 July 2010.

S Meer 'Litigating fundamental rights: rights litigation and social action litigation in India: a lesson for South Africa' (1993) 9 *South African Journal on Human Rights* 358 – 372.

E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31.

\_\_\_\_\_ 'Reconsidering Review: Participation and Accountability' 1993 *Acta Juridica* 35.

\_\_\_\_\_ 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464.

F Munger 'Inquiry and Activism in Law and Society' (2001) 35 *Law and Society Review* 7

B Neuborne 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476 – 510.

D Newman 'Institutional monitoring of social and economic rights: a South African case

study and new research agenda' (2003) *South African Journal on Human Rights* 189.

D Oliver 'Is the *ultra vires* rule the basis of judicial review?' (1987) *Public Law* at 543.

K O'Regan 'Breaking ground: some thoughts on the seismic shift in our administrative law' (2004) *South African Law Journal* 424.

S Palmer 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) *Cambridge Law Journal* 438.

\_\_\_\_\_ 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' (2000) *Oxford Journal of Legal Studies* 63.

M Pieterse Resuscitating Socio-economic Rights: Constitutional Entitlements to Health Care Services (2006) 22 *South African Journal on Human Rights* 473.

\_\_\_\_\_ 'Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882.

\_\_\_\_\_ 'Coming to terms with judicial enforcement of socio-economic rights (2004) 20 *South African Journal on Human Rights* 383.

A Pillay 'Reviewing reasonableness: an appropriate standard for evaluating state action and inaction?' (2005) 122 *South African Law Journal* 419.

K Pillay 'Implementing *Grootboom*: Supervision Needed' (2002) 3 *ESR Review* 11.

T Poole 'Legitimacy, rights and judicial review' (2005) *Oxford Journal of Legal Studies* 697.

B Rajagopal 'Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 18 *Human Rights Review* 157

U Ramanathan 'Demolition drive' *Economic and Political Weekly* July 2, 2005 2908 – 2912.

\_\_\_\_\_ 'Communities at risk: industrial risk in Indian law' *Economic and Political Weekly*, 9 October 2004 4521-4527.

J Rivers 'Proportionality and Variable Intensity of Review' (2006) 65(1) *Cambridge Law Journal* 174.

K Roach 'Dialogic judicial review and its critics' (2004) 23 *Supreme Court Law Review* 49.

N Robinson 'Expanding judiciaries: India and the rise of the good governance court' 2009 8(1) *Washington University Global Studies Law Review* 1-69.

C Roederer 'Judicious Engagement: Theory, Attitude and Community' (1999) 15 *South African Journal on Human Rights* 486.

T Roux 'Principle and pragmatism on the Constitutional court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106.

C Scott and P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206.

C Scott and P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' *University of Pennsylvania Law Review*, Vol. 141, No. 1. (Nov., 1992), pp. 1-148.

V Sripathi 'Human rights in India – fifty years after independence' (1997-98) 26 *Denver Journal of International Law and Policy* 93 – 136.

C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-

Economic Rights Jurisprudence' (2006) 123 *South African Law Journal* 266.

G Subramanian 'Contribution of Indian Judiciary to social justice principles underlying the Universal Declaration of Human Rights' (2008) 50:4 *Journal of the Indian Law Institute* 593-605.

C Sunstein 'Social and economic rights: lessons from South Africa' (2000/2001) 11:4 *Constitutional Forum* 125.

K Syrett 'Opening eyes to the reality of scarce health resources? R. (on the application of Rogers) v Swindon NHS Primary Care Trust and Secretary of State for Health' *Public Law* (2006) 664.

M Tushnet 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895.

G van Bueren 'Including the excluded: the case for an economic, social and cultural Human Rights Act (2002) *Public Law* 456.

D Van Wyk 'Administrative Justice in *Bernstein v Bester* and *Nel v Le Roux*' (1997) 13 *SAJHR* 249.

J Waldron 'The core of the case against judicial review' (2005-2006) 115 *Yale Law Journal* 1346.

M Wesson 'Equality and social rights: an exploration in light of the South African Constitution' (2007) *Public Law* 748.

\_\_\_\_\_ 'Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284.

## Chapters in edited books

U Baxi (2000) 'The avatars of Indian judicial activism: explorations in the geographies of (in)justice' 156 – 209 in SK Verma and K Kumar (eds.) (2000) *Fifty years of the Supreme Court of India: its Grasp and Reach* (Oxford University Press: New Delhi).

J Cottrell and Y Ghai (2004) 'The role of the courts in the protection of economic, social and cultural rights' 58 – 89 in Y Ghai and J Cottrell (eds.) *Economic, Social and Cultural Rights in Practice: the Role of Judges in Implementing Economic, Social and Cultural Rights* (Interights: London).

A Desai and S Muralidhar (2000) 'Public interest litigation: potential and problems' 159 in BN Kirpal et al (eds.) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press: New Delhi).

J Dreze 'Democracy and the right to food' 45 – 64 in P Alston and M Robinson (eds.) (2005) *Human Rights and Development: towards Mutual Reinforcement* (Oxford University Press: Oxford).

D Hemson & M O'Donovan 'Putting Numbers to the Scorecard: Presidential Targets and the State of the Delivery' in S Buhlungu, J Daniel, J Lutchman & R Southall (eds.) (2006) *State of the Nation: South Africa 2005-2006* (HSRC Press: Pretoria).

M Jain (2000) 'The Supreme Court and fundamental rights' 1 – 100 in S Verma and K Kumar (eds.) (2000) *Fifty Years of the Supreme Court of India: its Grasp and Reach* (Oxford University Press: New Delhi).

H Mander 'Mid-day Meals Scheme' 70 – 74 in M Higgins et al (eds.) (2007) *Food Security and Judicial Activism in India* (Human Rights Law Network: New Delhi).

S Muralidhar 'Economic, social and cultural rights: an Indian response to the justiciability debate' 23 – 32 in Y Ghai and J Cottrell (eds.) (2004) *Economic, Social and Cultural Rights in Practice: the Role of Judges in Implementing Economic, Social and Cultural Rights* (Interights: London).

B Patnaik 'The poorest in the poorest states suffer the most' 45 – 51 in M Higgins et al (eds.) (2007) *Food Security and Judicial Activism in India* (Human Rights Law Network: New Delhi).

N Saxena 'Food security and poverty in India' 55 – 62 in M Higgins et al (eds.) (2007) *Food Security and Judicial Activism in India* (Human Rights Law Network: New Delhi).

S Shankar and P Mehta 'Courts and Socioeconomic rights in India' 146 – 182 in V Gauri and D Brink (eds.) (2008) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press: New York).

## **Books**

G Austin (1966) *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press: Oxford).

Isaiah Berlin (1969) *Four Essays on Liberty* (Oxford: Oxford University Press).

D Bilchitz (2007) *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-economic Rights* (Oxford University Press: Oxford)

D Brand and S Russell (2002) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* (Protea Book House: Pretoria).

R Calland and P Graham (eds.) (2005) *Democracy in the Time of Mbeki: IDASA's Democracy Index* (Institute for Democracy in South Africa: Cape Town).

P Craig (2003) *Administrative Law* (Sweet and Maxwell: London).

M Craven (1995) *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press: Oxford and New York).

I Currie and J De Waal (2005) *The Bill of Rights Handbook* (Juta: Cape Town).

I Currie and J Klaaren (2001) *The Promotion of Administrative Justice Act Benchbook* (SiberInk: Cape Town)

J de Ville (2003) *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths: Durban).

L Du Plessis and H Corder (1994) *Understanding South Africa's Transitional Bill of Rights* (Juta: Cape Town)

R Dworkin (1978) *Taking Rights Seriously* (Harvard University Press: Cambridge, Massachusetts).

J Ely (1980) *Democracy and Distrust* (Harvard University Press: Cambridge, Massachusetts and London, England).

S Fredman (2008) *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press: Oxford).

C Hoexter (2007) *The New Constitutional and Administrative Law Volume Two: Administrative Law* (Juta: Cape Town).

J Jowell and J Cooper (eds.) (2003) *Delivering Rights: How the Human Rights Act is Working and for Whom* (Hart Publishing: Oxford and Portland, Oregon).

S Krishnaswamy (2009) *Democracy and Constitutionalism in India: a Study of the Basic Structure Doctrine* (Oxford University Press: New Delhi).

E Palmer (2007) *Judicial Review, Socio-economic Rights and the Human Rights Act* (Hart Publishing: Oxford and Portland, Oregon).

O Reddy (2008) *The Court and the Constitution of India: Summits and Shallows* (Oxford University Press: New Delhi).

K Roach (2001) *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law: Toronto).

S Sathe (2002) *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press: New Delhi)

N Saxena et al (eds.) *Right to Food* 3ed (Socio-Legal Information Centre: New Delhi).

H Steiner, P Alston and R Goodman (eds.) (2007) *International Human Rights in Context: Law Politics Morals* (Oxford University Press: Oxford and New York).

C Sunstein (2001) *Designing Democracy: What Constitutions Do* (Oxford University Press: Oxford and New York).

J Waldron (1999) *Law and Disagreement* (Clarendon Press: Oxford).

H Woolf, J Jowell and A Le Sueur (2007) *De Smith's Judicial Review* (Sweet and Maxwell: London).

\_\_\_\_\_ (2009) *De Smith's Judicial Review (6ed), 1st Supplement* (Sweet and Maxwell: London)

## CASES

### South Africa

*Abahlali Basemjondolo Movement SA and another v Premier of KwaZulu-Natal and others* 2010 (2) BCLR 99 (CC).

*Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others,* 2004 (4) SA 490 (CC)

*Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

*Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC).

*Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC).

*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W).

*City of Johannesburg v Rand Properties (Pty) Ltd* [2007] 2 All SA 459 (SCA); 2007 (6) SA 417 (SCA).

*Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa*, 1996 1997 (1) BCLR 1; 1997 (2) SA 97 (CC).

*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

*Government of the RSA v Grootboom* 2000 (11) BCLR 1169.

*Harksen v Lane NO and others* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC).

*Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (1) BCLR 78 (CC); 2005(2) SA 140 (CC).

*Jordan v S* 2002 (6) SA 642 (CC)

*Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

*Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening)* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC).

*Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* 2002 (10) BCLR 1033 (CC).

*Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

*Minister of Public Works and others v Kyalami Ridge Environmental Association and others* [2002] 1 LRC 139 (CC).

*Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC).

*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC).

*National Coalition for Gay and Lesbian Equality v Minister of Justice and another* 1999 (1) SA 6 (CC); 1998 (1) BCLR 1517 (CC).

*NTC v Chetty's Transport Commission (Pty) Ltd* 1972 (3) SA 726 (A).

*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC).

*Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

*Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others* 2000(2) SA 1074 (SECLD).

*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005(5) SA 3 (CC).

*President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

*Prinsloo v van der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

*R v Jopp* 1949 (4) SA 11 (N).

*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

*Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration; Moropa NO and Sidumo* 2007 (1) SA 576 (SCA).

*S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC)

*S v Makwanyane and another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

*Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd; Commission for Conciliation, Mediation and Arbitration and Moropa NO* 2008 (2) SA 24 (CC).

*Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

*Standard Bank of Bophuthatswana Ltd v Reynolds* 1995 (3) BCLR 305 (B).

*Theron v Ring van Wellington van die NG Sendingkerk* 1976 (2) SA 1 (A)

*Union Government v Union Steel Corporation* 1928 AD 220.

## **United Kingdom**

*Anufrijeva and another v Southwark London Borough Council; R. (N) v Secretary of State for the Home Department; R (M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406; [2004] 2 WLR 603 (CA).

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

*Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

*De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1991] 1 AC 69.

*Family Planning Association of Northern Ireland v The Minister for Health, Social Services and Public Safety* [2004] NICA 39

*Huang v Secretary of State for the Home Department; Kashmiri v Secretary of State for the Home Department* [2007] W.L.R. 581.

*In Re S (Minors) (Care Order: Implementation of Care Plan); In Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 2 AC 91.

*JA (Ivory Coast), ES (Tanzania) v Secretary of State for the Home Department* [2009] EWCA Civ 1353.

*Kay v Lambeth London Borough Council* [2006] 2 AC 465.

*Kruse v Johnson* [1898] 2 Q.B. 91.

*N v Secretary of State for the Home Department (Terence Higgins Trust intervening)* [2005] 2 A.C. 296.

*North-West Lancashire Health Authority v A, D, and G* [2000] 1 WLR 977.

*R. v Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052.

*R. v Cambridge Health Authority, ex parte. B* [1995] 1 W.L.R. 898.

*R. v Chief Constable of Sussex Ex. p International Trader's Ferry Ltd.* [1999] 2 A.C.

*R v East Sussex County Council, ex parte Tandy* [1998] 2 W.L.R. 884; [1998] A.C. 714.

*R. v Lord Chancellor Ex p. Maxwell* [1997] 1 W.L.R. 104.

*R. v Lord Saville of Newdigate Ex p. A* [1999] 4 All E.R. 860.

*R. v Minister of Defence Ex p. Smith* [1996] Q.B. 517.

*R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213.

*R. v Parliamentary Commissioner for Administration Ex p. Balchin* [1997] C.O.D. 146.

*R. v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115.

*R. v Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 686.

*R. v Secretary of State for Social Security ex parte. Joint Council for the Welfare of Immigrants; R. v Secretary of State for Social Security Ex p. B* [1997] 1 W.L.R 275.

*R. v Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990.

*R. (Gezer) v Secretary of State for the Home Department* [2004] EWCA Civ 1730.

*R. (Hooper) v Secretary of State for Work and Pensions; R. (Withey) v Same; R. (Naylor) v Same; R (Martin) v Same* [2005] UKHL 29.

*R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389.

*R. (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003; [2005] 3 WLR 1132.

*R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532.

*R. (on the application of G) v Barnet London Borough Council*, 2004] 2 A.C. 208

*R. (on the application of Jackson v Attorney-General)* [2006] 1 A.C. 262 (HL).

*R. (on the application of Limbuela) v Secretary of the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396 (HL).

*R. (on the application of Limbuela) v Secretary of the Home Department* [2004] QB 1440.

*R. (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] 1 W.L.R. 2649.

*R. (Razgar) v Secretary of State for the Home Department* [2004] 2 A.C. 368.

*Smith and Grady v United Kingdom* (1999) 29 EHRR 493

*The Queen on the application of W v Lincolnshire County Council* [2006] EWHC 2365.

## **India**

*Additional District Magistrate, Jabalpur v SS Shukla* 1976 SCR 172, available at <http://judis.nic.in/supremecourt/helddis.aspx>, last accessed on 25 August 2010.

*AK Gopalan v State of Madras (Union of India: Intervener)* 1950 SCR 88, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 5 May 2009.

*Almira H. Patel and Anr. v Union of India and Ors*, unreported judgment, decided on 15/02/2000, available at <http://www.judis.nic.in/supremecourt/chejudis.asp>, last accessed on 12 May 2009.

*BALCO Employees' Union v Union of India* (2002) 2 SCC 333.

*Bandhua Mukti Morcha v Union of India and others* 1984 SCR (2) 67, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 11 May 2009.

*Calcutta Electricity Supply Corporation (CESC) Ltd. Etc. v Subash Chandra Bose and Ors* 1991 SCR Supl (2) 267.

*Common Cause v Union of India and others* 1996 (1) SCR 89.

*Consumer Education and Research Centre v India* (1995) 3 SCC 42.

*Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi and others* 1992 SCR (1) 565, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 11 May 2009

*Divisional Manager, Aravali Golf Club and another v Chander Hass and another* 2007(12) SCR 1084; 2008(1) SCC 683, available at <http://www.judis.nic.in/supremecourt/helddis1.aspx>, last accessed on 6 April 2010.

*Francis Coralie Mullin v The Administrator, Union Territory of India and others* 1981 SCR

(2) 516, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 8 May 2009.

*Golaknath and others v State of Punjab and another* 1967 SCR (2) 762, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 28 April 2009.

*Indian Council for Enviro-Legal Action and others v Union of India and others* 1996 (2) SCR 503.

*Indira Nehru Gandhi v Raj Narain and another* 1975 AIR 1590.

*Karimbil Kunhikoman v State of Kerala* 1961 AIR 723, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 28 April 2009.

*Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and another* AIR 1973 SC 1461.

*Maneka Gandhi v Union of India and another* (1978) 1 SCC 248.

*M.C. Mehta and Anr. v Union of India* and Ors. 1987 SCR (1) 819.

*MK Balakrishnan and others v Union of India and others*, Writ Petition No. 230 of 2001. Judgment was handed down on 28 April 2009 and is available at <http://www.judis.nic.in/supremecourt/helddis.aspx>, last accessed on 6 April 2010.

*Minerva Mills Ltd and others v Union of India and others* 1981 SCR (1) 206.

*Mohini Jain v State of Kerala and others* (1992) 3 SCC 666.

*Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664, available at <http://judis.nic.in/supremecourt/helddis.aspx>, last accessed on 26 August 2010.

*Olga Tellis and others v Bombay Municipal Corporation and others* 1985 SCR Supl. (2) 51, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 10 May 2009.

*Paschim Banga Ket Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

*Peoples' Union for Civil Liberties v Union of India* (2001) 5 SCALE 303; 7 SCALE 484.

*Rustom Cavasjee Cooper v Union of India* 1970 SCR (3) 530, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 5 May 2009.

*Sachidananda Pandey and Another v State of West Bengal and others* 1987 SCR (2) 223, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 11 May 2009.

*Saudan Singh and others v New Delhi Municipal Committee and others* 1992 SCR (2) 243.

*State of West Bengal v Mrs Bela Banerjee and others* 1954 SCR 558, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 28 April 2009

*Sunil Batra v Delhi Administration and others* 1979 SCR (1) 392, available at <http://judis.nic.in/supremecourt/chejudis.asp>, last accessed on 3 May 2009.

*Unnikrishnan v. State of Andhra Pradesh* 1993 (1) SCC 645.

## **Canada**

*R v Oakes* [1986] 1 SCR 103.

## **European Court of Human Rights**

*Bensaid v United Kingdom* (2001) 33 EHRR 205.

*D v United Kingdom* (1997) 24 EHRR 423.

## INTERNATIONAL INSTRUMENTS

African Convention on Human and Peoples' Rights, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>, last accessed on 30 July 2010.

Additional Protocol to the Inter-American Convention on Human Rights adopted on 17 November 1988 and entered into force on 16 November 1999, available at <http://www.oas.org/juridico/english/treaties/a-52.html>, last accessed on 30 July 2010.

European Convention on Human Rights, available at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf), last accessed on 30 July 2010.

European Social Charter adopted on 18 October 1961 and entered into force on 26 February 1965, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/035.doc>, last accessed on 30 July 2010.

General Comment No. 15, International Convention on Economic, Social and Cultural Rights, E/C.12/2002/11, adopted on 20 January 2003 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement>, last accessed on 5 May 2010.

General Comment 9, International Convention on Economic, Social and Cultural Rights E/C.12/1998/24 (3 December 1998), available at <http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument>, last accessed on 30 July 2010.

General Comment 3, International Convention on Economic, Social and Cultural Rights, adopted on 14 December 1990, E/1991/23, available at <http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument>, last accessed on 30 July 2010.

Inter-American Convention on Human Rights adopted on 22 November 1969 and entered into force on 18 July 1978, available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>, last accessed on 30 July 2010.

International Convention on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force on 23 March 1976), available at <http://www2.ohchr.org/english/law/ccpr.htm>, last accessed on 1 August 2010.

International Convention on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force on 3 January 1976), available at <http://www2.ohchr.org/english/law/cescr.htm>, last accessed on 23 March 2010.

Optional Protocol to the International Convention on Economic, Social and Cultural Rights, General Assembly Resolution A/RES/63/117, available at <http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf>, last accessed on 16 June 2009.

Universal Declaration of Human Rights, General Assembly Resolution 271 A (III), adopted on 10 December 1948, available at <http://www.un.org/en/documents/udhr>, last accessed on 30 July 2010.

## **CONFERENCE PAPERS, SEMINARS AND OTHER PRESENTATIONS**

P Bhushan 'The lack of judicial accountability in India', talk delivered at the Department of South Asian studies at Princeton University, 10 March 2009, text available at [www.judicialreforms.org/files/the\\_lack\\_of\\_judicial\\_accountability\\_in\\_india.pdf](http://www.judicialreforms.org/files/the_lack_of_judicial_accountability_in_india.pdf), last accessed on 24 April 2009.

P Bhushan 'Sacrificing human rights and environmental rights at the altar of development', talk presented at George Washington University Law School on 13 March 2009, text available at [http://www.judicialreforms.org/files/sacrificing\\_human\\_rights\\_and\\_environmental\\_rights\\_at\\_the\\_altar\\_of\\_development.pdf](http://www.judicialreforms.org/files/sacrificing_human_rights_and_environmental_rights_at_the_altar_of_development.pdf), last accessed on 15 May 2009.

D Bilchitz 'Towards a theory of content for socio-economic rights', paper presented at the 7<sup>th</sup> Annual World Congress of Constitutional Law (Athens, 11-15 June 2007) at 5 – 8, <http://www.enelsyn.gr/papers/w13/Paper%20by%20Dr.%20David%20Bilchitz.pdf>, last accessed on 4 August 2010.

H Corder 'Reinventing Administrative Law in South Africa' 12, paper presented at the 2000 Administrative Law Forum, Adelaide, published in Finn (ed.) *Sunrise or Sunset? Administrative Law in the New Millennium* (2000).

J Jowell Seminar 'Proportionality and the standard of review after *Huang*', Institute of Advanced Legal Studies, 23 November 2007.

## INTERNET SOURCES

Auditor-General of South Africa, Report of the Auditor General on the Special Audit of the N2 Gateway Project at the National Department of Housing (2008), available at <http://www.pmg.org.za/files/docs/N2gatewayreport.pdf>, last accessed on 4 May 2010.

Centre on Housing Rights and Evictions (COHRE) ‘N2 Gateway Project: housing rights violations as “development” in South Africa’ (2009: Geneva), available at <http://www.cohre.org/store/attachments/090911%20N2%20Gateway%20Project%20Report.pdf>, last accessed on 4 May 2010.

‘Evictions suspended: shack dwellers reprieved’, *The Sowetan*, 4 September 2009, available at <http://www.sowetan.co.za/News/Article.aspx?id=1060093>, last accessed on 4 May 2010.

Heads of argument submitted by the *amicus curiae* in *Mazibuko*, available at <http://www.constitutionalcourt.org.za/Archimages/13809.PDF>, last accessed on 5 May 2010.

Heads of argument submitted by the applicants in *Mazibuko*, available at <http://www.constitutionalcourt.org.za/Archimages/13710.PDF>, last accessed on 5 May 2010.

History of the adoption of the Optional Protocol on the International Convention on Economic, Social and Cultural Rights: [http://www.escr-net.org/resources\\_more/resources\\_more\\_show.htm?doc\\_id=421703](http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=421703).

Joint Committee on Human Rights Report ‘A Bill of Rights for the U.K.?’ , Twenty-ninth Report of Session 2007-08, published on 10 August 2008, available at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtright/165/165i.pdf>, last accessed on 12 March 2010.

Justice Suresh (retired) ‘Socio-economic rights and the Supreme Court’, available at [http://www.escr-net.org/usr\\_doc/suresh\\_article.doc](http://www.escr-net.org/usr_doc/suresh_article.doc), last accessed on 28 July 2010.

<http://www.journaids.org/politicsofhiv.php#pmtctpolitics>, last accessed on 12 November 2008 (on televised interview with then South African Minister of Health, Manto Tshabalala-Msimang).

‘Mantashe lashes out at black judges’ by Political Staff, Cape Argus, 14 December 2008, page 1, available at [www.iol.co.za](http://www.iol.co.za) (last accessed on 18 February 2009).

‘Mantashe slated for attitude on Concourt’ by Lavern de Vries, Cape Argus, 16 October 2008, page 5, available at [www.iol.co.za](http://www.iol.co.za) (last accessed on 18 February 2009).

P de Vos ‘Sanity and humanity prevails - for now’, 8 September 2009, *Constitutionally Speaking* blog, available at <http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/>, last accessed on 4 May 2010.

‘Provincial ANC takes Hlope’s side’ by Bonganie Mthembu and Ella Smook, 23 June 2008, page 3, available at [www.iol.co.za](http://www.iol.co.za) (last accessed on 18 February 2009).

Status of signatures and ratifications, Optional Protocol on Economic, Social and Cultural Rights: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en).

United Kingdom Ministry of Justice Green Paper ‘Rights and responsibilities: developing our constitutional framework’, March 2009, available at <http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>, last accessed on 12 March 2010.