Constitutional Deference, Courts and Socio-Economic Rights in South Africa

Kirsty McLean

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Kirsty Sheila McLean
Johannesburg

November 2009

FOREWORD

'We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men."'

Franklin D Roosevelt *State of the Union address* 11 January 1941

In this short passage, FDR acknowledged the fundamental interdependence between civil and political guarantees fundamental to democracy, on the one hand, and social and economic guarantees, on the other. That interdependence recognises most importantly that people living without the basic necessities of life are deprived of human dignity, freedom and equality. It also recognises that democracy itself is enhanced where all citizens have access to the basic necessities of life. It is not surprising then that the interdependence of civil and political guarantees and social and economic ones is asserted in many international conventions, and, increasingly in national constitutions.

The South African Constitution is one of the first Commonwealth constitutions to entrench both civil and political rights and social and economic rights and to render both justiciable before the courts. The task of interpreting and applying the social and economic rights in the Constitution is arguably the most challenging task facing lawyers and courts in South Africa. That task is rendered all the more difficult by the deep inequality in South African society. In its Preamble, the Constitution states that the Constitution is adopted in order to build a society in which, to paraphrase, the quality of life of all South Africans is improved and the potential of each person is freed. Fifteen years into our new democratic order, we are still far from realising these goals. South Africa is a middle-income country with a high rate of unemployment and government is simply not able immediately to provide the basic necessities of life to all citizens.

We need to develop a jurisprudence which gives concrete meaning and effect to social and economic rights. This jurisprudence must foster the constitutional values of human dignity, equality and freedom, on the one hand, without unduly trammelling the executive and legislative arms of government, on the other. Only just over a decade in, we should accept that we are only beginning the long process of establishing that jurisprudence.

The more we debate and consider the proper approach to social and economic rights in our Constitution, the more likely it will be that we will develop a progressive and democratic jurisprudence. There can be no doubt that this book will make a marked contribution in this regard. In clear and readable prose, Kirsty McLean identifies the key challenge for the jurisprudence: determining the appropriate role for courts in interpreting and applying social and economic rights in a

constitutional democracy where resources are inadequate to meet the basic needs of all citizens.

The first two chapters of the book grapple with an issue which many commentators have identified as the central question: the extent to which courts should defer to, or respect, the decisions of other arms of government. These chapters are followed by an illuminating discussion of the objections to the justiciability of social and economic rights, many of which are based on an understanding of the role of courts that renders it inappropriate for them to adjudicate social and economic rights in a democracy. The remaining chapters contain a careful and thoughtful analysis of the adjudication of social and economic rights in South Africa since 1997.

As we set out on the journey to develop a progressive jurisprudence of social and economic rights, it seems to me that we should accept that it is unlikely that we will achieve consensus on the proper role for courts in this field. Like other areas of constitutional adjudication, our understanding of the proper role of courts will depend on deep and contested questions of political and moral philosophy. The contestation that will inevitably persist, therefore, makes it all the more important that contributions to the debate are clear and principled. This book is both.

As lawyers who are embarking on this journey, I would warn of two countervailing dangers. The first is that we stop challenging our preconceptions, and fail to let our jurisprudential imagination roam. By so doing, we may fail to give real content to the social and economic rights in our Constitution. The second is that we must be cautious, given our own craft and the power that it affords us, not to seek a jurisprudence that will empower lawyers and clients but in the end undermine democracy and the democratic arms of government. This book is alive to both these dangers and proposes a principled basis for the development of our jurisprudence which will constitute a valuable and lasting contribution to the debate.

Kate O'Regan
Johannesburg

June 2009

INTRODUCTION

In 1996, South Africa joined a growing number of countries to include justiciable socio-economic rights in its written Constitution. This development began in earnest in the early 1990s and is indicative of the growing importance of rights discourse internationally to articulate claims for social and economic goods. Countries across Latin America, Asia, Africa and Eastern Europe, as a result of a range of complex social and political forces, embraced these rights as the best way to deliver on or preserve social welfare.[1] In Latin America, for instance, the failure of communism, together with a history of oppressive military dictatorships, wide-spread poverty and a growing recognition of socio-economic rights in international law, prompted those concerned with social justice to turn to the courts to force their governments to comply with their international obligations in giving effect to socio-economic rights contained in the Universal Declaration of Human Rights (Universal Declaration)[2] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3] In Eastern Europe, on the other hand, socio-economic rights were already entrenched in a number of communist constitutions — but were rendered effectively non-justiciable as a result of a non-independent judiciary. With the transition to democracy in the early 1990s, many of these countries were compelled by political pressure to retain the constitutionalised communist welfare state.[4] The Hungarian Constitutional Court, for instance, then enforced socio-economic rights to protect the *status quo* welfare rights of the majority.[5]

1 R Gargarella *et al* 'Courts, rights and social transformation: Concluding reflections' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 255 255-57.

2 Adopted 10 December 1948, UNGA Res 217 A(III).

3 Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3. JA Couso 'The changing role of law and courts in Latin America: From an obstacle to social change to a tool of social equity' in Gargarella *et al* (n 1 above) 61 61-74.

4 A Sajó 'Social rights as middle-class entitlements in Hungary: The role of the Constitutional Court' in Gargarella *et al* (n 1 above) 83 85-87.

5 As above, 96-98.

Today, the debates around socio-economic rights have shifted from *whether* they are to be constitutionalised, that is, whether they are in fact justiciable and whether socio-economic rights should be regarded as rights of the same nature and status as civil and political rights, to a discussion as to *how* courts should engage with socio-economic rights. This book examines that question in relation to South Africa, by considering the manner in which the South African courts have interpreted and enforced the socio-economic rights in the South African Constitution over the past 12 years — from the coming into force of the 1996 Constitution in February 1997, until June 2009. As such, it does not seek to argue for a specific interpretation of these rights as other theorists have done; rather, it attempts to 'step back' and analyse the reasoning of the court — evaluating the internal coherence of that reasoning process and providing a critique of its normative argument.

The approach adopted in this book in providing this critique of the Constitutional Court's jurisprudence is a combination of description and prescription of a normative approach to judicial reasoning. It therefore adopts a predominantly doctrinal analysis to the case law - a traditional approach to legal scholarship, in which the content and reasoning of a judgment is examined (described), and then evaluated on its own terms for internal consistency, its implications for the further development of the law, and where thought necessary, deficencies in that process are identified (prescribed).[6] It is, therefore, 'a reasoned response to reasoned argument'.[7] This approach is adopted as the one seemingly most fitting to the task undertaken in this book: an evaluation of the jurisprudence of the Constitutional Court in interpreting and enforcing socio-economic rights over the past 12 years, through the lens of what is called 'constitutional deference'.

As a means of discussing the difficulties which socio-economic rights raise for judicial review, the book begins, in chapters one and two, by establishing a concept of constitutional deference. Constitutional deference derives from the doctrine of separation of powers and provides a means through which to articulate the role which courts have created for themselves in adjudicating these rights. The idea of deference is one which has often been used by the courts to explain their refusal to engage in issues which have budgetary or policy-making implications. Yet, constitutional deference, as a principle of judicial decision making, is one which permeates almost all judicial adjudication, and it is unhelpful for the courts to use the

6 EH Tiller & FB Cross 'What is legal doctrine?' (2006) 100 *Northwestern University Law Review* 517 518.

7 DL Shapiro 'In defense of judicial candor' (1987) 100 *Harvard Law Review* 731 737.

idea tactically with regard to certain types of decisions and ignore its application elsewhere. A more sophisticated notion of constitutional deference is therefore developed, in order to render the decision-making process more transparent and accountable.

This leads to a discussion, in the following chapter (chapter three), of the difficulties which socio-economic rights pose for judicial review and the various objections which have been made against the constitutional entrenchment of socio-economic rights. These objections relate to the theoretical arguments made for distinguishing socio-economic rights from civil and political rights, and to arguments deriving from the separation of powers doctrine — that socio-economic rights are not suitable for judicial resolution, and that judicial review of socio-economic matters undermines democracy. While it is argued in that chapter that these objections do not create a bar to the judicial review of socio-economic rights (that is, they cannot render socio-economic rights non-justiciable), they are nonetheless relevant to how the South African courts interpret the socio-economic rights in the South African Constitution — and the manner in which they are relevant is articulated through the notion of constitutional deference.

Chapters four and five then consider the particular ways in which the South African courts have responded to the cases brought before them. Chapter four provides a systematic discussion of the major South African Constitutional Court decisions, using constitutional deference to interpret the Court's approach to the interpretation and enforcement of socio-economic rights. This discussion is extended in chapter five, which selects specific themes arising from the discussion of the case law, for further and more detailed discussion.

Before launching into the body of the discussion itself, it is useful to consider the broader historical context of the development of socio-economic rights, both in international law and in domestic constitutions, such as South Africa. The rest of this introduction, therefore, sketches out these developments.

1 The creation of the United Nations and the International Bill of Rights

In the first decades of the twentieth century, the call for a stronger role for the state in securing social justice in Europe and the United States took hold, and there was growing consensus that the economic well-being of people should not be left to the vagaries of the market

or to the chance circumstance of one's birth.[8] The experience of the Great Depression in the 1930s galvanised the claim for economic security to be afforded to citizens through social welfare provisions at the domestic level. World War II was also critical in strengthening calls for greater protection of 'universal' or fundamental human rights, in an effort to stave off a repetition of the fascist nightmare. These events, and the debates that they gave rise to, contributed to the creation of the United Nations (UN) and the International Bill of Rights, which includes ICESCR.

This growing commitment to the protection of socio-economic rights coincided with a renewed interest in the notion of universal, or fundamental, rights generally. Prior to World War II, there was hardly any support for the notion of universal human rights, and states took little interest in what was done by another state to those within its borders — such matters were seen as being of domestic concern only.[9] The atrocities committed during World War II, however, gave rise to a renewed interest in the idea of fundamental rights and freedoms, and many of the war crimes tribunals after the war appealed to human rights notions of 'crimes against humanity' in order to counter the defence of legality raised by those who claimed they were merely following orders. After the war, many of the world's states came together to create an 'International Bill of Rights', committing the signatories to a new era of respect for human rights — and it was at this time that the term 'human rights' was first used.[10]

In 1946, the Commission on Human Rights was established to prepare and submit a report on the International Bill of Rights to the General Assembly of the UN. Delegates, from primarily English-speaking countries in the Commission, argued for a legally-binding and enforceable treaty or convention. The Soviet Union, however, objected, and stated it was only prepared to support a declaration or manifesto of rights — a proposal later endorsed by the United States.[11] As a result of this dispute, the Commission decided, in 1947,

8 Many European states had already introduced what would be regarded by today's standards as social welfare legislation in the late nineteenth century. Eg, social welfare legislation was introduced in Germany in 1883, and in the Nordic countries between 1884 and 1889: B Andreassen 'Article 22' in A Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 319 322-29. See also P Flora & J Alber 'Modernization, democratization, and the development of welfare states in Western Europe' in P Flora & A Heidenheimer (eds) *The development of welfare states in Europe and America* (1984) 37-73; HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 242-43.

9 MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 6.

10 BH Weston 'Human rights' (1984) 6 *Human Rights Quarterly* 257 257.

11 M Cranston 'Human rights, real and supposed' in DD Raphael (ed) *Political theory and the rights of man* (1967) 43 45; MA Glendon *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 85.

first to produce a manifesto of rights that would have greater acceptability to the parties to the UN, and later to draft a more legally-binding covenant to which states could commit themselves.[12] The manifesto was produced fairly quickly and the Universal Declaration of Human Rights was proclaimed by the UN in 1948. The Covenant — later to be split into two Covenants — however, took far longer to reach agreement.[13]

The inclusion of socio-economic rights in the Universal Declaration was not without difficulty. This difficulty did not, contrary to what one might expect, relate to the inclusion of socio-economic rights, but rather to the way in which socio-economic rights would be formulated and enforced, and how they would relate to civil and political rights. No country party to the drafting process, in fact, opposed, in principle, the inclusion of social, economic and cultural rights.[14] What is perhaps most notable about the formulation of the socio-economic rights in the Universal Declaration[15] is that they are cast as individual rights, that is, they vest in the individual rather than the group, and that they are conceived as rights rather than as duties placed on the state or the rest of society. In this way, socio-economic rights are filtered through the paradigm of Western notions of civil and political rights — a paradigm which is continued into ICESCR and the South African Constitution.

After the Universal Declaration was completed, the Commission turned its hand to drafting the (at that stage, still single) Covenant. This time, however, the differences in opinion over the two sets of rights erupted, and a long and acrimonious debate ensued on the nature of the two sets of rights; the enforcement mechanisms and the individual-complaints procedure.[16] During this time, the European Convention on Human Rights (European Convention) was signed in 1950, coming into force in 1953. The European Convention contained only civil and political rights and established the European Commission and European Court of Human Rights in order to investigate and adjudicate alleged breaches of the European

12 J Donnelly 'Human rights as natural rights' (1982) 4 *Human Rights Quarterly* 391 404.

13 The Covenants took 18 years to be adopted (1966) and a further 10 years to enter into force (1976).

14 Glendon (n 11 above) 185. In addition to the USSR, the countries championing the 'new' rights included Chile, the UK (at that time with a labour government), France, China and the US (under the presidency of Truman and the influence of Eleanor Roosevelt).

15 The socio-economic rights included in the Universal Declaration are the right to work, and various fair labour practices (art 23); the right to rest and leisure (art 24); the right to an adequate standard of living, which includes adequate food, clothing, housing, medical care, social services and social security (art 25); the right to education, including free elementary education (art 26); and the right to participate in the cultural life of the community (art 27).

16 See Craven (n 9 above) 16-22 for a detailed discussion of this debate.

Convention.[17] The European Convention thus added fuel to the argument that it is only civil and political rights which can be fully justiciable; and that socio-economic rights are of another order — a so-called 'second generation' of rights — and not fully justiciable.

Finally, in 1952, after much debate, the General Assembly instructed the Commission to draft two covenants, dealing with the two sets of rights separately.[18] These two covenants later became known as the International Covenant on Civil and Political Rights (ICCPR)[19] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[20] At the time, the two Covenants were understood to deal with two distinct types of rights: ICCPR being concerned with civil and political rights first developed in the eighteenth century in the Declaration of the Rights of Man and the Citizen, and ICESCR dealing with social, economic and cultural rights associated with nineteenth-century developments in socialist ideas and the labour movement.[21] The real distinction, however, was mostly ideological: in a Cold War context, these two sets of rights were seen to mirror political differences between the West and the East. In Matthew Craven's words:

> In fact the reason for making a distinction between first and second generation rights could be more accurately put down to the ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenants. The Soviet States, on the one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of the socialist society. Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the 'free world'.[22]

Cold War bickering divided even the once-indivisible Universal Declaration into two, with each side using its preferred rights to criticise the other.[23] This, in turn, also lent support to the idea that the two sets of rights were of different orders, or even incompatible,

17 Later, the European Social Charter was signed, which committed member states to social and economic rights.
18 Glendon (n 11 above) 207.
19 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.
20 n 3 above. The Universal Declaration, ICCPR and ICESCR are together collectively known as the International Bill of Rights.
21 Craven (n 9 above) 8.
22 As above, 8-9. See also C Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769 795. By contrast, see MJ Dennis & DP Stewart 'Justiciability of economic, social, and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* 462 477, who argue that this emphasis on ideological differences is overstated. See the discussion on this perspective in ch three, sec 2.1.
23 Glendon (n 11 above) 213-14.

and that member states were free to pick and choose from the array of rights available in the Universal Declaration. The separation of the two groups of rights has also resulted in the perception of social, economic and cultural rights as being of a lower status — a 'second-generation' of rights to their civil and political counterparts — which were only to be realised once the first generation of civil and political rights had been fulfilled.[24] This perceived difference has been bolstered and perpetuated through numerous theoretical writings, despite the fact that the UN has repeatedly emphasised the indivisibility of the two sets of rights.[25] This hierarchy of rights has, in turn, been perpetuated at domestic level in many countries. Closer examination of the theoretical distinction between the two sets of rights in chapter three will demonstrate that the distinction is more apparent than real.

2 Domestic protection of socio-economic rights

Many countries now include protection of socio-economic rights at the domestic level and, for many people, this is the most accessible and successful way for them to enforce these rights against their respective governments. There are a number of ways in which this can be done. First, governments can enact justiciable bills of rights with entrenched and justiciable socio-economic rights. South Africa is one of the foremost examples of such an approach.[26] Second, socio-economic rights can be protected at domestic level through their entrenchment as higher objective legal norms which are then used as a guide to interpreting other rights or the underlying values in a particular society. A common way in which this is done is through the inclusion of directive principles in a national constitution.[27] This approach allows for a more expansive reading of civil and political rights to include aspects of socio-economic protection. A clear

24 The main proponent of the idea of first, second and third generations of rights was Karel Vasak. See, eg, K Vasak '*A 30-year struggle: The sustained effort to give force of law to the Universal Declaration of Human Rights*' (1977) 29, quoted in P Alston 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?' (1982) 29 *Netherlands International Law Review* 307 309. Due to the implication implicit in the term 'second generation rights' that social, economic and cultural rights are of a lower status than civil and political rights, this term will be avoided in this book. For a criticism of the notion of generations of rights, see Alston (above) 316-18.

25 See, eg, art 3 of the Proclamation of Teheran GA Res 32/128 (1968); United Nations Resolution 32/130 (1977); United Nations Vienna Declaration (1993) para 3; and Scott (n 22 above) 778-90.

26 Other examples of countries with constitutions of this nature are Portugal, Hungary, Sri Lanka and Lithuania. Many other counties include only one or two socio-economic rights, and Germany, Canada and a number of states in the US, eg, include a right to education.

27 Examples of countries which include socio-economic rights in the directive principles of their national constitutions are Ireland, India, Nigeria and Papua New Guinea.

example of such an approach is found in Indian jurisprudence where the courts have adopted an 'organic' approach towards the interpretation of fundamental rights and directive principles.

Third, socio-economic rights may be afforded protection through domestic legislation. This approach is, of course, not inconsistent with the above two means of protecting socio-economic rights. It is also the most frequent course, and almost all developed countries have enacted legislation dealing with education, access to water, healthcare, and so on. Giving effect to socio-economic rights through legislation is important for a number of reasons, such as providing clarity on the normative content of the right, and certainty as to who is responsible for fulfilling the right and how it is to be fulfilled.[28]

Lastly, ICESCR itself may be incorporated directly into domestic law.[29] Indeed, Craven argues that this is the ideal way to protect socio-economic rights — through direct incorporation of ICESCR at domestic level and through the provision of domestic legal remedies.[30] Widely held perceptions on the non-justiciability of socio-economic rights, however, have resulted in few domestic courts engaging with ICESCR and attempting to develop domestic remedies to enforce the Covenant. These self-fulfilling perceptions have, therefore, in turn, served to reinforce the notion that socio-economic rights are not capable of judicial enforcement. This is so despite the fact that the Committee on Economic, Social and Cultural Rights (ESCR Committee) — which is tasked with ensuring compliance with ICESCR through a reporting mechanism — has demonstrated that social, economic and cultural rights are capable of enforcement through its General Comments.[31] As a result, there are few examples of domestic courts enforcing ICESCR and attempting to craft domestic remedies to that end. ICESCR itself does not provide any specific mechanism for the domestic protection of its provisions.[32]

3 The South African debate

South Africa provides an interesting example of the domestic protection of socio-economic rights. It has moved from being one of

28 S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 55 79.

29 Countries which have incorporated ICESCR directly into their domestic law include Argentina, Columbia, Costa Rica, Cyprus, Ecuador, Luxembourg and Mexico: Craven (n 9 above) 28.

30 MCR Craven 'The domestic application of the International Covenant on Economic, Social and Cultural Rights' (1993) 40 *Netherlands International Law Review* 367 368.

31 As above, 368-69.

32 See above for a thorough discussion of the domestic incorporation of ICESCR and the benefits and problems associated with such incorporation.

the most oppressive, undemocratic regimes, with a deliberate and systematic denial of socio-economic rights to the majority of the population, to a country which now includes justiciable socio-economic rights in its national constitution, accompanied by a genuine commitment by the government to give effect to them.

While socio-economic rights were only formally given recognition in the 1996 South African Constitution, the ideals of social justice that underpin these rights have a long history in the South African political imagination. One of the cornerstones of apartheid policy was the systematic denial of access to services, or equal services, for the black majority of the country. The liberation struggle, in turn, emphasised access to basic services as one of the foundational aspirations for a free South Africa. These aspirations are illustrated in two key documents from the mid-twentieth century — the first is the African Claims in South Africa of the African National Congress (ANC), modelled on the Atlantic Charter.[33] The African Claims in South Africa was adopted by the ANC in 1945 and created a bill of rights for Africans in South Africa, demanding equal opportunities and the right to vote, equal education and a share in the material resources of the country.[34] The link between social services and democracy was made even more clear in the second document — The Freedom Charter, which was adopted by the ANC and other similar parties[35] in 1955 and which sets out a prototype bill of rights for a democratic South Africa. The Freedom Charter arose out of the historic meeting, on 26 June 1955, of the Congress of the People, which was attended by almost 10 000 people in Johannesburg. For two years prior to the meeting, thousands of people all over the country wrote down their vision for a future South Africa, 'when all South Africans will live and work together, without racial bitterness and fear of misery, in peace and

33 The Atlantic Charter was adopted by Roosevelt and Churchill in 1941 and signalled those leaders' commitment to social justice as an indispensable part of a flourishing democracy. See A Eide 'Economic, social and cultural rights as human rights' in Eide *et al* (n 28 above) 9 14. The Atlantic Charter is available at http://usinfo.state.gov/usa/infousa/ facts/democrac/53.htm (accessed 30 June 2009).

34 The African Claims in South Africa is available at http://www.anc.org.za/ancdocs/history/claims.html (accessed 30 June 2005). For a discussion of this document, see H Klug 'Historical background' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1998) 2-11; M Benson *The African patriots: The story of the African National Congress of South Africa* (1963) 117-18.

35 The organisations included in the Congress of the People were the ANC, the South African Indian Congress, the South African Congress of Trade Unions, the South African Coloured People's Organisation, and the Congress of Democrats; A Lutuli *Let my people go* (1962) 157 fn 1.

harmony'.[36] These contributions were then collated and distilled into a draft document which was presented at the 26 June meeting and, after modification, adopted at that meeting as the Freedom Charter. The Freedom Charter is an important and fascinating socio-political document and it is worth quoting relevant passages in full to demonstrate the interrelationship between socio-economic rights and democracy, echoing the words of Roosevelt in the previous decade:

> We, the People of South Africa, declare for all our country and the world to know:
>
> that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;
>
> that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality;
>
> that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities;
>
> that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief;
>
> And therefore, we, the people of South Africa, black and white together equals, countrymen and brothers adopt this Freedom Charter;
>
> And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won.
>
> ...
>
> There Shall be Houses, Security and Comfort!
>
> All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security;
>
> Unused housing space to be made available to the people;
>
> Rent and prices shall be lowered, food plentiful and no-one shall go hungry;
>
> A preventive health scheme shall be run by the state;
>
> Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children;
>
> Slums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres;

36 'Call to the Congress of the People' leaflet issued by the National Action Council of the Congress of the People, reprinted in T Karis & GM Gerhart *Challenge and violence* volume 3 in T Karis & GM Carter *From protest to challenge: A documentary history of African politics in South Africa 1882-1964* (1977) 180 182. For a fuller, more personal account of the development of *The Freedom Charter*, see ch 15 'The Freedom Charter' in Lutuli (n 35 above) 153. See also R Suttner *The Freedom Charter - The people's charter in the nineteen-eighties: The twenty-sixth T B Davie Memorial Lecture delivered in the University of Cape Town on 26 September 1984* (1984); and R Suttner & J Cronin *30 Years of the Freedom Charter* (1986).

> The aged, the orphans, the disabled and the sick shall be cared for by the state;
>
> Rest, leisure and recreation shall be the right of all;
>
> Fenced locations and ghettoes shall be abolished, and laws which break up families shall be repealed.[37]

These passages clearly demonstrate the link made between social rights and democratic rights in anti-apartheid politics in South Africa. These ideas are still largely prevalent today and underpin the inclusion of socio-economic rights in the South African Constitution. Unfortunately, this history has been substantially marginalised within academic debate, which has instead tended to focus on more formal legal arguments of separation of powers and justiciability.

By the late 1980s, it became clear in South Africa that the apartheid government could no longer continue governing the country and that change of some sort was inevitable. In 1988, the ANC published the Constitutional Guidelines for a Democratic South Africa, thereby committing itself to a constitutional dispensation and allaying fears of a socialist revolution should the ANC eventually gain power.[38] At the same time, the South African government itself began to explore the possibility of extending individual rights in the country, and requested the South African Law Commission (SALC) to investigate this possibility.[39] From as early as 1985, members of the apartheid government had held secret talks with Nelson Mandela in prison over the prospect of negotiations leading to power sharing between itself and the ANC and finally, on 2 February 1990, President FW de Klerk announced the unbanning of the ANC, and the imminent

37 See, eg, FD Roosevelt 'Message to the congress on the state of the Union' 11 January 1944, reproduced in CR Sunstein *The second Bill of Rights: FDR's unfinished revolution and why we need it more than ever* (2004) 242-43. More fully, Roosevelt's Second Bill of Rights includes 'the right to a useful and remunerative job in the industries or shops or farms or mines of the nation; the right to earn enough to provide adequate food and clothing and recreation; the right of every farmer to raise and sell his products at a return which will give him and his family a decent living; the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; the right of every family to a decent home; the right to adequate medical care and the opportunity to achieve and enjoy good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education'.

38 Klug (n 34 above) 2-11; A Sachs *Protecting human rights in a new South Africa* (1990) 37 ch 12; A Sparks *Tomorrow is another country: The inside story of South Africa's negotiated settlement* (1995) 1-8. This commitment was reaffirmed in the Harare Declaration by the Organisation of African Unity in 1989, and by the UN General Assembly, also in 1989: Klug (n 34 above) 2-11.

39 The SALC was requested to investigate the possibility of an extension of rights in 1986, resulting in the publication of a working paper in 1989 and the SALC *Interim Report on Group and Human Rights* in 1991: Klug (n 34 above) 2-12.

release of Nelson Mandela.[40] Later in the same year, the ANC tabled its Bill of Rights for a New South Africa, which notably again includes several socio-economic rights as justiciable rights giving rise to carefully crafted obligations, rather than as directive principles.[41] This development was influenced, in no small part, by the writings, in the late 1980s, of Albie Sachs — later to become one of the first judges of the Constitutional Court — which argued for the inclusion of socio-economic rights in a new constitution.[42]

In December 1991, the Convention for a Democratic South Africa (CODESA) was launched, marking the commencement of open negotiations for a democratic South Africa. The CODESA negotiations culminated in agreement on a process to create a democratic Constitution for South Africa. The negotiating parties, themselves not democratically representative, decided to create an interim Constitution which was to come into force on the date of South Africa's first democratic elections — 27 April 1994. Thereafter, the democratically elected parliament (doubling as the 'Constitutional Assembly' for the purposes of drafting a new text) was to write a new, 'final' Constitution, which would eventually replace the interim Constitution. The final Constitution, however, was not to be completely unfettered in its content, and was to comply with a set of Constitutional Principles listed in the interim Constitution and, before the final Constitution could come into effect, it would have to be submitted to the new Constitutional Court (established in terms of the interim Constitution) for certification of its having complied with these Constitutional Principles. This process was known as 'certification'.[43]

40 At the same time, De Klerk announced the unbanning of the Pan-Africanist Congress (PAC) and the South African Communist Party (SACP), as well as the lifting of restrictions on various other parties, and the release of several other political prisoners.

41 N Haysom 'Democracy, constitutionalism and the ANC's Bill of Rights for a new South Africa' (1991) 7 *South African Journal on Human Rights* 102-3; a revised draft of the *Bill of Rights for a new South Africa* (May 1992) is reprinted in A Sachs *Advancing human rights in South Africa* (1992) app 1 215.

42 DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "Deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 302. See also Sachs (n 41 above) for a collection of these writings.

43 The new constitutional text was passed on 8 May 1996 with the support of 87% of the members of the Constitutional Assembly. The text was then submitted to the Constitutional Court for certification, and the Court found that it was substantially in compliance with the Constitutional Principles. Nevertheless, it found that in a number of respects the text had not complied and therefore failed to certify the draft text: *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC). The text was then revised and resubmitted to the Court, and this time the Constitutional Court certified that the text did indeed comply with the Constitutional Principles: *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 2 SA 97 (CC). The final Constitution, The Constitution of the

The interim Constitution[44] contained certain socio-economic rights, namely, rights to adequate nutrition and medical care for prisoners;[45] rights to fair labour practices;[46] property rights;[47] children's rights to security, basic nutrition, basic healthcare and social services;[48] and education rights.[49] It did not, however, contain the generally formulated rights of 'everyone' to housing, healthcare, food and water, and social security found in sections 26 and 27 of the Constitution. The Reconstruction and Development Programme (RDP), the election manifesto of the ANC for the 1994 elections, was also clear to commit the new government to 'meeting basic needs', and explicitly recognised a *right* to housing, water and sanitation.[50]

Later that same year, on 3 October 1994, the President of South Africa, Nelson Mandela, on his historic visit to the UN General Assembly, signed ICESCR and ICCPR.[51] By doing so, he signalled the new government's commitment to be bound by international human rights norms and South Africa's commitment to protecting economic, social and cultural rights. South Africa, however, has not yet ratified ICESCR, so the country is not bound by the Covenant. This is unfortunate, given the international importance of South Africa in interpreting domestic socio-economic constitutional provisions. Nevertheless, South Africa does incur certain obligations under the Vienna Convention on the Law of Treaties (Vienna Convention) in the period between signature and ratification: in particular, South Africa must refrain from 'acts which would defeat the object and purpose of the treaty';[52] and should use the interim period to review its laws for consistency with ICESCR, and educate its citizens, public service and

Republic of South Africa Act 108 of 1996, came into force on 4 February 1997. For a discussion of the first certification judgment, see M Chaskalson & D Davis 'Constitutionalism, the rule of law, and the *First Certification Judgment: Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa 1996,* 1996 4 SA 744 (CC)' (1997) 13 *South African Journal on Human Rights* 430.

44 Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

45 As above, sec 25(1)(b).

46 As above, sec 27. Note that neither the interim nor sec 23 of the final Constitution contains the right to work, and both extend fair labour practice rights to both employees and employers. This may be one of the reasons why fair labour practice rights are generally not viewed as 'socio-economic' rights in South Africa. The South African understanding of socio-economic rights is discussed below at sec 4.

47 Interim Constitution (n 44 above) sec 28.

48 As above, sec 30(1)(c).

49 As above, sec 32.

50 ANC 'Reconstruction and Development Programme' (1994) ch 2.

51 http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp (accessed 30 June 2009).

52 Vienna Convention on the Law of Treaties (Vienna Convention) art 18, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

judges about ICESCR.[53] South Africa has a general duty to act in 'good faith' and cannot use the provisions of its law to justify a failure to ratify the Convention.[54] Moreover, the South African Constitutional Court has affirmed that binding as well as non-binding international law is relevant to the interpretation of the Bill of Rights.[55] ICESCR is therefore relevant to the interpretation of South Africa's socio-economic rights provisions.

The academic debate over the inclusion of justiciable socio-economic rights in the interim and final Constitutions began in earnest in the early 1990s.[56] On the whole, most of the discussion accepted the general need for some form of protection or recognition of socio-economic rights, and the debate was over the form this should take — as fully justiciable rights, or as directive principles.[57] One of the key early articles was that by Mureinik, in which he argued that to fail to entrench socio-economic rights as justiciable rights, rather than include them as directive principles, and to protect only civil and political rights, would turn the bill of rights into a 'charter of luxuries'. Moreover, in order to deal with the objections to judicial enforcement of socio-economic rights on the basis that the judiciary lacks expertise and political accountability, courts should review governmental action for 'sincerity and rationality'.[58] Other writers, notably Davis, argued forcefully that socio-economic rights should only be given recognition in the form of directive principles, on the model of the Indian Constitution, since this was the 'honest' way for a constitution to protect socio-economic rights — rights which, by their nature, 'can only be protected by way of negative constitutional review'.[59]

53 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* 359 371.

54 Vienna Convention (n 52 above) arts 26 & 27.

55 *S v Makwanyane & Another* 1995 3 SA 391 (CC) para 35.

56 See, eg, C Scott & P MacKlem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1; D Davis 'The case against inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475; 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.

57 Liebenberg (n 53 above) 377.

58 Mureinik (n 56 above) 465-67 474. Note that the standard of 'sincerity and rationality' clearly prefigures the test of reasonableness later adopted in the final Constitution.

59 Davis (n 56 above) 487. See also B de Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29; B de Villiers 'The socio-economic consequences of directive principles of state policy: Limitations on fundamental rights' (1992) 8 *South African Journal on Human Rights* 188.

Despite this academic debate, most of the political parties involved in the negotiations favoured the inclusion of some form of socio-economic rights.[60] The *travaux préparatoires* are instructive in revealing the concerns of parliament in formulating the socio-economic rights to be included in the 1996 Constitution. For instance, international law was highly influential in the formulation of the rights, and there was a conscious effort to align the Constitution with the wording of ICESCR.[61] The reasons for modelling the formulation of the rights on ICESCR was to harmonise South African law with its obligations under international law and second, to provide a source of jurisprudence which courts could use in interpreting socio-economic rights.[62] In particular, there was concern to align the meaning of 'progressive' realisation and 'reasonable legislative and other measures within its available resources' with international law.[63] The *travaux préparatoires* also reveal a recognition of the link in the liberation struggle between democracy and the 'struggle for freedom from poverty, homelessness and landlessness and for a better living environment'.[64] The ANC, for instance, in its submissions to the drafting committee, writes:

> The ANC believes that the wide-scale injustices and inequalities of the past require the inclusion of particular socio-economic rights in a South African Bill of Rights. The inclusion of such rights within a Constitution records a country's vision and aspirations for the future. The new Bill of Rights cannot therefore shy away from including within the scope of its protection, fundamental rights, which while posing difficulties in enforcement reflect important principles in the promotion of a society based on justice and equality, a society which seeks to redress the imbalances of the past.[65]

The ANC submission then goes on to discuss individual rights. In its discussion of the right to housing it notes the importance of the right to housing in international law, and in article 11 of ICESCR in particular.[66] Further discussion by the Technical Committee, on the

60 S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999) 41-I to 41-3.

61 *Travaux Préparatoires* Panel of Constitutional Experts: Memorandum on 'Socio-Economic Rights' (5 February 1996) 6. See also P de Vos 'Pious wishes or directly enforceable human rights: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67 76.

62 *Travaux Préparatoires* (n 61 above) 6.

63 *Travaux Préparatoires* Panel of Constitutional Experts: Memorandum on 'The Meaning of "Progressive"' (6 February 1996) 1-6. See ch five, secs 3.1 & 4.2.1 for a discussion on how the Constitutional Court has responded to the international jurisprudence on these two issues.

64 *Travaux Préparatoires* Constitutional Talk Number 10 (11-25 August 1995) 9.

65 *Travaux Préparatoires* Preliminary ANC Submission: Theme Committee 4 — Further Socio-Economic Rights (nd) 1. This submission also contains extensive reference to international law in the formulation of the individual socio-economic rights.

66 n 63 above, 1.

right to housing, reveals the concern of the drafters in framing the right, which points out that the right to housing should be drafted in such a way that:

> (a) they do not place an obligation on the state which cannot be fulfilled in terms of its resources and capacity;
>
> (b) they preserve the distinction between the roles of the judiciary and the legislature: this entails that the legislature is given the main responsibility for elaborating and implementing the rights, with the courts possessing the necessary powers of review;
>
> (c) the main duty on the state is to provide opportunities and remove constraints which prevent access to social and economic rights in South Africa.[67]

These requirements reveal a concern not to place an undue burden on the state and to ensure that the judiciary is not able to hold the state to an unattainable standard. This was achieved through the use of two qualifications on the state's obligation to realise socio-economic rights, namely, that they are subject to 'progressive realisation' within the state's 'available resources'. The wording of the socio-economic rights contained in sections 26 and 27 of the Constitution are thus clearly modelled on ICESCR. In particular, article 2(1) of ICESCR governs the state's general obligations relating to substantive rights in ICESCR and provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) is the primary clause — the 'linchpin' as Craven calls it[68] — dealing with the obligations placed on state parties to the Covenant, although it should be noted that there are more specific obligations pertaining to each of the rights in ICESCR. It sets out the nature of the duties assumed by member states, namely that the rights in the Covenant are to be realised progressively, subject to the available resources of the state party. This obligation reflects a compromise between two groups — those who wished to create a fully binding obligation on member states, and those who recognised the need for flexibility in creating an obligation where member states vary greatly in economic means.[69]

67 *Travaux Préparatoires* Explanatory Memoranda of the Technical Committee to Theme Committee IV of the Constitutional Assembly (9 October 1995) 155 quoted in Liebenberg (n 60 above) 41-4.
68 Craven (n 9 above) 106.
69 n 65 above, 150-51.

Despite the similarities between article 2(1) of ICESCR and sections 26 and 27 of the Constitution, there are a number of important differences in the wording chosen by the drafters of the South African constitutional text. First, there is no obligation to seek 'international assistance and co-operation, especially economic and technical' to realise socio-economic rights; second, there is no obligation on the South African state to try to realise its socio-economic obligations to the *maximum* of its available resources — it need only attempt to realise the entrenched rights within its 'available resources'; and third, there is no obligation to use 'all appropriate means' to realise the right — it need only 'take reasonable legislative and other measures', assessed in light of available resources. All of these differences place further qualifications on the state's obligation, thereby narrowing the scope of the state's duty. These aspects are discussed further in chapters four and five.

4 The South African Constitution

This section considers features of the socio-economic rights included in the South African Constitution. The use of the term 'socio-economic' rights has a narrower meaning in the South African context than that of ICESCR, and refers to what are commonly called social rights. Most notably, the South African 'socio-economic' rights discourse excludes property rights (but not land rights) and labour rights from general discussion. Indeed, the Constitutional Court, in listing socio-economic rights, cites the right of access to land (section 25(5)), rights to adequate housing, healthcare, food, water and social security (sections 26 and 27), the rights of the child (section 28), and the right to education (section 29).[70] This is echoed in the academic discourse which has focused on sections 26 and 27 and to a lesser extent on sections 28 and 29 and the difficulties that interpretation and implementation of these rights have given rise to. There does not appear to be any principled reason for this restrictive understanding of socio-economic rights, and perhaps the primary reason is that the label 'socio-economic rights' came to be associated with the contentious rights found in sections 26 and 27, while property and labour rights, in South Africa, were generally accepted as obvious rights for inclusion in the Constitution and as uncontentious.[71] In this book, the term socio-economic rights will be used (rather than 'social

[70] *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC) para 19.

[71] See, eg, Mureinik (n 56 above) 464-65 who identified rights to nutrition, shelter, healthcare and education as socio-economic rights.

rights' or 'social and economic rights')[72] and it will be used consistently with the South African usage.

In the South African Constitution, two categories of socio-economic rights may be distinguished, as well as a third related category of procedural rights which have socio-economic implications. The primary, or at least, most characteristic, category is that with internal limitations found in sections 26 and 27 of the Constitution, dealing with housing, healthcare services, food and water, and social security. The right consists of a two-part structure, with the first part stating the right to have access to the relevant social good, and the second part outlining the obligation of the state to realise the right. The right to housing illustrates this category of rights well. Section 26 provides:

> (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.

Section 25(5) similarly provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis', thereby collapsing the characteristic two-part structure of the right. Given the South African Constitutional Court's current approach to sections 26 and 27 of folding the two parts of the right into a single right,[73] the distinction in drafting between section 25(5) and sections 26 and 27, should make little difference to the interpretation of the section.

Importantly, and unlike the many unqualified socio-economic rights discussed immediately below, these socio-economic rights are extended to *everyone*. It is this feature that has made them so unpalatable to the courts as they could potentially involve a seemingly limitless demand on state resources. The obligation on the state in terms of these rights is to take reasonable measures to ensure that the right is progressively realised. Courts, therefore, engage in a reasonableness review in order to decide whether the state has complied with its constitutional obligations. Nevertheless, there is a fair degree of scope for courts to engage the substantive content of the right in assessing the reasonableness of state action.

The second category of socio-economic rights is that without internal limitation. This does not, however, mean that the rights are completely without qualification since all rights in the South African

72 See Eide (n 33 above) 31 for the distinction between social and economic rights.
73 See the discussion in ch four and five below.

Constitution are subject to a general limitations clause which enables a right to be limited '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'.[74] This category of socio-economic rights is generally directed towards specific groups, such as children and those in detention. In the case of detained persons, sub-section 35(2) provides that:

> (2) Everyone who is detained, including every sentenced prisoner, has the right -
>
> ...
>
> (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

Section 28 regulates children's rights and, in particular, sub-section 28(1) provides:

> (1) Every child has the right -
>
> ...
>
> (c) to basic nutrition, shelter, basic healthcare services and social services.

At this point it may be observed that sub-section 28(1)(c) replicates the same socio-economic rights set out in the first category of socio-economic rights with internal limitations, but it does so by restricting the content of the right: 'basic nutrition' instead of 'sufficient food and water; 'shelter' instead of 'adequate housing'; 'basic healthcare services' instead of 'healthcare services'; and 'social services' instead of 'social security'. Hence, the constitutional drafters chose to limit the scope of the right by providing a more restrictive right, rather than by making the obligation to provide the right subject to, and limited by, available resources and progressive realisation.[75]

Section 29(1) is the only instance of a socio-economic right without internal restrictions afforded to everyone:

> (1) Everyone has the right -
>
> (a) to a basic education, including adult basic education.

In addition to these rights, there are two other rights that are recognised in the South African Constitution that would be described

74 Constitution (n 43 above) sec 36(1).
75 This interpretation is in contrast to that taken by the Constitutional Court in *Grootboom* (n 70 above). See the discussion in ch four, sec 3.2.1.

internationally as socio-economic rights. In South Africa, however, they are omitted from the discussions of socio-economic rights, probably because they fail to raise the same concerns that are raised by the socio-economic rights discussed above. These rights are the right to property and the right to fair labour practices. They are discussed here for the sake of completeness, and because it would be distorting to imply that they are not given constitutional recognition, along with all the standard civil and political rights found in the constitutions of most constitutional democracies.

Section 25(1) provides constitutional protection for property ownership by stating that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. The section then goes on to provide the circumstances under which the state may validly expropriate property, clearly making provision for the state to return property to those from whom it was unjustly taken under apartheid 'forced removals'. Sub-sections 25(6) and (7) then go on to provide specific rights to address further the consequences of apartheid land-policy:

> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
>
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

And finally, section 25(8) stipulates that the provisions of section 25 generally may not be used to thwart 'legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination' — as was done in the United States in the series of infamous *New Deal* cases.

Section 23 of the Constitution provides for fair labour practices for both employers and employees. Notably, the section does not provide a right to work, and this may be another of the reasons why labour rights in South Africa are not considered to be socio-economic rights. A further reason may be that labour rights in South Africa predate the democratic transition, and both Constitutions effectively codified the existing legislative framework in constitutional form. Even today, the Constitutional Court views the right to fair labour practices as

embodying a compromise between employer and employee interests, that is, as a product of compromised negotiation, rather than an absolute right for employees.[76]

In addition to socio-economic rights proper, there are a number of procedural rights which have socio-economic implications. For example, sub-section 26(3) provides that:

> 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.

The right therefore confers a procedural benefit to a person who stands to be evicted. It may even confer a substantive benefit as courts have interpreted 'relevant circumstances' to include the issue of whether or not the person in question has access to alternative housing. Thus, where a person has no alternative housing, a court may be more reluctant to grant an eviction order, or may grant an eviction order on more lenient terms.[77]

Notwithstanding the importance of section 26(3) and the significant protection which the courts and the legislature[78] have afforded to those facing eviction from their home, this right and the case law which elucidates it will not be discussed in detail in this book. Instead, this book focuses on the first and second categories of socio-economic rights discussed above, in particular, on the rights set out in sections 26, 27 and 28(1)(c) of the South African Constitution. This discussion is set out in chapters four and five. Before this, in chapters one and two, is a discussion on constitutional deference — the lens through which the South African case law is later examined — and a discussion in chapter three on the difficulties which socio-economic rights pose for judicial review.

76 *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 3 SA 1 (CC) paras 33-40; and *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd & Another* 2003 3 SA 513 (CC) para 26.

77 See, eg, *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA) para 26; *City of Johannesburg v Rand Properties & Others* 2007 6 SA 417 (SCA) para 47; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 28; *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 56; *Lingwood & Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 326 (W) paras 32 & 37; *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W) paras 16 & 19; *Blue Moon Light Properties 39 (Pty) Limited v The Occupiers of Saratoga Avenue & Another* 2009 3 BCLR 329 (W) paras 67-69.

78 See, in particular, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 28; and the cases cited in n 77 above.

CHAPTER 1

COMPARATIVE PERSPECTIVES ON DEFERENCE

'The testing right is a principle of the Devil.'

President Paul Kruger on Judicial Review (1897)[79]

1 Introduction

This chapter seeks to examine the operation of the concept of deference in judicial review in order to lay the foundations for the construction of a framework within which to understand this idea — which is then developed in chapter two. This chapter is divided into two main parts — sections 2 and 3 — in which the approach to deference adopted in Canada and the United Kingdom is discussed respectively, through an examination of selected case law and secondary literature of those jurisdictions.

These two jurisdictions have been selected for comparison with South Africa because of the similarity between them with respect to the role played by courts and the judiciary in their respective democracies. While other countries (such as Brazil, India or China) may be closer to South Africa in terms of their social and economic development, colonial history and unequal distribution of wealth, the rhetoric and operation of the courts in these countries often functions in a manner distinct from South Africa, and in a way which is not always helpful for a comparison of the manner in which courts say they defer to other branches of government. The language of deference, and the self-consciousness by judges of their role in a democracy which the usage entails, is a relatively recent phenomenon and is not widespread. The United Kingdom and Canada, by contrast, provide good examples of countries where the courts are explicitly mindful of their role, and the fact that they delimit their own boundaries of power. Moreover, the topic of judicial review, and

[79] Quoted in J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181 184.

deference in particular, has received considerable academic and judicial attention in these countries. British jurisprudence has been influenced appreciably by Canadian jurisprudence, and therefore integrates the jurisprudence of the two jurisdictions, although it has also tended to diverge from the Canadian approach, developing a conception of deference which is closer to the margin of appreciation doctrine that has been adopted by the European Court of Human Rights. The drafting of the British Human Rights Act was, in fact, influenced by the text of the Canadian Charter, and both allow for legislative derogation and adopt a doctrine of proportionality. In this way, both constitutional texts facilitate a 'dialogue' between the courts on the one hand, and the executive and legislature on the other.[80]

Before turning to those jurisdictions and a discussion on the nature of judicial review, it is important to note some of the limits of this analysis. First, this chapter is confined to a discussion of deference in judicial review of rights, although, in principle, the same framework may operate throughout all judicial adjudication. Second, the analysis is confined to a discussion of deference towards decision making of the executive and legislature, and not of administrative tribunals, private persons or lower courts. Third, no distinction is made at this stage between the approach to deference to decisions of the legislature or to the executive, and fourth, deference is discussed primarily in relation to the interpretation of rights and in the limitations or proportionality analysis and is not discussed in relation to remedies. In chapters four and five, in a discussion of South African jurisprudence, these latter two areas are developed and a distinction is drawn between deference to legislative and executive decisions, as well as the interaction between deference in interpretative and limitations analysis and its relationship to deference at remedial stages.

In this book, constitutional deference is viewed as an integral aspect of judicial review, and a sharp distinction is not drawn between judicial review of administrative action and judicial review of other forms of constitutional power for consistency with a constitution. Rather, judicial review is characterised generally in order to understand how it operates in the power-play between the various branches of government. Judicial review, therefore, is defined as the evaluation undertaken, by the courts, of the exercise of public power — whether exercised by a public or a private body — to gauge its consistency with a set of pre-defined or constructed legal norms.[81] The power under review may be power exercised by any of

[80] R Clayton 'Principles for judicial deference' (2006) *Judicial Review* 109 para 39.

[81] This general discussion is limited to a characterisation of countries with a democratic system of government and an independent judiciary.

the branches of government — the executive, including the public administration, the legislature and even the judiciary itself. The exercise of public power is similarly wide-ranging, including executive and judicial decision making, policy formulation (by the legislature or executive), legislation (primary or delegated) or the implementation of legislation or policy. The courts undertake judicial review when they consider whether such legislation, policy or action is consistent with these legal norms. The precise content of these norms will depend on the constitution; the values of the dominant culture; the type of democracy which a country espouses; and the court's understanding of its role and of judicial review.

The justification for judicial review is, broadly, that the courts act as a check on the exercise of public power, ensuring that it is exercised in a manner consistent with the constitution (in the wide sense) of a particular country.[82] This justification is grounded in the rule of law, as well as the doctrine of separation of powers and the system of checks and balances that is part of the doctrine.[83] In addition to this justification, in countries with a written constitution which provides for judicial review, the courts are mandated by that constitution to uphold the constitution, through, amongst other means, the process of judicial review. Such courts, therefore, have direct constitutional legitimisation for the exercise of their power.

Shapiro elaborates the justification for judicial review by arguing that constitutional judicial review is politically justified by the twin aims of division of powers (both between national and provincial/ state power, and between and within the legislature and executive) and the enforcement of rights. These aims are not understood as excluding each other, but rather as a 'branching pair', where either one or both of these aims may be true for a particular country at a particular time.[84]

Constitutional deference overlaps with other constitutional principles. For example, it overlaps with the principle of comity — that is, that the different institutions of government maintain a respect for the functions and powers of the other institutions. Deference is also a part of the same family of concepts as justiciability. Justiciability is a question of whether a matter is suitable for judicial resolution, and in this sense, the same considerations which underpin that question, underpin the notion of

82 There are a number of competing theories on the justification for judicial review that are not covered in this chapter. See C Forsyth (ed) *Judicial review and the Constitution* (2000) for a good overview of the debate in the UK, in the context of administrative law.

83 See the discussion on the separation of powers doctrine in ch three, sec 3.1.

84 M Shapiro 'The success of judicial review and democracy' in M Shapiro & A Stone Sweet (eds) *On law, politics, and judicialisation* (2002) 149-61.

constitutional deference and clearly the two concepts overlap. The main difference between them is that justiciability is a concept which will determine whether a court will make a ruling on a matter or not, while constitutional deference is a more subtle balance within the adjudication process determining the weight to be given to the decision-making process of the other branches of government. In this sense then, the decision by a court that a matter is non-justiciable reflects a position of extreme deference.[85]

2 Canadian approaches to deference

This part of the chapter, and the next, examines the discourse of deference in the case law of two commonwealth jurisdictions, namely Canada and the United Kingdom. It should be noted from the outset that the following two sections do not purport to be a comprehensive survey of the case law dealing with deference in either Canada or the United Kingdom. Neither does the discussion set out to provide a normative evaluation of the judgments discussed. Rather, this discussion examines some of the more important decisions which include judicial discussions on deference in order to highlight the considerations which the courts take into account in deciding on the approach that has to be adopted for the review of executive and legislative decision making. In the following chapter, this discussion is synthesised into a more theoretical consideration of the ingredients which make up judicial approaches to constitutional deference.

2.1 The Canadian Charter of Rights and Freedoms

In 1982, the Canadian government formally adopted the Canadian Charter of Rights and Freedoms (Canadian Charter), thereby 'constitutionalising' a number of rights and institutionalising the courts as the protector of these rights through the process of judicial review.[86] No question arises, therefore, as to the constitutional legitimacy of the Canadian courts' reviewing government action.[87] Among the rights protected are civil and political rights. Socio-

85 The justiciability of socio-economic rights is discussed in ch three, sec 3.2.

86 Prior to this, in 1960, the Canadian Bill of Rights SC 1960 c 44 was enacted. This statute of the federal parliament, however, was not given any special entrenchment, and was only applicable to federal laws, and not to provincial legislation or action. The Charter, on the other hand, is part of the Canadian Constitution and is applicable to federal and provincial levels of government. Most of the rights protected in the Canadian Bill of Rights are protected in the Charter, and for this reason the former is now mostly superseded, although the Bill still remains in force: PW Hogg *Constitutional law of Canada* (1997) 787-88.

87 B Dickson 'The Canadian Charter of Rights and Freedoms: Context and evolution' in G Beaudoin & E Mendes (eds) *The Canadian Charter of Rights and Freedoms* (1996) 1-1 to 1-12.

economic rights, however, are not given express protection; neither is the right to property.[88]

The approach of the Canadian courts (like that of the South African courts) to deciding whether Canadian Charter rights have been violated is known as a two-stage approach. First, a court interprets the right or rights in question and decides whether the affected action or interest falls within the scope of the right or rights, that is, whether it is an action or interest protected by the Charter. If it does, the court then moves to the 'limitations stage': Section 1 of the Charter establishes a 'limitations clause' which provides that the rights in the Charter may be limited where these are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The burden thus shifts to the state to establish, on a balance of probabilities, that the limitation is justified.

In *R v Oakes*, the Supreme Court elaborated on the test to be applied in ascertaining whether a law limiting a Charter right is justified.[89] The four-part *Oakes* test requires the limiting law to be (a) of 'sufficient importance to warrant overriding a constitutionally protected right or freedom', that is, there must be a 'pressing and substantial' interest; (b) 'rationally connected to the objective' sought to be achieved; (c) the least possible impairment of the right or freedom in question; and (d) proportionate 'between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective'.[90] Parts (b), (c) and (d) have collectively been described as the 'proportionality test' and this interpretation is followed in the discussion below.[91] The limitations clause means that Charter rights and freedoms can be limited by parliament where it can be shown that it is necessary and important to do so. The *Oakes* test thus establishes a 'strict standard' for the assessment of rights violations under the Charter.[92]

88 This was a deliberate decision on the part of the drafters, and follows ICCPR in this respect: see H Glasbeek 'The Social Charter: Poor politics for the poor' in J Bakan & D Schneiderman (eds) *Social justice and the Constitution: Perspectives of a social union for Canada* (1992) 115 122. The Canadian Bill of Rights does, however, contain a 'due process' clause which includes the protection of property. To this extent then, property rights are still protected at federal level: see n 86 for a discussion of the Canadian Bill of Rights.

89 *R v Oakes* [1986] 1 SCR 103.

90 As above, 138-39 (emphasis in the original). Much of the *Oakes* test was prefigured in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 352.

91 E Mendes 'The crucible of the Charter: Judicial principles v judicial deference in the context of section 1' in Beaudoin & Mendes (n 87 above) 3 3-21 to 3-31.

92 G Davidov 'The paradox of judicial deference' (2000-2001) 12 *National Journal of Constitutional Law* 133 137.

2.2 Democratic dialogue

The use of limitations analysis also promotes what has been called a 'culture of justification' since the executive and legislature are required to set out reasons for their desire to limit Charter rights and freedoms. This means that the courts are not the final arbiters on human rights and that parliament and the executive are invited to enter into a 'democratic dialogue' with the courts regarding the proper ambit and scope of Charter rights.[93] Hogg and Bushell explain the idea as follows:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which the *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded ... The *Charter* can act as a catalyst for a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of democratic institutions.[94]

The idea of a democratic dialogue has also been adopted by the Canadian courts and in *Vriend v Alberta*, Cory J held that:

> As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a 'dialogue' by some ... In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives ... By doing this, the legislature responds to courts; hence the dialogue among the branches.
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the

93 See generally PW Hogg & AA Bushell 'The *Charter* dialogue between courts and legislatures (or perhaps the *Charter of Rights* isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75; J Jai 'Policy, politics and law: Changing relationships in the light of the Charter' (1997-1998) 9 *National Journal of Constitutional Law* 1; and K Roach 'Constitutional and common law dialogues between the Supreme Court and Canadian legislatures' (2001) 80 *The Canadian Bar Review* 481. See also R Clayton 'Judicial deference and "democratic dialogue": The legitimacy of judicial intervention under the Human Rights Act 1998' (2004) *Public Law* 33 40-46, who argues that the notion of a 'democratic dialogue' should be applied in the UK.

94 Hogg & Bushell (n 93 above) 79-81.

> work of the court in its decisions can be reacted to by the legislature in the passing of new legislation ... This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it.[95]

Bushell and Hogg argue that there are four features in the Canadian Charter which make it possible for this dialogue to take place.[96] The first is the 'power of legislative override' in section 33 of the Charter, which allows the legislature to insert a 'notwithstanding clause' in a statute, thereby immunising the statute from review for consistency with most rights in the Charter. The power of legislative override therefore allows legislatures to re-enact legislation which has been struck down by the courts.[97] Second, the section 1 limitations analysis allows courts to speculate on how the offending legislation could be remedied, usually through providing a less restrictive means of achieving the same result. Again, this allows courts to engage in a discussion with legislatures on the most appropriate way for legislative objectives to be achieved and for legislatures to respond within the guidelines set out by the court. Third, certain rights in the Charter are internally qualified, and allow for restrictions on those rights which are fair and reasonable or in accordance with the 'principles of fundamental justice'. These provisions allow (as does the limitations analysis) the courts to speculate on alternative measures that would pass constitutional muster. And finally, constitutional dialogue is enhanced by the equality clause in section 15(1) of the Charter, since a finding that a particular law or policy violates the equality guarantee still leaves a number of options open to the legislature to remedy the defect of under-inclusiveness, such as by extending the provision of the benefit or by 'levelling-down' so that no-one receives the benefit.[98] Bushell and Hogg also acknowledge that there are instances where dialogue is foreclosed, such as where there is no limitations analysis applicable; where the objective of the legislation itself is unconstitutional; or where circumstances are such that the legislature is not able to respond to the decision, such as where it is forced not to due to political pressure.[99]

'Dialogic' theories of judicial review thus differ from 'conventional' accounts of judicial review in that dialogic theories accept that courts do not have the final word on the interpretation of the Charter, but rather, courts and legislatures enter into a 'dialogue' over this interpretation. 'Conventional' accounts of judicial review,

95 *Vriend v Alberta* [1998] 1 SCR 493 paras 138-39 (footnotes omitted).
96 Hogg & Bushell (n 93 above) 82.
97 Namely, secs 2 & 7-15 of the Charter. The legislative override does not extend to secs 3-6 of the Charter.
98 Hogg & Bushell (n 93 above) 82-91.
99 As above, 91-96.

on the other hand, accept the supremacy of the courts in interpreting the constitutional text and, therefore, focus on delimiting the appropriate role of the courts.[100] Roach identifies a number of different types of dialogues which theorise different relationships between the legislature and the courts, all of which are present in Canada. These theories, he argues, fall into three categories, namely, theories which are based on an assumption that legislatures and courts have an equal right to interpret the constitution;[101] theories which emphasise the accountability of courts to society in general and legislatures in reflecting majority sentiment; and theories which see courts and legislatures as having distinct and complementary roles in interpreting the constitution.[102]

The Canadian approach to democratic dialogue informs the Canadian courts' approach to deference. The following section discuses some of the more important case law on deference.

2.3 Case law

The first judgment in which the Supreme Court discussed the notion of deference (although without actually using the term) was in *R v Edwards Books*.[103] This judgment concerned the constitutionality of the Retail Business Holidays Act, which prohibited certain retail stores with more than seven employees from opening for business on Sundays and exempted other stores with seven or less employees (along with a number of other requirements) from this rule. In deciding whether the state could justify its decision to craft the exemption in this manner, Dickson CJ found that the legislature was entitled to a measure of leeway in deciding how to achieve its goals. In his words, '[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line'.[104] While Dickson CJ speculated that there may, arguably, have been a better legislative solution to the religious exemption by crafting another religious exemption for those who could not be fitted in within the existing exemption, to find the Act unconstitutional on that ground would be to impose 'an excessively high standard on the legislatures'.[105] The Court therefore found that, since the state had made a 'serious effort' to balance the rights of those affected, it had

100 Roach (n 93 above) 489. Examples of more 'conventional' accounts of judicial review include those by Ely and Dworkin: see the discussion in ch two, sec 2.1.
101 See, eg, the discussion of Tushnet, ch two, sec 2.1.
102 Roach (n 93 above) 487-503. It is the latter approach, based on the work on Alexander Bickel, which Roach favours. See, eg, AM Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1986) 23-28.
103 *R v Edwards Books & Art Ltd* [1986] 2 SCR 713.
104 As above, para 147.
105 As above, para 149.

demonstrated that its legislation was a justifiable infringement on the right to freedom on religion.[106]

The concurring judgment of La Forest J takes this reasoning a step further in holding that he would not have found a constitutional duty on the state to craft a Sabbatarian exemption for those who close their businesses on a Saturday for religious reasons. La Forest J does so in the context of recognising the importance of the legislative objective in providing a common day of rest:

> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures … [I]t seems to me that the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions. These choices require an in-depth knowledge of all the circumstances. They are choices a court is not in a position to make.[107]

The approach adopted by La Forest J is thus more deferential than the approach adopted by Dickson CJ in that it is less prescriptive in defining how the state should respond to an infringement of the right to freedom of religion of those who close their businesses on a Saturday for religious reasons. It should also be noted that La Forest J appeals to both democratic and institutional competence arguments in framing his particular position. As a result, for La Forest J, the state should be given 'reasonable room to manoeuvre' in balancing the conflicting rights of different groups. The obligation on the state is therefore to show that it has acted *reasonably* in crafting its legislative compromise.

This approach of La Forest J, in assessing the legislative balance of rights between competing groups on a reasonableness standard, is adopted by the majority of the Court in the judgment of *Irwin Toy Ltd v Québec*.[108] *Irwin Toy* concerned the constitutionality of Québec legislation which prohibited commercial advertising directed at children under 13. The Court (per Dickson CJ, Lamer and Wilson JJ (Beetz and McIntyre JJ dissenting) accepted that the prohibition abridged the right to freedom of expression in the Canadian Charter, and that this abridgment was justified by the limitations clause in the case of children below the age of seven. The question before the

[106] As above, para 151. It should be noted that there was no strict majority of the Court on this reasoning. Dickson CJ's judgment represented his, Chouinard and Le Dain JJ's views. Beetz, McIntyre and La Forest JJ disagreed with the reasoning of Dickson CJ, but concurred in the order; Wilson J dissented.

[107] As above, para 183.

[108] *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927.

Court, then, concerned the constitutionality of the prohibition directing advertising at children between the ages of seven and 13.[109] In applying the *Oakes* test, the Court began by considering whether the state's objective related to concerns which are 'pressing and substantial in a free and democratic society'. In deciding that the legislation in question did indeed meet this requirement, the Court held:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.[110]

Similarly, in judging whether the state had decided correctly how it should protect vulnerable groups under the minimal impairment test, the Court held that a more deferential approach should be adopted.[111] This is appropriate, the Court held, where the Court has to assess government's decision on how to regulate competing constitutional interests, rather than where the state, as a 'singular antagonist', has infringed the rights of an individual.[112] The primary justification given by the Supreme Court for adopting the minimal impairment test in this case is that this approach respects the proper role of the legislature.[113]

The test adopted in *Irwin Toy* is thus substantially less onerous than the traditionally applied *Oakes* test, since under the minimal impairment test in *Irwin Toy*, the state has only to demonstrate that its decision was 'reasonable', instead of the previous standard of having to demonstrate that its choice involved the least intrusive means of achieving its objective. Moreover, as Davidov points out, 'the test focuses on the subjective point of view of the legislature', that is, when the state is able to demonstrate that it acted in good faith (as it presumably usually does) the legislation will most likely satisfy the limitations test.[114] Beatty is also particularly critical of this development, arguing that this approach of the courts 'has, more often than not, meant no review at all'.[115]

[109] As above, para 73.
[110] As above, para 74.
[111] As above, para 81. The 'minimal impairment test', as noted above in sec 2.1, is the third part of the *Oakes* limitation test.
[112] As above, para 80.
[113] As above, para 79.
[114] Davidov (n 92 above) 138.
[115] DM Beatty *Constitutional law in theory and practice* (1995) 83.

The Supreme Court's approach to deference was developed further in *RJR-MacDonald Inc v Canada*,[116] where it is instructive to contrast the majority and minority judgments' approach to deference in the section 1 analysis. The judgment concerned the constitutionality of a total prohibition on commercial tobacco advertising in Canada and prescribed unattributed health warnings on tobacco products as a violation of the right to freedom of speech in section 2(b) of the Charter.[117] The minority,[118] per La Forest J, continued the approach to deference used in *Edwards Books* and *Irwin Toy*, and found that different levels of deference should apply, depending on the nature of the legislation and the nature of the right before the court.[119] As the legislation in this case dealt with tobacco advertising, La Forest J characterised it as 'social legislation' which has been 'generally accorded a high degree of deference' by the Supreme Court.[120] Moreover, the nature of the right concerned is not worthy of a high degree of protection, as the 'harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography'.[121] In addition to considering the nature of the right and the nature of the legislation in question in deciding the appropriate level of deference, La Forest J also articulates two justifications for deference, namely, democratic and institutional competence arguments. In discussing these justifications, he carefully weaves them into the justifications given in *Irwin Toy* so that the various justifications merge into one another, as the passage quoted below demonstrates:

> In drawing a distinction between legislation aimed at 'mediating between different groups', where a lower standard of s 1 justification may be appropriate, and legislation where the state acts as the 'singular antagonist of the individual', where a higher standard of justification is necessary, the Court in *Irwin Toy* was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts

116 *RJR-MacDonald Inc v Canada (AG)* [1995] 3 SCR 199.

117 The judgment also concerned the legislative validity of the enactment of the legislation in question. The majority of the judges found that the legislation was validly enacted under the criminal law power, but Sopinka and Major JJ found that certain provisions of the Act, which prohibited advertising and promotion, did not. This line of reasoning is not discussed further in this book.

118 The minority decision is discussed first because it is set out first in the judgment itself, because the majority's discussion on deference responds to the minority discussion, and because the reasoning of the minority follows on from the jurisprudence discussed above, while the majority represents a new approach.

119 *MacDonald* (n 116 above) para 64.

120 As above, paras 68 70.

121 As above, para 75.

> are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.[122]

From this passage, it is clear that an institutional competence justification is most clearly emphasised, while a democratic justification is only hinted at in the words, 'legislative and judicial function'. La Forest J also develops the institutional competence argument even further by giving leeway to the state where it has to provide complex social science data as part of its justification. Thus, where the nature of the social science evidence before a court required to demonstrate the necessity of a ban on tobacco advertising in the proportionality analysis 'would place an impossible onus on parliament by requiring it to produce definitive social scientific evidence', there is a need for the Court to 'attenuate' the standard of justification required in *Oakes*.[123] A lower standard of justification is therefore required by the minority in order for the state to justify its infringement of the right to freedom on speech in this case.

The majority, per McLachlin J, also accepted that a contextual approach must be taken to the section 1 limitations analysis, but cautioned on taking this approach too far in a manner which would 'undercut the obligation on parliament to justify limitations which it places on *Charter* rights' and thereby 'substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the *Charter*'.[124] McLachlin thus rejected the lower standard of proof required by La Forest J, and reasserted the 'civil standard of proof on a balance of probabilities' as the appropriate standard of proof in all stages of the proportionality analysis.[125] In discussing the limits of judicial deference, she cautions against an overly deferent approach:

> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether parliament's choice falls within the

[122] As above, para 68.
[123] As above, paras 67 68.
[124] As above, para 134.
[125] As above, para 137.

> limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is parliament. To carry judicial deference to the point of accepting parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[126]

The primary difference between the majority and the minority, therefore, is the role that deference should play in determining the nature of the burden which the state bears in the section 1 analysis. For the minority, a deferential approach meant that the state did not have to meet its burden according to the usual civil standard of proof, but only had to 'demonstrate that it had a reasonable basis for believing that such a rational connection exists'. This is indeed a very low standard, and goes a long way to undermine the constitutional protection afforded to these rights. Perhaps a better approach for the minority would have been to find that there had been no constitutional infringement in the first place. This approach, however, may be criticised as amounting to a 'pre-limitations' deference which raises a new set of problems.[127]

The factors to be taken into account in deciding the appropriate levels of deference have been given further refinement in *Thomson Newspapers v Cananda*[128] and *Delisle v Canada*.[129] In *Thomson Newspapers*, Bastarache J discussed a number of 'contextual factors' which would influence the degree of deference to be applied in a particular case. This judgment concerned the limitation of free speech relating to opinion survey results during the final three days of a federal election campaign. The majority (per Bastarache J, Cory, McLachlin, Iacobucci and Major JJ concurring) found that the means adopted by the legislature (a total ban on publishing such polls) did not meet the minimum impairment test. In deciding the particular level of deference which the majority found would be appropriate, Bastarache J considered the nature of the expression at issue. In this case he found that the expression was 'at the core of the political process' and for this reason, a deferential approach was inappropriate.[130] Furthermore, he found that the group which sought

[126] As above, para 136. The majority and minority also discussed the degree of deference which is appropriate for appellate courts to accord to the findings of the trial judge. See paras 79-81, 139-141 & 151. This facet of deference is not explored in this book, but it should be noted that many of the considerations which underpin constitutional deference between courts and the other branches of government would be replicated in the treatment of trial judge findings by appellate courts.

[127] See the discussion on pre-limitations deference at sec 3.4 below, and in ch five, sec 2.1.

[128] *Thomson Newspapers Co v Canada (AG)* [1988] 1 SCR 877.

[129] *Delisle v Canada (Deputy AG)* [1999] 2 SCR 989.

[130] *Thomson Newspapers* (n 128 above) paras 93 87-95.

to be protected (the Canadian voter) was not a vulnerable group, and that the government could not claim any widespread or significant harm to that group;[131] the 'autonomy and dignity' of the group was not under attack or undermined by a more powerful group; and the government had not demonstrated that the harm sought to be averted would affect a significant number of that group. For all of these reasons, Bastarache J found that a 'significant level of deference' was not warranted, and found, on the facts, that the legislative means adopted did not constitute a minimal impairment.[132] The minority (Lamer CJ, L'Heureux-Dubé and Gonthier JJ), by contrast, found that the minimum impairment test was satisfied. In coming to this conclusion, Gonthier J quoted *Irwin Toy* and *RJR MacDonald* and held that the legislature only had to demonstrate that there was a reasonable basis for the choice it made and 'courts must accord some leeway to the legislator' in tailoring the legislative objective to the measures used.[133]

Similarly, in *Delisle*, the minority considered the appropriate level of deference in a judgment relating to the constitutionality of a legislative provision which excluded the Royal Canadian Mounted Police (RCMP) from forming a union protected by the Public Service Staff Relations Act.[134] In deciding that very little deference should be afforded to the legislature in justifying an infringement to freedom of expression, Cory and Iacobucci JJ considered the following factors: that the exclusion of an entire class of employees from a 'comprehensive labour relations scheme' did not constitute a delicate balance between the interests of labour, management and the public; that the provision was not designed to protect a vulnerable group; that the evidence suggested that the opposite result might have been achieved by the legislative provision; and finally, that freedom of expression is a highly valued constitutional value.[135]

The final judgment discussed in this overview of Canadian jurisprudence is *Chaoulli v Quebec,*[136] which concerned the validity of section 15 of the Health Insurance Act and section 11 of the Hospital Insurance Act, under the Quebec Charter and the Canadian

131 As above, paras 112-13.
132 As above, paras 117 & 114-17.
133 As above, paras 43 & 41-47.
134 The majority (*per* Gonthier, McLachlin, Major and Bastarache JJ) found that the right to freedom of association in the Charter was not infringed, and hence, did not consider the question of deference in a limitations analysis.
135 *Delisle* (n 129 above) paras 129 & 126-32.
136 *Chaoulli v Quebec (AG)* [2005] 1 SCR 791.

Charter.[137] These two provisions prohibit Quebecers from taking out medical insurance for services in the private sector that are available under the provincial health system. The rationale of these provisions is the provision of healthcare services on the basis of need, and not on the basis of wealth. The appellants claimed that the waiting times in the public health system, coupled with the prohibition on medical insurance, created an obstacle to medical treatment, resulting in unnecessary suffering. As a result, the appellants argued, section 7 of the Charter, which protects the right to life, liberty and security of the person, is infringed.[138] The approach of the majority and minority differ markedly in their consideration of the evidence and in their reasoning, and a discussion of the judgments is informative of differing approaches to deference.

The majority, per Deschamps J, found that there was an infringement of section 7 of the Charter, since waiting times within the public healthcare system meant that it was 'inevitable that some patients will die if they have to wait for an operation'.[139] Moreover, this infringement was not justified under the Charter since there was no proportionality between the measure adopted and the objective of the provisions, namely, 'to preserve the integrity of the public healthcare system'.[140] While Deschamps J found that there was a rational connection, she held that the Attorney-General had not demonstrated that this measure met the minimal impairment test.[141] In coming to this conclusion, Deschamps J relied extensively on comparative evidence from other Canadian provinces and OECD countries to show that the integrity of the public healthcare system could be maintained, even with private medical insurance allowed.[142]

In her reasoning, Deschamps J made a number of comments on the level of deference required in this judgment. Her starting point, in this discussion, is that government must be able to justify any measures it takes which infringe Charter rights. In assessing whether such a limitation is justifiable, courts can consider any evidence they wish and, provided that courts are satisfied that they have all the evidence necessary to make an assessment, they must do so. It is only

[137] For the purposes of this discussion, the provisions of these Charters relevant to this judgment are substantially the same, and reference will be made to the Canadian Charter in the subsequent discussion for ease of comparative reference. It should be noted, however, that the judgment was ultimately decided on the basis of the Quebec Charter, and the finding of the Court was inconclusive with regard to the Canadian Charter, since Deschamps J reserved judgment in this regard, with the result that three judges found a violation of the Canadian Charter, while three did not.

[138] *Chaoulli* (n 136 above) para 37.

[139] As above, para 40.

[140] As above, para 56.

[141] As above, para 84.

[142] As above, paras 70-84.

where the state explains why evidence is too complex to be understood by the court, that a measure of deference is required.[143] Moreover, none of the other reasons justifying deference, such as 'the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state' were, according to Deschamps, applicable in this case.[144] Rather, '[t]he instant case is a good example of a case in which the courts have all the necessary tools to evaluate government's measure'.[145] There is thus a strong link between deference and the evidence which a court will or does consider: in practice, the more deferent a court is on a substantive issue, the less evidence it may require by the executive or legislature to find that the action in question is consistent with the Constitution. In this sense, it is important to distinguish between the evidence considered by a court and reasons given by the executive or legislature as to why a court should be more or less deferent. Of course, it is also possible to argue that the opposite should be true: the more inclined a court is to be deferent on a substantive issue, then the more important it is not to defer in assessing evidence, and to ensure solid evidentiary foundations for the executive or legislative action.

Thus, Deschamps J emphasises the institutional capacity of the courts to decide complex social matters, provided they have the appropriate evidence before them. In doing so, however, she adopts a narrow understanding of competence, arguing that the level of deference to be applied will depend on the factual assessment of whether the court has sufficient evidence before it to decide the matter, rather than a deeper appreciation of the inherent limitations of the courts for adjudication of complex, polycentric matters. Thus, for Deschamps J, deference is something to be applied (or not) depending on the circumstances and evidence before the court. This is a very thin conception of deference which fails to appreciate how the notions that underpin deference have already contributed to her reasoning. Notably, her discussion of deference is 'tagged on' to the end of her judgment, after she had already made her finding that 'the prohibition of private insurance contracts is not justified by the evidence'[146] and therefore does not meet the minimal impairment test. This approach is inconsistent with earlier court jurisprudence which, generally, and appropriately, considers the level of deference it will apply at the beginning of the limitations analysis.

[143] As above, paras 85-92.
[144] As above, para 95.
[145] As above, para 96.
[146] As above, para 84.

The concurring judgment of McLachlin CJ and Major J (with Bastarache J) similarly found that the purpose of the legislation was to protect the public health system and that there was an infringement of section 7 as the provisions in question restricted access to private healthcare, while 'failing to provide public healthcare of a reasonable standard within a reasonable time'.[147] Such an infringement, they concluded, failed to meet the rational connection requirement, and characterised the provisions as 'arbitrary'.[148] Moreover, they were of the view that the provisions failed to meet the minimal impairment test as 'the prohibition goes further than necessary to protect the public system'.[149] The majority and concurring judgments therefore characterise the question before the Court as being whether the prohibition on private medical insurance is justifiable given the waiting times within the public health system, and the legislative objective of protecting the public health system.

The dissenting approach, per Binnie and LeBel JJ (with Fish J), by contrast, defines the question before the Court as a question of constitutional authority:

> The question in this appeal is whether the province of Québec not only has the constitutional authority to establish a comprehensive single-tier health plan, but to discourage a second (private) tier health sector by prohibiting the purchase and sale of private health insurance.[150]

Similarly, the minority defines the objective of the legislative provisions differently to the majority and concurring judgments which define the legislative objective vaguely as protecting the public healthcare system:

> Québec's legislative objective is to provide high quality healthcare, at a reasonable cost, for as many people as possible in a manner that is consistent with principles of efficiency, equity and fiscal responsibility. Québec (along with the other provinces and territories) subscribes to the policy objectives of the *Canada Health Act*, which include (i) the equal provision of medical services to all residents, regardless of status, wealth or personal insurability, and (ii) fiscal responsibility ... The legislative task is to strike a balance among competing interests.[151]

In dealing with this issue, the minority adopted a far more deferential approach than the majority. The minority held that the debate could not be resolved by the courts, and that it is impossible for courts to assess when healthcare services are 'reasonable', as the concurring

147 As above, para 105.
148 As above, para 155.
149 As above, para 156.
150 As above, para 161.
151 As above, para 236.

judgment of MacLachlin CJ and Major J held. While this criticism (given the South African jurisprudence which demonstrates that courts can adjudicate healthcare policy fairly effectively) is perhaps overstated,[152] it is valid insofar as the concurring judgment failed to discuss how and why it reached this conclusion. In considering the evidence before the court, Binnie and LeBel JJ emphasised the importance of appropriate deference to the institutional competence of government in making policy decisions.[153]

> In our view, the appellants' case does not rest on constitutional law but on their disagreement with the Quebec government on aspects of social policy. The proper forum to determine the social policy of Quebec in this matter is the National Assembly.[154]

Similarly, the minority emphasise the constitutional competence of the state to decide certain matters:

> Still less can we say that the boundaries of the Quebec health plan are dictated by the Constitution. Drawing the line around social programs properly falls within the legitimate exercise of the democratic mandates of people elected for such purposes, preferably after a public debate.[155]

Thus, in contrast to the majority, the minority are more keenly aware of the role of the courts in adjudicating social and economic policy, and adopt a more deferential approach to the adjudication of these issues. The majority approach has been keenly criticised for its unprincipled approach to deference, for its inadequate handling of complex evidence, and for failing to take into consideration the rights of vulnerable groups.[156] It has also been received negatively by the executive and the public, and may, for this reason, be a good example of where the relevant legislation should be re-enacted with the 'notwithstanding clause'.

2.4 Themes in Canadian approaches to deference

It is apparent from this brief discussion of some of the seminal judgments of the Canadian Supreme Court that, at this point, it is difficult to point to a single, coherent and principled approach to deference as a concept that underpins judicial reasoning.[157] Nevertheless, a number of themes have emerged regarding when the

152 See the discussion on the right to healthcare in South Africa in ch four, sec 3.1; and on the standard of reasonableness in socio-economic rights adjudication in ch five, sec 2.1.
153 See, eg, *Chaoulli* (n 136 above) para 164.
154 As above, para 167.
155 As above, para 170.
156 See, eg, JA King 'Constitutional rights and social welfare: A comment on the Canadian *Chaoulli* healthcare decision' (2006) 69 *Modern Law Review* 631 636-39.
157 Davidov (n 92 above) 150 148-52.

Court will defer to executive or legislative decision making. First, the Supreme Court, in deciding the degree of scrutiny to be used, places great emphasis on its institutional ability to assess the subject matter before it. This is clearly demonstrated in the majority decision of *Chaoulli*, where Dechamps found no difficulty for the Court in assessing complex social and economic data in reviewing state healthcare policy. This stands in contrast to earlier decisions, such as *MacDonald*, where La Forest J held that, in a matter which required the assessment of complex social science evidence, courts should show greater deference to the legislature. Clearly, the extent to which a court feels comfortable with assessing evidence is critical to the degree of deference displayed by the court. By the same token, the deferential position adopted by the court may also influence the evidence it will require to defer to an executive or legislative decision. In this way, deference on a substantive matter may influence procedural aspects of the judgment.

Another important theme which emerges is the democratically mandated role of the courts in adjudicating decisions made by the executive and legislature which involve the balancing of rights or interests. This is clearly demonstrated in the two judgments of Dickson and La Forest in *Edwards Books*, and in *Irwin Toy*, all of which accord a degree of leeway to the legislature in balancing competing rights. McLachlin J's majority judgment in *MacDonald* sounds a note of caution in this regard, warning courts not to go too far in deferring to the legislature and to be mindful of the court's constitutional role in rights adjudication. Importantly, the Supreme Court's understanding of its role is shaped by the notion of a constitutional dialogue.

And third, the approach of the court to deference is, in part, determined by the nature of the right which is infringed, as well as by the extent of the infringement and the group whose rights are infringed. In *Thomson Newspapers* and *Delisle*, for example, the Court found that since each of the cases involved the fundamental right to expression, little deference should be afforded to the executive or legislature in determining the proportionality analysis. By contrast, when the decision involved social or economic policy (see the minority judgments of *MacDonald* and *Chaoulli*), greater deference is due to the choices of the executive or legislature. This point is noted by Beatty, who points out that the minimal impairment approach is used extensively where the subject matter involved is of a social or economic nature.[158] In addition to the nature of the right which is infringed, the court also considers the nature and extent of the

[158] Beatty (n 115 above) 82-83.

infringement (*Thomson Newspapers* and *Delisle*) and the impact it has on the group which the court seeks to protect (*Thomson Newspapers*).

These themes are picked up and discussed in greater detail in chapter two, after a discussion in section 3 of some of the more important United Kingdom case law.

3 The United Kingdom

3.1 The Human Rights Act

The question of deference, or rather, the appropriate level of deference, became an important question in the United Kingdom after the introduction of the Human Rights Act (HRA) in 1998, which incorporated the rights in the European Convention into domestic British law.[159] The introduction of the HRA caused a 'paradigm shift in the foundations of British constitutional law' by creating a form of quasi-constitutional review in which the judiciary is empowered to test the conduct and legislation of the state for consistency with the rights set out in the Convention.[160] This has, to use Mureinik's words in describing the introduction of the interim Constitution in South Africa, ushered in a different legal culture — a 'culture of justification' as opposed to the 'culture of authority' embodied in the 'Westminster-style' constitution of pre-1994 South Africa and Britain.[161]

Unlike a United States-style constitution, which allows for the striking down of legislation which is incompatible with the Constitution, the HRA allows courts to make a declaration of incompatibility only where a court is of the opinion that it is not possible to read the legislation in question in a manner which is consistent with Convention rights.[162] This declaration of incompatibility affects neither the validity of primary legislation, nor the validity of secondary legislation where the removal of such secondary legislation is dependant on primary legislation.[163] The fact that the validity of primary legislation is not affected is consistent with the British conception of supremacy of parliament, since at no time is a court given the power to 'strike down' primary legislation inconsistent with Convention rights. The repeal of the offending legislation is left to parliament. The critical issue for judicial

159 Human Rights Act 1998. The HRA came into force on 2 October 2000.
160 RA Edwards 'Judicial deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859 866.
161 E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32.
162 HRA (n 159 above) secs 3 & 4.
163 As above, sec 3(2).

interpretation is then the extent to which courts are able to read and give effect to legislation so that it is compatible with Convention rights. The exact wording of the test laid down in the HRA is that the courts must do so, '[s]o far as it is possible to do so'.[164] Clearly, this involves another potential challenge to the principle of supremacy of parliament since the courts, in interpreting the legislation under scrutiny, may either attribute a meaning to it that parliament may not have intended, so that it is consistent with the HRA (unless its intention is unambiguous and clearly inconsistent with such a reading, in which event, the court must make a declaration of incompatibility) or the courts may uphold the original intention of parliament as the court interprets it from the legislation. Thus, the extent to which courts defer to the intention of parliament will influence the possibility of a court finding inconsistency.[165]

The ensuing debate surrounding the HRA and deference echoes many of the issues raised around the justiciability of socio-economic rights discussed in chapter three. The two primary arguments which advocate a deferential court are essentially the same two objections raised to entrenching justiciable socio-economic rights (or indeed, any justiciable entrenched right). These are, first, that courts lack democratic legitimacy to decide matters of policy,[166] and second, that courts are institutionally ill equipped to deal with the complex, polycentric policy issues that arise in matters dealing with social and economic policy.

3.2 Standard of review

A further issue is the standard of review to be applied and whether that standard should be that applied by the European Court of Human Rights in its doctrine of the margin of appreciation. Prior to the coming into force of the HRA, it was argued by many that the European Court's margin of appreciation was essentially the same as the British concept of *Wednesbury* unreasonableness,[167] since both rest on the idea that there is a 'legitimate area of discretionary decision making' in which the decision maker alone can exercise

[164] As above, sec 3(1).

[165] PP Craig 'The courts, the Human Rights Act and judicial review' (2001) 117 *Law Quarterly Review* 589; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 paras 144 184.

[166] See, eg, KD Ewing & CA Gearty 'Rocky foundations for labour's new rights' (1997) 5 *European Human Rights Law Review* 146 147; and the High Court judgments in *Alconbury* [2001] 2 WLR 1389.

[167] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223. According to the test established in *Wednesbury*, a reviewing court can only set a decision aside if that decision is 'so unreasonable that no reasonable authority could ever have come to it': as above, 230.

power and in which the courts, as a matter of principle, ought not to interfere.[168] The test was later modified to allow for greater scrutiny in *Smith*,[169] in what is referred to as the *Wednesbury/Smith* test.

The doctrine of margin of appreciation operates where a convention right has been violated and the European Court seeks to examine whether this violation can be justified — in other words, a type of limitations analysis. The test for limitation is that the violation must be 'necessary in a democratic society', and the term 'necessary' has been interpreted to include the requirement that it be proportionate to its aim. The doctrine has been clearly articulated in cases like *Handyside*:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them ... Consequently, article 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[170]

Despite the similarities between the European doctrine of margin of appreciation and the domestic test of *Wednesbury* unreasonableness, a number of forceful reasons for not incorporating the doctrine into United Kingdom jurisprudence have been articulated. First, it was argued that it would be inappropriate to transplant the margin of appreciation doctrine into British law, since the rationale for including the doctrine at the supra-national European level is not applicable to adjudication of Convention rights at national level by a domestic court.[171] This is because the European Convention and the European Union (EU) itself recognises that there are certain matters which are more appropriately left to individual states, including domestic courts, to decide, rather than impose a single interpretation of a right on all countries. In this sense, the doctrine recognises that there may be cultural and economic reasons for states to interpret a particular right differently and that the multi-national character of the European Convention mandates this respect for a 'margin' of difference. Indeed, the doctrine is based on the assumption that national courts will review domestic decision making more rigorously

168 R Singh *et al* 'Is there a role for the "margin of appreciation" in national law after the Human Rights Act?' (1999) 7 *European Human Rights Law Review* 15.
169 *R v Ministry of Defence, Ex parte Smith* [1996] QB 517.
170 *Handyside v The UK* (1979) EHRR 737 para 48 (footnotes omitted).
171 J Laws 'The limitations of human rights' (1998) *Public Law* 254 258; Singh *et al* (n 168 above) 17; R Gordon & T Ward *Judicial review and the Human Rights Act* (2000) 78-79; and Craig (n 165 above) 590.

than the European Court.[172] At a domestic level, this respect for national difference is not warranted, and certainly not between a domestic court and the executive. The doctrine of margin of appreciation is an attempt to recognise cultural differences and to allow a space for domestic courts to express these differences. These divergences do not operate in the same way at domestic level, where national government assumes some degree of cultural homogeneity.

Moreover, the doctrine of margin of appreciation is different to principles of deference incorporated into the proportionality test in community law.[173] This principle of proportionality is used to ensure that measures are not disproportionate to their stated aim and are applied in a flexible manner, differing where the affected interest is a recognised right or an economic interest. This test is also different to the test for *Wednesbury* unreasonableness.[174]

In *Smith v UK*,[175] the European Court of Human Rights made it clear that the *Wednesbury*/*Smith* test was inappropriate for the adjudication of Convention rights. In addition, section 6(1) of the HRA states that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. This obligation extends to courts and obliges British courts to apply the same test for review as that applied by the European Court of Human Rights, that is, the test for proportionality.[176] The difference in approach between these two tests was acknowledged by Lord Steyn in *Daly*.[177] Lord Steyn accepted, as a 'starting point', that an overlap exists between the *Wednesbury*/*Smith* standard of review traditionally applied by English courts and the principle of proportionality. He described the approach adopted by the European Court by using Lord Clyde's words in *De Freitas*,[178] where he set out the test for deciding whether a limitation is 'arbitrary or excessive':

> whether: (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.[179]

172 *A v Secretary of State for the Home Department; X v Secretary of State for the Home Department* [2004] UKHL 56, paras 113-14.
173 Singh *et al* (n 168 above) 18.
174 *R v Chief Constable of Sussex, ex parte International Traders' Ferry Ltd* [1996] QB 197.
175 *Smith v UK* (2000) 29 EHRR 493.
176 M Hunt 'Judicial review after the Human Rights Act' (1999) 2 *Queen Mary and William Law Journal* 14.
177 *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622 para 26.
178 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.
179 *Daly* (n 177 above) para 27.

He also noted that most cases 'would be decided in the same way whichever approach is adopted', but that in some cases the outcome would differ since the proportionality test required a greater 'intensity of review'.[180] Nevertheless, he identified what he saw as three important differences between the two standards of review:

> I would mention three concrete differences without suggesting that my statement is exhaustive. 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 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. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex parte Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.[181]

With regard to the third difference, that the traditional test is not appropriate for the protection of human rights, it would therefore be necessary to 'guarantee' 'the intensity of the review, in similar cases … by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.'[182] The concept of deference will, then, be relevant at the three stages of the proportionality test by asking the three questions: 'whether the measure was necessary to achieve the desired objective, whether it was suited to doing so, and whether it nonetheless imposed excessive burdens on the individual'?[183]

3.3 Case law

The first clear post-HRA reference to the concept of deference (although without actually using the term) in the United Kingdom is in the judgment of *R v DPP ex parte Kebilene*.[184] The judgment concerned the compatibility of certain reverse-onus provisions in the Prevention of Terrorism (Temporary Provisions) Act 1989 with the presumption of innocence in the European Convention and the HRA, although the latter had not yet been brought into force. The applicants brought an application for judicial review of the Director

180 As above.
181 As above.
182 As above. See the discussion in F Klug & K Starmer 'Incorporation through the "front door": The first year of the Human Rights Act' (2001) *Public Law* 654 663; and I Leigh 'Taking rights proportionately: Judicial review, the Human Rights Act and Strasbourg' (2002) *Public Law* 265 272-79 for this reasoning.
183 Craig (n 165 above) 595-56.
184 *R v DPP ex parte Kebilene* [2000] 2 AC 326.

of Public Prosecutions' decision to prosecute the applicants on the ground that they had had a legitimate expectation that he would not institute such a prosecution where the statutory offence was inconsistent with the HRA. In considering the question whether the decision of the Director of Public Prosecutions was reviewable in this case, Lord Hope addressed the question of the appropriate role of the courts in reviewing such decisions. He began by affirming that the margin of appreciation doctrine articulated by the European Court was not applicable at the domestic level.[185] Nevertheless, he went on to hold that the courts, in applying Convention rights, will have to engage in the same judicial exercise of balancing competing rights and interests in their own proportionality analysis. Within this exercise, the courts should recognise a 'discretionary area of judgment'[186] in which they should, *on democratic grounds*, defer to the decisions of the executive and legislature.

> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.[187]

Lord Hope went on to point out that this discretionary area of judgment is more likely to occur in matters of social and economic policy, rather than where courts are 'well-placed' to decide the subject matter, or where the right is unqualified, or where the matter is of 'high constitutional importance'.[188]

This passage was subsequently quoted by Parker LJ, in the decision of *Roth*.[189] The judgment concerned the question of whether legislation which criminalised the act of intentionally or negligently allowing an illegal immigrant into the United Kingdom is consistent with the European Convention. Parker LJ found that the subject matter involved social and economic policy and that parliament should therefore be given a large measure of deference, that is, that 'courts should not intervene in the operation of the scheme save in circumstances where the bedrock of the article 6 right to a fair trial begins to be eroded'.[190] Laws LJ (dissenting) went further in giving flesh to the concept of deference and outlined a number of instances

185 As above, 380.
186 As above, 381. Lord Hope borrowed this phrase from A Lester & D Pannick 'Principles of interpretation' in A Lester *et al* (eds) *Human rights: Law and practice* (1999) 74.
187 *Kebilene* (n 184 above) 380.
188 As above.
189 *Roth* (n 165 above).
190 As above, para 139.

in which he found deference would be appropriate. In deciding the same question, Laws LJ found that it was first necessary to determine 'the true principles according to which a proper degree of deference to the legislature falls to be measured'.[191] Most importantly, according to Laws LJ, the extent of deference will depend on the 'nature and quality of the measure in question' and whether the measures fall within the responsibility of the executive (such as state security) or the courts (such as criminal justice).[192] Synthesising previous jurisprudence, Laws LJ then draws out a list of principles which determine the degree of deference to be applied in a particular case. First, 'greater deference is to be paid to an Act of parliament than to a decision of the executive or subordinate measure'.[193] This factor, it must be emphasised, is based on the principle of parliamentary sovereignty in the United Kingdom. Second, and following *Kebilene*, more deference should be afforded where the Convention itself calls for a balancing of rights, and less where rights are unqualified.[194] Third, more deference will be given to the exercise of power by parliament or the executive where 'the subject matter in hand is peculiarly within their constitutional responsibility', rather than the responsibility of the courts,[195] and fourth, 'greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'.[196]

The approach taken in *Roth* was affirmed in another judgment involving reverse-onus provisions. In *Lambert*,[197] three defendants all appealed against their convictions on the ground that a requirement in each of their convictions, which obliged them to establish their respective defences on a balance of probabilities, was inconsistent with the presumption of innocence guaranteed in the European Convention and HRA. In considering the compatibility of the various statutory provisions with the presumption of innocence in article 6(2) of the European Convention, Lord Woolf referred to *Kebilene* and found that 'a fair balance must be struck' between the fundamental rights of the individual and the interests of the community.[198] Furthermore, 'as a matter of constitutional principle', courts should afford a 'degree of deference to the view of parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention'.[199] Thus, in interpreting the scope

191 As above, para 76.
192 As above, para 77.
193 As above, para 83.
194 As above, para 84.
195 As above, para 85.
196 As above, para 87.
197 *R v Lambert, Ali & Jordan* [2001] 2 WLR 211 (CA).
198 As above, para 15.
199 As above, para 16.

of the right itself, a certain measure of deference is due to parliament in striking the correct balance between the interests of the individual and the community.[200] It should be noted that this approach was adopted in part because the European Convention, unlike the Canadian Charter and the South African Constitution, does not contain a general limitations clause and it is therefore necessary to do part of the work done by a general limitations clause in interpreting the scope of the right.[201]

Similarly, in *Brown,*[202] a degree of deference was afforded to the legislature in determining whether a statutory provision which compelled the defendant to provide evidence (in the form of requiring the defendant to state who had been driving her car) in a charge of driving after consuming an excessive amount of alcohol, was consistent with the right to a fair trial in the European Convention. In determining the nature of the social problem which the legislature wished to address and whether this was proportionate to and not compromising of the right to a fair trial, Lord Bingham found that it was important to 'give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodes'.[203] Lord Bingham noted that a restrictive reading of the right was, in part, justified as the right against self-incrimination is not expressly included in the general right to a fair trial in the European Convention (which is, in any event, not absolute), and is therefore an implied right.[204] Similarly, Lord Steyn characterised the question before the court as 'whether the legislative remedy in fact adopted is necessary and proportionate to the aim sought to be achieved'[205] and that there may be instances where the context requires that 'national courts may accord to the decisions of national legislatures some deference'[206] in deciding the scope of the right to a fair trial.

An important qualification to the approach to interpreting rights under the European Convention and the limits of deference was

200 Craig (n 165 above) 593.
201 *Lambert* (n 197 above) para 14.
202 *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 (PC).
203 As above, 703.
204 As above, 704. The judgment of Lord Hope expressly distinguishes between 'absolute rights' and non-absolute rights, where the latter are 'open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial', while the former are not: as above, 719. This point is expanded upon by Lord Hoffmann in *Alconbury* (n 207 below).
205 As above, 710.
206 As above, 711.

extended in *Alconbury*.[207] This judgment related to an application for judicial review of the decision-making processes of the Secretary of State affecting people's civil rights, and the compatibility of those processes with the European Convention, on the basis that such decisions must be made by an 'independent and impartial tribunal', as guaranteed in article 6(1) of the European Convention. The question before the court, therefore, was whether the Secretary of State was an independent and impartial decision maker in determining civil rights for the purposes of the European Convention.[208]

In deciding this question, Lord Hoffmann began with a discussion of the appropriate body to make such decisions affecting civil rights in a democracy and found that such decisions must be made by democratically elected persons, or people accountable to them.[209] From this starting point, he goes on to articulate a more general theory of the relationship between human rights and democratic decision making.

> There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.[210]

The introduction of the HRA, therefore, does not undermine the democratic function of the legislature and executive in making decisions which affect rights, particularly where it comes to the

[207] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport & the Regions; R (Holding and Barnes Plc) v Secretary of State for the Environment, Transport & the Regions; Secretary of State for the Environment, Transport & the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23.

[208] All of the Law Lords ultimately found that the decision-making process of the Secretary of State was consistent with the provisions of the European Convention and the HRA as the appeal and review process of the courts provided adequate safeguard.

[209] *Alconbury* (n 207 above) para 69.

[210] As above, para 70.

allocation of resources. In deciding matters based on the HRA, courts must be mindful of the democratic role of government in deciding such matters. There are important limits to this 'deference' in relation to fundamental or 'basic' rights, and where there is a question as to whether such rights have been infringed, this should be decided by independent and impartial tribunals, such as courts.[211]

Two years later, in the *ProLife Alliance*[212] judgment, Lord Hoffmann extended the discussion on deference further. The judgment concerned an application for judicial review by a political party (ProLife Alliance) of a decision by the public television broadcaster (BBC) to refuse to screen a broadcast which contained pictures of aborted foetuses on the grounds that it was offensive. It was accepted by all parties that the broadcast fell within the restriction imposed on the BBC against the broadcasting of offensive material. The question before the court, therefore, was whether to 'interfere with the broadcasters' decisions that the offensive material restriction precluded them from transmitting the programme proposed by ProLife Alliance'.[213] In deciding the prior question of whether parliament was entitled to place restrictions on the broadcasting of political material by requiring them to comply with standards of taste and decency, Lord Hoffmann stated that

> although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles.[214]

[211] Craig (n 165 above) 591.
[212] *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23.
[213] As above, para 10.
[214] As above, paras 75-76.

There are a number of issues which Lord Hoffmann raises in this passage. First, there are the problematic associations of servility and abdication with the word 'deference', which do not describe accurately the process which the courts undertake when they 'defer'. This criticism is well made, and is one of the primary reasons why the term 'constitutional deference' has been chosen to describe the fuller notion of deference advocated in this book.[215] Second, any notion of deference, or any term used to describe the relationship between the courts and the executive and legislature, must be based on separation of powers and the rule of law. Moreover, as Lord Hoffmann notes, it is for courts to define the limits of their own power. Both of these observations are included in the approach to constitutional deference discussed in chapter two.

Despite this agreement, there are some deviations from Lord Hoffmann's approach, in the approach to deference discussed below. Lord Hoffmann argues that, in every situation where a decision is made by government which courts are called upon to adjudicate, the courts must decide, as a matter of law, which branch of government has the power to make such a decision and what the limits of that power are. An attempt to apply a strict delineation of powers may, however, prove extremely difficult in practice and a more subtle notion of balancing powers, rather than strictly separating them, may be called for — in line with the interpretation of the doctrine of separation of powers discussed in chapter three.[216] Lord Hoffmann's approach to adjudication is also inconsistent with the notion of a dialogue, where courts share powers with the executive and legislature, particularly in interpreting and giving effect to the constitution.

A further criticism, as Jowell points out, is that the question of which body has the democratic mandate to decide a particular issue, is not simply a matter of law:

> In so far as the courts ... concede competence to another branch of government, it seems to me that such a concession is not a matter of law, nor based upon any legal principle as Lord Hoffmann contends. Lord Hoffmann is right that it is for the courts to decide the scope of rights, but there is no magic legal or other formula to identify the 'discretionary area of judgment' available to the reviewed body. In deciding whether matters such as national security, or public interest, or morals should be permitted to prevail over a right, the courts must consider not only the rational exercise of discretion by the reviewed body but also the imperatives of a rights-based democracy.[217]

[215] See the discussion below in ch two.
[216] See ch three, sec 3.1.
[217] J Jowell 'Judicial deference: Servility, civility or institutional capacity?' (2003) *Public Law* 592 599 (footnotes omitted).

And finally, Lord Hoffmann argues that the fact that the courts are the 'independent' branch of government, and the executive and legislature 'elected', determines the respective decision-making roles. Again, dividing powers into those appropriate for elected bodies and those appropriate for independent bodies may not be so neat in practice, and other considerations, such as the expertise of the institutions, or constitutional mandate should be considered.

The final judgment discussed in this brief survey of judicial discourses of deference in the United Kingdom is the seminal decision in *A v Secretary of State for the Home Department,*[218] where the House of Lords considered whether section 23 of the Anti-Terrorism, Crime and Security Act 2001 was compatible with the European Convention. Section 23 allowed for the indefinite detention of non-nationals, who could not be deported as they would face torture or other inhumane treatment in their home country, and who were not charged with any crime, but who were suspected of being involved in international terrorism and of being a threat to the security of the United Kingdom. The majority of the court found that the derogation from article 5(1) of the European Convention, which prohibited detention without lawful authority, was unlawful as the provision authorising the detention was not consistent with the principle of proportionality and because it was discriminatory. The judgment was widely hailed, and, as Birkinshaw put it, '[i]n the most difficult of circumstances, the executive were chastened and reminded of the exigencies of the rule of law'.[219] The judgment is also notable for the remarks of the various judges on the topic of deference.

Lord Bingham characterised the state's argument as follows:

> [The Attorney-General] submitted that as it was for parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court of Human Rights allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state.[220]

The Attorney-General therefore argued that there were two grounds on which the court should show deference to the executive, namely,

[218] *A* (n 172 above).
[219] P Birkinshaw 'Book Review of "D Dyzenhaus (ed) *The unity of public law*"' (2004) 4 *Oxford University Commonwealth Law Journal* 235 236.
[220] *A* (n 172 above) para 37.

on the issue of whether there was an emergency and on the issue of what the appropriate response should be.

On the first issue, as to whether there was in fact a public emergency, the majority showed a considerable degree of deference. Lord Bingham, in his judgment representing majority views, gave three reasons for deferring to the decision of the executive on this point: first, it could not be shown that the Special Immigration Appeals Commission (SIAC) or the Court of Appeal misdirected itself; second, this position followed the precedent set in *Lawless v Ireland*,[221] where a wide margin of appreciation was afforded to the Irish state in determining the same question; and third, because the question involved a 'pre-eminently political judgment'.[222] Dyzenhaus and Hunt are particularly critical of this reasoning, and point out that the majority of judges 'failed to require that a proper case for deference be made by the government and therefore failed to conduct anything approaching appropriate judicial scrutiny of the reasons underlying the government's assertions about the existence of an emergency'.[223] On the second reason given by Lord Bingham, in particular, they point out that it is entirely inappropriate for the court to map the margin of appreciation given by the European Court onto the deference afforded by a domestic court, for reasons already given above.[224]

Other judges were similarly deferential on this issue. Lord Scott deferred to the decision of the executive on this question, even though he expressed 'very great doubt whether the "public emergency" is one that justifies the description of "threatening the life of the nation"'.[225] Lord Walker (dissenting) found that, on the facts before the court, the issue was non-justiciable,[226] and Baroness Hale remarked that, on this question, she did not 'feel qualified or even inclined to disagree'[227] with the decision of SIAC and the Secretary of State.

Lord Hoffmann, by contrast, handed down an important dissenting judgment. He began his dissent by discussing the meaning of 'threatening the life of the nation' and found that it must constitute a threat to the institutions and values of a particular people, rather

221 *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.
222 *A* (n 172 above) paras 26-29.
223 D Dyzenhaus & M Hunt 'Deference, security and human rights' in B Goold & L Lazarus (eds) *Security and human rights* (2007) 125 130.
224 As above, 129-30. Fredman also criticises the court in this regard for failing to carry out its proper role in rights adjudication: S Fredman 'From deference to democracy: The role of equality under the Human Rights Act 1998' (2006) 122 *Law Quarterly Review* 53 61.
225 *A* (n 172 above) para 154.
226 As above, para 195.
227 As above, para 226.

than a threat of loss of life to some individuals.[228] He then considered the margin of appreciation accorded to states by the European Court in *Lawless* and interpreted this to mean that it is for national courts to interpret and decide what constitutes a threat to the life of their nation, and not the European Court.[229] The question then 'is whether the threat of terrorism from Muslim extremists threatens the life of the British nation'.[230] Lord Hoffmann found that, even if he accepted the word of the Attorney-General that there was credible evidence of a plot to attack the United Kingdom, it could not be said that such an attack would 'threaten the life of the nation'.[231] On this basis he found that SIAC had made an error of law and that its decision should be overturned.[232] Lord Hoffmann therefore subjected the legal interpretation of the statutory requirements for executive action to judicial scrutiny, rather than the merits of the decision itself. In so doing, he required the executive to justify its actions and to act within a correct interpretation of the HRA, but deferred to the executive on the question of evidence, given the political sensitivity of that material.[233] For reasons elaborated on in this chapter and the next, it is this approach to deference which is advocated in this book — one which seeks to promote a culture of justification and accountability.[234]

On the second issue, of the appropriate resonse to such an emergency, the judges were less deferential and Lord Bingham held that 'the appellants are in my opinion entitled to invite the courts to review, on the ground of proportionality, the derogation order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised'.[235] On an analysis of the facts, Lord Bingham found that the measures adopted by the government were

228 As above, para 91.
229 As above, para 92.
230 As above, para 93. This approach stands in contrast to earlier extra-judicial pronouncements in Lord Hoffmann 'The Combar Lecture 2001: Separation of powers' (2002) *Judicial Review* 137 para 11, where Lord Hoffmann, in a discussion of *Chandler v DPP* [1964] AC 763, stated that 'it was for the executive to decide whether our national security required international co-operation against terrorism anywhere. It was not a question which could be decided by the judicial branch of government.'
231 *A* (n 172 above) paras 95-96.
232 As above, para 97.
233 Lord Hoffmann's reasoning is also in line with the approach to deference advocated by Jowell prior to *A*: J Jowell 'Judicial deference and human rights: A question of competence' in PP Craig & R Rawlings (eds) *Law and administration in Europe: Essays in honour of Carol Harlow* (2003) 67 74-75.
234 The idea of a culture of justification is derived from the work on Mureinik (n 161 above), and has been developed by a number of subsequent writers. See, eg, Edwards (n 160 above) 866; Dyzenhaus & Hunt (n 223 above) 125.
235 *A* (n 172 above) para 42. Lord Walker dissented on this issue, finding that a low threshold should be applied in deciding what is strictly necessary and discriminatory given the threat facing the country.

disproportionate to their aim[236] and that they were discriminatory, in breach of article 14 of the European Convention.[237] Similarly, Lord Nicholls concluded that parliament had given 'insufficient weight to the human rights of non-nationals', particularly to the fundamental right to liberty, and that this fact outweighed the 'substantial latitude' to be given to the state in matters of national security.[238] On the question of deference on this issue, Lord Hope found that, although a 'wide margin of discretion' should be given to the executive and parliament in matters of security, the importance of the right to liberty and the responsibility of courts to give effect to that right mean that 'the margin of the discretionary judgment that the courts will accord to the executive and to parliament where this right is in issue is narrower than will be appropriate in other contexts'.[239] In the same vein, Lord Roger held that, in interpreting the HRA,

> deference to the views of the government and parliament on the derogation cannot be taken too far. Due deference does not mean abasement before those views, even in matters relating to national security.[240]

It was on this second issue, therefore, that the court showed a notable willingness to engage with the executive's reasoning and scrutinise it for consistency with the HRA. This contrasts strongly with the majority's approach to the executive on the first issue, namely as to whether there was a threat facing the life of the nation. In many ways, it is difficult to reconcile these two approaches. Dyzenhaus contrasts these two approaches to deference as 'deference as respect' and 'submissive deference' illustrated by the court's approach on the second and first issues respectively. On the first issue, the courts demonstrated 'submissive deference' where they deferred to the word of the executive on the basis that it constituted a political decision, and failed to require the executive to provide any reasons as to why it should be accorded this degree of deference. By contrast, on the second issue, the court practised 'deference as respect' and required the state to provide adequate and rational reasons as to why its decision should be given deference.[241]

[236] As above, paras 42-44 (Lord Bingham); paras 121-33 (Lord Hope); paras 155-56 (Lord Scott); paras 167-68 (Lord Rodger); and paras 227-31 (Baroness Hale).
[237] As above, paras 45-70 (Lord Bingham); paras 134-38 (Lord Hope); paras 157-59 (Lord Scott); paras 169-89 (Lord Rodger); paras 232-38 (Baroness Hale).
[238] As above, para 81.
[239] As above, para 108.
[240] As above, para 176.
[241] Dyzenhaus & Hunt (n 223 above) 128-32.

3.4 Themes in the United Kingdom's approach to deference

As in the discussion of Canadian jurisprudence, it is difficult to point to a principled and consistent approach to deference in the British courts.[242] Early cases, after the introduction of the HRA, appear to apply a fairly high level of deference to executive and legislative decision making, perhaps in response to the doctrine of parliamentary sovereignty and the legal culture that it gives rise to.[243] Lord Bingham, for example, writing extra-judicially at the introduction of the HRA, was of the view that 'British judges will continue to accord a very considerable margin of appreciation to political and official decision makers', at least in the initial years of operation of the HRA.[244] Later cases, illustrated by the *A* judgment, reveal a more assertive court, willing to engage in substantive review, even in the notoriously difficult area of security cases.

A survey of the reasons underpinning judicial deference in the British cases reveals much the same concerns as those relating to Canadian case law. Perhaps, most importantly, the British cases demonstrate a concern for the appropriate democratic role of the courts in reviewing decisions of the executive and legislature. This is illustrated in all of the decisions discussed above, but is particularly clear in the deference afforded the legislature in the first issue decided in *A*. An important difference in approach between the Canadian and British courts is that, in Canada, the democratic legitimacy of the courts to engage in issues of review is, generally, one of the factors determining the degree of deference applied, while in the United Kingdom, where the subject matter is one that falls within the 'discretionary area of judgment' of the executive or legislature, the courts will generally defer to the decision of that body (Lord Hope in *Kebilene*, and Lord Hoffmann in *ProLife*). In other words, where British courts decide that a matter is within the discretionary area of judgment of the decision-making body, they will generally accept that decision without further scrutiny,[245] while the Canadian courts' approach would be for similar considerations to accord greater weight to the justification of the decision maker in a limitations analysis, but not for that degree of deference to be determinative of the issue under consideration (see McLachlin J in *MacDonald*). Lord Hoffmann's judgment in *Alconbury* is important in this regard, as it challenges this approach to deference, pointing out

242 See a similar analysis in S Sayeed 'Beyond the language of "deference"' (2005) *Judicial Review* 111 para 35; and J King 'The justiciability of resource allocation' (2007) 70 *Modern Law Review* 197 223.

243 Clayton (n 80 above) para 7.

244 Lord Bingham 'Incorporation of the European Convention on Human Rights: The opportunity and the challenge' (1998) 2 *Jersey Law Review* 257 269-70.

245 Lord Steyn 'Deference: A tangled story' (2005) *Public Law* 346 349; Clayton (n 80 above) para 1.

that there is no fundamental conflict between human rights adjudication and democratic decision making. What is needed, in the words of Hunt, is a new concept of 'due deference' based on a culture of justification, and not one rooted in the legacy of parliamentary supremacy.[246]

The second set of considerations, namely the nature of the right infringed and the extent of the infringement, as in the Canadian jurisprudence, plays an important role in determining the degree of deference to be applied. This is illustrated in *Roth*, where Parker LJ found that courts would only intervene where the core of the right is eroded, and that where the subject matter was one that involved social and economic issues, a court would be more likely to defer to the decision making of the executive.[247] Likewise, in *Kebilene*, Lord Hope held that courts would be more likely to defer in socio-economic matters, while in *A*, the majority of judges stressed the importance of the right not to be detained without trial, and how a deferential approach would be inappropriate in the context of such an important right.

Finally, British courts are also concerned with the third category of considerations underpinning the courts' approach to deference, namely, the issue of institutional competence of the judiciary (see Laws J in *Roth*, and Baroness Hale in *A*). This factor, however, is emphasised less in the British case law than in the Canadian case law, although it is still clearly one of the contextual factors underpinning judicial approaches to deference.

As Fredman points out, the pre-*A* British approach to deference is based on a notion of 'separate spheres' of decision making, primarily as a result of the injunction in the HRA for courts to decide on the compatibility of executive and legislative decision making with the HRA, while maintaining parliamentary sovereignty. This means that courts have to 'delineate a role which protects human rights but does not encroach on the elected legislature'.[248] Edwards goes further and argues that the early British appreciation of deference is 'flawed and unprincipled' and that the flaw underpinning this approach can be found in the text first outlining this understanding, in Lester and Pannick's *Human rights: Law and practice*.[249] Their mistake, for Edwards, lies in their reliance on the Canadian case of *Libman v*

246 M Hunt 'Sovereignty's blight: Why contemporary public law needs the concept of "due deference"' in N Bamforth & P Leyland (eds) *Public law in a multi-layered constitution* (2003) 337 339-40. This idea of a theory of deference being rooted in a culture of justification is developed in chs four and five in relation to South Africa.

247 See also King (n 242 above) 224.

248 Fredman (n 224 above) 54.

249 Lester & Pannick (n 186 above); Edwards (n 160 above) 863.

Quebec[250] and its analysis of the role of deference in the proportionality test in the limitations analysis.

> It was from this stage of the proportionality test that Pannick and Lester quote and distil their principles of deference — right at the heart of the test. Deference may have a role to play under this limb of the proportionality test, but as a general principle the contextual approach of a court at this stage of the test is not suitable as a rule of general application. There is a difference between affording the legislature an area of discretion under the most stringent part of the proportionality test and the broader form of deference which the executive and parliament has, on occasion, been granted by British courts, in some cases even before any form of limitation analysis is undertaken.[251]

The argument is therefore that Lester and Pannick have taken the approach to deference adopted by the Canadian Supreme Court out of context and used it to create an approach to deference that is far more akin to the European Court's margin of appreciation[252] and in fact, for Edwards, 'appears to be wider in its application than the margin of appreciation'.[253] This 'pre-limitations' deference, as he terms it, undermines a two-part interpretative rights analysis. The first stage, the interpretative task, is one which the courts are ideally suited to undertake, arguably even democratically mandated to undertake by the HRA. If a court defers to the executive or legislature at this stage, it compromises its own role by substituting its judgment for that of the executive or legislature and undermines the effectiveness of the HRA.[254]

A similar point is made by McLaughlin J in *MacDonald*, where she warns that

> [t]o carry judicial deference to the point of accepting parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[255]

250 *Libman v Quebec* [1997] 3 SCR 569.
251 Edwards (n 160 above) 863 (footnotes omitted).
252 Fredman (n 224 above) 54-55.
253 Edwards (n 160 above) 866.
254 As above, 869. For a similar argument, see AL Young '*Ghaidan v Godin-Mendoza*: Avoiding the deference trap' (2005) *Public Law* 23 28-34, who argues that the UK courts should only defer at the first stage of analysis in determining the scope of Convention rights, but not at the second stage of determining whether it is possible to interpret legislation consistently with the Convention: To do so is to apply deference twice and fall into the 'deference trap'. The solution to the deference trap, Young argues, is to adopt the two-stage analysis described above within her first stage. See the discussion of pre-limitations deference in relation to South African case law in ch five, sec 2.1.
255 *MacDonald* (n 116 above) para 136.

The same view was expressed by Lord Hoffmann in his dissent in *ProLife* and in *A*. The majority in *A* also appear to have gone some way in accepting this position, in deciding the second issue before the court — on the first issue, despite reservations, they deferred to the executive where, as Lord Hoffmann's dissent and previous European Court jurisprudence illustrates, there was ample room for judicial scrutiny. On the second issue, as to whether the derogation measure was consistent with the European Convention, Lord Bingham affirmed that the role of the courts is to 'interpret and apply the law' and that this is a 'cardinal feature of the modern democratic state, a cornerstone of the rule of law itself'.[256] This approach to deference accords more fully with the Canadian approach, and with the approach developed more fully in the following chapter.

4 Conclusion

This chapter provides a discussion of selected case law and secondary literature from Canada and the United Kingdom, in order to explore the common threads underpinning the discourse on deference. From this discussion, it is clear that there are multiple, and not necessarily related, threads which weave together to inform a courts' particular approach to deference. These threads may be grouped together into three broad categories: first, there are considerations relating to the role of a court in a democracy; second there are considerations of what courts can, practically, decide, and third, there are considerations relating to the subject matter of the issue before the court. These three categories clearly overlap to some extent in the discussion of the case law, yet remain conceptually distinct. In the following chapter, each of these factors is discussed and developed theoretically in order to construct a framework for understanding the principle of 'constitutional deference'.

[256] *A* (n 172 above) para 42.

CHAPTER 2

CONSTITUTIONAL DEFERENCE

1 Introduction

This chapter builds on the work of the previous chapter in constructing a theoretical framework for the concept of constitutional deference. Specifically, it is argued that deference is comprised of three intersecting principles, namely, the court's views on the democratically legitimate role of a court in a constitutional democracy, the court's views on its appropriate role given its institutional limitations, and the nature of the dispute before the court. Together, these three principles constitute a particular court's approach to deference. These three principles are discussed separately in sections 2.1, 2.2 and 2.3 respectively. In section 3, the post-apartheid approach of the South African courts to deference is discussed, illustrating the ways in which those courts have begun to adopt an approach to deference in line with that of other commonwealth jurisdictions. The chapter concludes with a summary of the main points raised in the chapter and a brief outline of the value that this analysis of constitutional deference may provide for understanding judicial review.

2 Deconstructing deference

In engaging in the process of judicial review, courts assess the exercise of public power for consistency with constitutional norms. In applying these norms, courts have a degree of discretion regarding the strictness with which they are applied. In other words, they can apply the norms strictly, applying a high level of judicial scrutiny, or they can apply them more leniently, preferring to accept the word of the legislature or executive (or judiciary) that it has in fact met the standard required by the norm in question. It is this degree of discretion (whether expressed or not) that is encompassed in the notion of deference. Deference, as a principle of judicial decision making, therefore, includes the approach of the courts to the level of scrutiny applied in the process of judicial review and consequently —

as the reverse side of the coin — to the amount of weight which a court gives to the decision-making process of the institution under review. Deference also operates in other respects, such as the choice of remedy or the way in which the remedy is crafted, or in the manner in which the court defines the content of the right itself. Deference is therefore not an all-or-nothing approach but, rather, a range of approaches to the institution whose action is under review, as well as the action itself. Deference is the court's understanding of its role and the role of the other branches of government in adjudication.

This understanding of deference differs from others which seek to describe a theory of when it would be appropriate for courts to defer and when it would not.[257] Instead, the analysis of deference developed in this book arises out of the separation of powers doctrine and must therefore be understood as a general principle of constitutional adjudication. For this reason, the term 'constitutional deference' is used to indicate that deference, in the sense used in this book, is a principle of judicial adjudication. This approach to deference would therefore counter the criticisms levelled against the 'doctrine of deference' by Trevor Allan — that there is no reason to create a 'further, free-standing doctrine of deference', since the doctrine of separation of powers already enables courts to respect the role of the executive and legislature in formulating policy.[258] Instead, constitutional deference integrates the existing discourse of deference into a principled doctrine of separation of powers. In this way, the discussion of constitutional deference allows for an examination of the reasons which underpin a court's deferential approach (in the sense of a great degree of deference) in choosing a lower standard of review, for example, in the same way as it would a discussion on a court's 'ordinary' standard of review.

This approach has been chosen for two reasons. First, it is more conceptually coherent to understand a court's use of a high level of deference within the broader framework of its overall approach to judicial review and adjudication more generally. Second, delimiting the theoretical underpinnings of judicial approaches to adjudication through the lens of deference enables greater scrutiny of 'ordinary review' and helps focus discussion on how courts adjudicate particular areas of the law.

257 See, eg, D Pannick 'Principles of interpretation of convention rights under the Human Rights Act and the discretionary area of judgment' (1998) *Public Law* 545 548-51; Lord Steyn 'Deference: A tangled story' (2005) *Public Law* 346 350; R Clayton 'Principles for judicial deference' (2006) *Judicial Review* 109 para 1; M Hunt 'Sovereignty's blight: Why contemporary public law needs the concept of "due deference"' in N Bamforth & P Leyland (eds) *Public law in a multi-layered constitution* (2003) 337 345-48 provides a further criticism of the use of this 'spatial metaphor'.

258 T Allan 'Common law reason and the limits of judicial deference' in D Dyzenhaus (ed) *The unity of public law* (2004) 289 306.

Despite the non-determinant nature of the concept, the discussion of Canadian and British jurisprudence in chapter one reveals that it is possible to draw out a number of underlying considerations which influence the ways in which the courts have used the notion of deference. These considerations may be grouped into three categories and a court's understanding of constitutional deference is dependent on the interplay of these three factors. The three considerations are: the appropriate role of the court *vis-à-vis* the institution under review; the capacity of the court *vis-à-vis* the institution under review; and the content of the matter before the court. These three factors together make up a court's specific approach to constitutional deference.[259]

These considerations are analogous to Cartesian co-ordinates, with each factor operating as an axis. The point at which these three axes meet is the court's approach to deference in a particular case. In principle, these axes operate independently, that is, there is no necessary relationship between the approach taken for one to determine the approach taken on another. In practice, however, these three issues are often used instrumentally so that the approach taken in all three may be similar, and there may be substantial overlap between the axes. An example is useful here: a court, in considering the legality of an alleged extra-legal rendition of a foreign national to a country with which the home country has friendly relations, may decide that, for reasons of comity and international relations, it would ordinarily afford the executive a high degree of deference in deciding whether and how to deport non-nationals suspected of terrorism. At the same time, however, it may decide that the rights of the individual to liberty and due process, as well as the principle of rule of law, would demand a low level of deference in these circumstances. Here the two axes, that of democratic competence and the nature of the interests at stake, may point in different directions. The third axis, that of institutional competence, may or may not be raised to defend a high or low degree of deference. Alternatively, the court could decide that it wishes to adopt a low degree of constitutional deference, and then use all three arguments of democratic competence, institutional competence, and the importance of the right in question to justify its finding.

Constitutional deference operates on two levels. First, a court (whether that be an individual judge, a particular court such as a constitutional court, or the judiciary of an entire country) can have a general approach to deference, that is, it can be characterised as a 'deferent' court or a non-deferent court. Such an approach may

[259] There may, of course, be unprincipled reasons for a court adopting a deferential position, such as political ambition, personal prejudice or corruption. These will not be considered in this book.

parallel a characterisation of a court as executive-minded or non-executive-minded. The second level on which constitutional deference operates is on a case-by-case basis. Here, a judge (or judges) will assess the specific matter before her and decide (albeit often intuitively) what the appropriate level of deference is, depending on the three factors outlined above. The approach adopted in a particular case may relate to the general, overarching position of the court, but is not necessarily determined by it. In the remainder of this book, it is the second approach to deference which will be used.

In the same vein, the principle of constitutional deference must be distinguished from the notion of judicial restraint — while conceding that they may at times be related or overlap. The notion of judicial restraint is contrasted with that of judicial activism. Broadly, an activist court is one which has its own political programme, and which uses its decisions to advance that programme. This could be through striking down decisions or legislation which run contrary to that programme, or through deferring to legislative and executive action which reinforces that programme. It is therefore possible, to have a highly activist court which still, in appropriate circumstances, defers to other branches of government.

In short, constitutional deference is the principle that a certain amount of weight, or *respect*,[260] should be accorded to the decisions of the executive or legislature in assessing the legality of those decisions in an exercise of constitutional review. The principle of constitutional deference can never be reduced to a bright-line test. It is a complex notion relating to doctrines of separation of powers, justiciability and comity. How and when courts choose to defer is determined by their approach to three considerations, that is, the court's understanding of its institutional role, the court's understanding of its institutional competence, and the nature of the matter before the court. These three factors are now discussed separately below.

2.1 Principles of democracy

The first aspect making up a court's approach to constitutional deference relates to its understanding of the institutional independence or interdependence of the three branches of government, in particular, the role of the courts in a democracy when engaged in the process of judicial review. This is by far the most important normative factor underpinning deference, and the

[260] See D Dyzenhaus 'The politics of deference: Judicial review and democracy' in M Taggart (ed) *The province of administrative law* (1997) 279 for a discussion of deference as respect.

approach taken by courts on this issue colours the approach of the courts to the other two principles. This issue has been described by Jowell as one of 'constitutional competence', involving 'a normative assessment of the proper role of institutions in a democracy'.[261]

The democratic legitimacy of judicial review has been the subject of intense academic debate, both historically and currently.[262] It is important to note, at the outset, that this discussion of the debate focuses on whether the institutional practice of judicial review is, in itself, democratic, and not on the efficacy of the protection of rights through a system of judicial review. That is a separate question.[263] Neither does this discussion consider the political objections to a rights-based discourse which argues that rights-discourse impoverishes our conception of society and leads to a preoccupation of the individual with his or her rights, rather than a more group-based approach to rights.[264] The argument that judicial review is a preferable or even a necessary means to ensure adequate protection of constitutional rights does not affect the question of the democratic legitimacy of judicial review. Rather, the 'democracy versus juristocracy debate' is one that hinges on the countermajoritarian nature of judicial review, since unelected (and therefore democratically unaccountable) judges, in engaging in judicial review, overturn the decisions of the democratically-elected majority representatives. This is the 'paradox' of judicial review in constitutional democracies: on the one hand, separation of powers requires that courts hold government accountable to the standards set out in the constitution; yet this power given to the courts may be used to thwart the very right to political participation by withdrawing debate from the public arena to the domain of the courts.[265]

Advocates of judicial review have essentially three arguments open to them in the face of this objection to judicial review. First, they can limit the scope of judicial review to procedural matters in

261 J Jowell 'Of *vires* and vacuums: The constitutional context of judicial review' in C Forsyth (ed) *Judicial review and the Constitution* (2000) 327 330. Jowell's argument is set out in relation to administrative judicial review, but is nevertheless applicable to constitutional review.

262 For a good overview of this debate in the US, see B Friedman 'The birth of an academic obsession: The history of the countermajoritarian difficulty' (2002) 112 *Yale Law Journal* 153.

263 See W Sadurski 'Judicial review and the protection of constitutional rights' (2002) 22 *Oxford Journal of Legal Studies* 275 276.

264 See, eg, M Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363 1384-94; J Waldron 'Nonsense upon stilts? — A reply' in J Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (1987) 151 183-90; and C Mouffe 'Hegemony and new political subjects: Toward a new concept of democracy' in C Nelson & L Grossberg (eds) *Marxism and the interpretation of culture* (1988) 89 100.

265 R Hirschl 'Looking sideways, looking backwards, looking forwards: Judicial review vs democracy in comparative perspective' (2000) 34 *University of Richmond Law Review* 415 421.

order to remove the democratic objections to substantive judicial review. This is the approach promoted by Ely.[266] This argument will not be considered here, and focus will instead be placed on arguments surrounding the democratic legitimacy of substantive constitutional review as these are the arguments relevant to a discussion of deference in constitutional review. The second avenue open to judicial review proponents is to question the assumption that democracy is the sole determinant of legitimacy. Such theorists would accept the undemocratic nature of constitutional review, but argue that it is nonetheless valuable as it affords greater protection for rights. The final option is to challenge a notion of democracy that excludes judicial review, that is, properly understood, democracy is in fact enhanced by judicial review.[267]

The debate regarding the democratic legitimacy of judicial review is perhaps best understood by referring to the authors who reflect the extreme positions of the academic spectrum: Dworkin and Waldron. Dworkin relies primarily on the third argument, that is, an expanded notion of democracy, but also puts forward arguments regarding the value of judicial review which could be used to support pragmatic arguments in favour of judicial review. Waldron, on the other hand, asserts the primacy of democracy and attempts to refute Dworkin's democratic argument for judicial review. It should be noted from the outset, that the Dworkin-Waldron debate is located firmly within the jurisprudence of the United States constitutional democracy, which is, given the lack of direct constitutional authority for judicial review and the extent to which the courts engage in judicial review, not the norm internationally. Indeed, in the United Kingdom and in Canada (and to a much greater extent in South Africa), courts are mandated to undertake judicial review — thus undermining, to some extent, the need and substance of both Dworkin's and Waldron's arguments in those jurisdictions. Nevertheless, the debate is informative for discussions on the democratic legitimacy of judicial review.

Waldron argues that there is no necessary connection between the adoption of a 'rights-based position' (a term he adopts from Dworkin) to indicate that a concern for fundamental rights lies at the foundation of a particular position[268] and the protection of those rights in a bill of rights with enforcement through judicial review.[269] His central thesis is that judicial review is a negation of the individual right to democratic self-government, which is given effect to through

[266] J Ely *Democracy and distrust: A theory of judicial review* (1980).
[267] P Lenta 'Democracy, rights disagreements and judicial review' (2004) 20 *South African Journal on Human Rights* 1 8-13.
[268] R Dworkin *Taking rights seriously* (1977) 90-100 171-77.
[269] J Waldron 'A right-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18 20-28.

electoral representation.[270] Constitutionalisation of rights, he argues, is undermined by its own logic. This is because the entrenchment of a right in a bill of rights and the 'attitude of mistrust' that this comprises (since it precludes citizen involvement in the development of rights jurisprudence) is undermined by the underlying premise of rights themselves — that citizens are autonomous and responsible agents.[271]

> To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust: self-assurance in the proponent's conviction that what she is putting forward really *is* a matter of fundamental right and that she has captured it adequately in the particular formulation she is propounding; and mistrust, implicit in her view that any alternative conception that might be concocted by elected legislators next year or the year after is so likely to be wrong-headed or ill-motivated that her own formulation is to be elevated immediately beyond the reach of ordinary legislative revision.[272]

Waldron emphasises the importance of citizens' right to participation as stemming from 'our democratic principles, and from our conviction that self-government and participation in politics by ordinary men and women, on equal terms, is itself a matter of fundamental right'.[273] The entrenchment of constitutional rights amounts to an abrogation of this right to the courts, a move which Waldron finds unacceptable.

> [T]his arrogation of judicial authority, this disabling of representative institutions, and above all this quite striking political inequality, should be frowned upon by any right-based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women.[274]

Instead, Waldron argues that it is only through majority decision making that disagreement can properly be accommodated. Disagreement, for Waldron, is 'one of the basic circumstances of political life'[275] and majoritarian processes are the only way in which to respect these differences. It is precisely because majoritarian processes are based on a rights-based resolution of these differences that it gains its legitimacy and its authority to make law. Majoritarian participation in dispute resolution 'calls upon the very capacities that rights *as such* connote, and it evinces a form of respect in the

[270] This argument was first presented in n 269 above, and later developed in J Waldron *Law and disagreement* (1999).
[271] As above, 249-52.
[272] Waldron (n 269 above) 27. See also ch 10 'Between rights and bills of rights' in Waldron (n 270 above) 211.
[273] Waldron (n 269 above) 36.
[274] As above, 42.
[275] Waldron (n 270 above) 246.

resolution of political disagreement which is continuous with the respect that rights as such evoke'. [276]

In a similar vein, Tushnet questions the legitimacy of giving over the responsibility for deciding important matters, from elected and politically accountable parliamentarians to the courts. He calls for a 'populist constitutional law', that is,

> a law committed to the principle of universal human rights justifiable by reason in the service of self-government ... It creates space for a politics oriented by the Declaration's principles by taking constitutional law away from the courts.[277]

Tushnet argues that individuals, rather than courts, should be allowed to interpret the 'thin constitution', that is, the 'fundamental guarantees of equality, freedom of expression, and liberty'[278] — as long as they are adopting reasonable interpretations of that thin constitution.

Tushnet's views on democracy are premised on the supremacy of a parliamentary democracy. In a constitutional democracy, however, all institutions of government are subject to the Constitution, and are mandated to give effect to the Constitution. A constitutional democracy, in other words, is not simply about giving effect to majority rule. Hirschl has also criticised Tushnet's work for its narrow, American provinciality, arguing that Tushnet's argument should be informed by approaches taken to the countermajoritarian problem in countries outside of the United States.[279] Hirschl demonstrates, by means of comparative study, that there are numerous 'innovative institutional mechanisms' which have been developed, particularly by countries which have introduced constitutions more recently, to mitigate the countermajoritarian difficulty.[280] Examples include the limitations clause in section 1 of the Canadian Charter and the 'notwithstanding clause' in section 33[281] and, in the United Kingdom, the HRA, using what Hirschl calls the 'preferential model', requires courts to favour interpretations of legislation which accord with the HRA, and to make a 'declaration of incompatibility' to the extent that this is not possible.[282] Thus Tushnet (and others like him in American scholarship) 'continues to conceptualise the counter-majoritarian difficulty in oversimplified and dichotomous, "either/or" type terms,

276 As above, 252.
277 M Tushnet *Taking the Constitution away from the courts* (1999) 181 187.
278 As above, 11.
279 Hirschl (n 265 above) 441.
280 As above, 435-40.
281 See ch one, sec 2.2.
282 See ch one, sec 3.1.

portraying the gap between rigid constitutions and political participation as irreconcilable and insurmountable'.[283]

On the other end of the spectrum, in *Freedom's law*,[284] Dworkin argues for the democratic legitimacy of judicial review using both a negative and a positive argument. He begins by questioning the majoritarian assumption that judicial review is necessarily undemocratic: 'democracy does not insist on judges having the last word, but it does not insist that they must not have it.'[285] The majoritarian assumption is that in order for a politically important decision to count as 'democratic' it must be one that the majority would agree to, given enough time and information to make an informed decision: if a decision is not one which the majority would agree to, then it is necessarily undemocratic.[286] Dworkin rejects this majoritarian view of democracy in favour of what he calls the 'constitutional conception of democracy', where the 'defining aim of democracy' is taken to be 'that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.'[287] Thus, Dworkin offers an account of substantive democracy, where substance takes precedence over form. For Dworkin, it is far more important that rights are enforced correctly, than that rights are interpreted by a majoritarian government.[288] The danger to democracy is in making a wrong decision — not in having the courts make it.

> Certainly it impairs democracy when an authoritative court makes the wrong decision about what the democratic conditions require — but no more than it does when a majoritarian legislature makes a wrong constitutional decision that is allowed to stand. The possibility of error is symmetrical.[289]

For Dworkin, it is only when the judiciary correctly interprets constitutional provisions, that it 'fulfil[s] the conditions of moral membership, rendering reasonable the identification of an individual's political agency with the collective actions of the community'.[290] Of course, the problem with the argument — indeed, a problem that many have criticised in Dworkin's work — is the idea

283 Hirschl (n 265 above) 440.
284 R Dworkin *Freedom's law: The moral reading of the American Constitution* (1996).
285 As above, 7.
286 As above, 16.
287 As above, 17. See also S Fredman 'Judging democracy: The role of the judiciary under the HRA 1998' (2000) 53 *Current Legal Problems* 99, 101-8, who argues that the HRA presents a significant opportunity to enhance participatory democracy in the arena of human rights.
288 Dworkin (n 284 above) 17; Lenta (n 267 above) 10-11.
289 Dworkin (n 284 above) 32-33.
290 Lenta (n 267 above) 11.

that there is one correct answer, or at least, that we can know what that answer is. Reasonable people differ as to how to interpret rights, so it can hardly be an argument in favour of judicial review that the judiciary is better able to find that correct answer.

Dworkin's positive argument focuses on the institutional strengths of the judiciary and the weaknesses of majoritarianism and the legislative process, arguing that

> despite reasonable disagreements over rights, the institutional structure of judicial review compared with the features of the legislature makes it more likely that judicial review will respect and protect rights and democracy better than the legislature would.[291]

For example, Dworkin points out the susceptibility of the legislative process to political corruption:

> Depressingly often ... the process is dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure groups to bribe or blackmail legislators into voting as they wish ... Ordinarily politics generally aims, moreover, at a political compromise that gives all powerful groups enough of what they want to prevent their disaffection, and reasoned argument elaborating underlying moral principles is rarely part of or even congenial to such compromises.[292]

Thus, for Dworkin, majoritarian politics 'encourages compromises that may subordinate important issues of principle.'[293] On the other hand, judicial review of constitutional rights and the widespread public debate which they give rise to, may even, for Dworkin, 'provide a superior kind of republican deliberation' to that of majoritarian processes.[294] Dworkin therefore provides a strong counter-argument to the 'democratic' argument for majoritarian decision making by developing a more sophisticated understanding of democracy and deliberation.

Hence, in the context of a discussion of judicial activism and judicial restraint, or a 'policy of deference',[295] Dworkin tackles what he calls the 'argument from democracy' as a justification for a policy of deference, namely, that it is more appropriate for democratically elected legislators to decide issues of moral and political importance.[296] Dworkin challenges this view, pointing out that state

[291] As above, 17-18.
[292] Dworkin (n 284 above) 344.
[293] As above, 30.
[294] As above, 31.
[295] The *policy* of deference must be distinguished from the *principle* of deference, which applies throughout judicial review. A *policy* of deference is a particular practice of judicial restraint adopted by a particular court.
[296] Dworkin (n 268 above) 140.

legislators (in the United States) are not in fact 'responsible to the people in the way that democratic theory assumes'.[297]

> The argument [from democracy] assumes that in a democracy all unsettled issues, including issues of moral and political principle, must be resolved only by institutions that are politically responsible in the way that courts are not. Why should we accept that view of democracy? ... We cannot argue that the Constitution, which provides no rule limiting judicial review to clear cases, establishes a theory of democracy that excludes wider review, nor can we say that our courts have in fact consistently accepted such a restriction ... So the argument from democracy is not an argument to which we are committed either by our words or our past.[298]

Thus, for Dworkin, it is not a self-evident argument from the United States constitutional text or practice that courts lack the democratic legitimacy to make policy decisions. After all, the common law itself is derived from the courts.

Dworkin then goes on to deliver a far more fundamental critique, examining the argument on its own terms — that a decision by a democratic institution would be more likely to be sounder and fairer.[299] Dworkin points out that the argument that a decision by a majority is always fairer than a decision by a minority

> ignores the fact that decisions about rights against the majority are not issues that in fairness ought to be left to the majority. … [T]o make the majority judge in its own cause seems inconsistent and unjust.[300]

For Dworkin, judicial review is part of the process of ensuring that rights are protected and that the Constitution is upheld. Accordingly, a judge who adopted a more Dworkinian approach, would see themselves as engaged in the democratic process when undertaking constitutional review, and would be far less likely to defer easily to parliament or the executive in deciding issues of policy.

From this brief discussion of some of the academic debates surrounding the role of the courts in a democracy, it is clear that there is a range of reasonable and defensible views which a court could adopt. In the United Kingdom, with its strongly ingrained tradition of parliamentary sovereignty, courts may be more inclined to adopt a position akin to that of Waldron. Judicial attitudes are not,

297 As above, 141.
298 As above.
299 As above.
300 As above, 142.

however, static, and the dicta of Lord Hoffmann in *Alconbury*[301] reveal a more sophisticated understanding of the relationship between judicial protection of human rights and democracy. Canadian courts, on the other hand, appear to have embraced their 'democratic' role in judicial review. Whatever jurisprudential position courts adopt on this 'spectrum' of understandings, it is clear that this position will be crucial in determining a court's approach to constitutional deference.

2.2 Institutional competence

The second consideration underpinning a court's approach to deference relates to perceived institutional limitations in the various branches of government, and is based on a 'practical evaluation of the capacity of decision making bodies to make certain decisions'.[302] For Lord Steyn, the 'relative institutional capacity' of the courts is *the* critical factor in deciding whether courts should defer to the other branches of government.[303] This consideration is given further weight in the modern bureaucratic state with its reliance on specialist expertise in almost all areas of the government machine. As a result, some have argued that it is inappropriate for courts to engage in review of complex government policy, or 'polycentric decision making', as judges lack the experience, knowledge or resources to make these types of decisions, in particular, to assess what the consequences of their decision may be and to respond flexibly to unanticipated results of those decisions. For the same reasons, as a general rule, courts will be far more willing to defer to other agencies where the matter is one of fact or policy rather than of law or constitutional interpretation.

It is important to note from the outset that, as with the other factors underpinning constitutional deference, the question of institutional capacity is based on the perceived appropriateness of the courts to make certain types of decisions, rather than an inherent inability to make these decisions. In principle, there are very few, if any, decisions which a court cannot make, if given enough time and information. In commenting on a British Court of Appeal judgment

301 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport & the Regions; R (Holding and Barnes Plc) v Secretary of State for the Environment, Transport & the Regions; Secretary of State for the Environment, Transport & the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23.

302 Jowell (n 261 above) 330.

303 Lord Steyn (n 257 above) 352. See also J Jowell 'Judicial deference and human rights: A question of competence' in PP Craig & R Rawlings (eds) *Law and administration in Europe: Essays in honour of Carol Harlow* (2003) 67 80; and J Jowell 'Judicial deference: Servility, civility or institutional capacity?' (2003) *Public Law* 592 598.

dealing with the allocation of limited budgets in the healthcare sector, in which the court stated that it could not make such a judgment, Lord Justice Dyson noted the following:

> I do not think that the court was saying that the court *cannot* make such a judgment. Clearly, it is not impossible for the court to do so, especially if it is provided with all the material that was available to the decision makers. But it is not the normal function of courts to make such judgments, and they are less-well-equipped than health authorities to make them.[304]

Thus, the question of institutional competence is not purely one of intellectual capacity and knowledge, but one of appropriateness. In this sense, it is clearly linked to issues of constitutional competence.

Another issue affecting the institutional competence of courts to adjudicate certain matters is the nature of the evidence placed before the court. Where evidence relates to complex social science matters, courts will be more deferent to the decision making of the other branches of government: see the minority judgments in *MacDonald* and *Chaoulli*.[305] There is also, of course, a limit to the quantity of evidence that can be placed before the court and which judges can be expected to assimilate.[306]

Lon Fuller's famous article on polycentricity is often cited as authority for the view that courts are not appropriate forums to decide sufficiently polycentric matters.[307] Since decisions involving social policy or socio-economic rights are normally thought to involve polycentric issues and complex issues of policy, courts are often reluctant to adjudicate on such matters and will usually accord the state a high level of deference in such adjudication. This is clearly demonstrated in some of the case law discussed in the previous chapter, for example, in the minority judgments in *MacDonald* and *Chaoulli* in Canada and in *Kebilene* and *Roth* in Britain.[308] In particular, where there are competing socio-economic theories, courts will be extremely reluctant to make policy choices.

304 Lord Justice Dyson 'Some thoughts on judicial deference' (2006) *Judicial Review* 103 para 13. The judgment being discussed by Lord Justice Dyson was *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898.

305 *RJR-MacDonald Inc v Canada (AG)* [1995] 3 SCR 199; *Chaoulli v Quebec (AG)* [2005] 1 SCR 791. See ch one, sec 2.3.

306 Lord Walker 'Second-guessing government: Judicial deference and human rights' (unpublished paper delivered at Oriel College, Oxford, 17 February 2005) 19.

307 LL Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353.

308 *MacDonald* (n 305 above); *Chaoulli* (n 305 above); *R v DPP ex parte Kebilene* [2000] 2 AC 326; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 paras 144 & 184. See ch one, secs 2.3 & 3.3.

Given the centrality of Fuller's article on this matter, it is worth discussing it in some detail. The notion of polycentricity was first introduced and discussed in his posthumously published article of 1978, 'The forms and limits of adjudication', and this article remains the foremost exposition on polycentricity, cited repeatedly in the secondary literature and case law with little further discussion. Fuller's article sought to explore the use of adjudication as a form of social ordering, contrasting adjudication with two other forms of social ordering, namely, contract and voting. He argued that various types of decisions are ideally suited to one of these types of social ordering, and in so doing, sought to draw out the limits of adjudicative decision making. In particular, Fuller argued that a polycentric matter is one that is not well-suited to adjudicative resolution, since a polycentric matter is one in which there is a matrix of interrelated issues, where the effect of altering one of the factors would have unpredictable consequences on the rest of the issues in the matrix. He famously used the illustration of the spider's web, where the plucking of one strand on the web would result in a complex set of changes throughout the web:

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker stands to snap. This is a 'polycentric' situation because it is 'many centered' — each crossing of strands is a distinct center for distributing tensions.[309]

Fuller derived his idea of polycentricity from the work of Polanyi, who developed the concept of polycentricity to argue that there are inherent informational constraints on any person making a central decision on a complex set of facts. For this reason, polycentric central state decisions regarding budgetary allocation are inappropriate, and should be left to market forces and 'spontaneous mutual adjustment'.[310] Individuals within the system should 'evaluate by their independent mutual adjustments the polycentric task of optimum allocation of resources and distribution of products' to resolve complex polycentric tasks, rather than attempt to solve the task centrally.[311] Fuller used Polanyi's concept of polycentricity to argue that when a matter is significantly polycentric, it becomes problematic for the issue to be resolved through a centralised decision-making process. His argument was directed primarily at

[309] Fuller (n 307 above) 395.
[310] M Polanyi *The logic of liberty: Reflections and rejoinders* (1951) 170-84.
[311] As above, 179.

curbing the use, by legislatures, of administrative agencies to resolve complex matters with significant polycentric consequences.[312] His objections to this type of decision making are, however, relevant also to the judicial resolution of disputes with significant polycentric implications.

It is important to note that polycentricity, or non-polycentricity, are not absolute categories. Rather, polycentricity is a matter of degree, and most decisions before a court have some elements of polycentricity. The greater the degree of polycentricity, the more difficult the decision will be and the less appropriate the matter becomes for judicial resolution. As Fuller recognised,

> concealed polycentric elements are probably present in almost all problems resolved by adjudication ... It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.[313]

This, in turn, will mean that courts tend to be reluctant to become engaged in matters that they regard as sufficiently polycentric, and will find them non-justiciable. As Fuller notes, however, a high degree of polycentricity cannot be a bar to judicial resolution in itself, and there may be instances where it is preferable for a court to engage in the resolution of a polycentric matter where it cannot be adequately resolved through other means.[314]

In this discussion of Fuller's work, the focus is on three important issues implicated by the judicial resolution of polycentric disputes — issues which are relevant for the determination of justiciability and the appropriate level of deference to be applied by a court in a particular matter. The first issue is the lack of evidence before, or lack of expertise within, a court to enable it to predict accurately the consequences of its decisions.[315] Moreover, if parties who may be adversely affected are not before the court — even if they could be identified — it may not be practical for a judge to attempt to take all their interests into account. When a court is confronted with having to decide a complex, polycentric matter it should therefore, in Allison's words, avoid choosing to decide the matter in a way that results in a decision which 'necessitates an appreciation of complex

312 JWF Allison 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *Cambridge Law Journal* 367 370.

313 Fuller (n 307 above) 398.

314 As above, 405-6. Allison notes that in his correspondence with Frank Newman, Fuller accepted that in certain situations, decisions such as the desegregation decisions of the 1950s were necessary, but that they place a 'serious moral drain on the integrity of adjudication': Allison (n 312 above) 374.

315 Fuller (n 307 above) 401.

repercussions'; nor should it develop the law where a similar appreciation of the repercussions is required.[316] It will not, however, always be clear to the court whether a matter before it is one which involves a complex, polycentric determination, precisely because the evidence before it is limited to that which the parties place before it. For Allison, Fuller's concept of polycentricity therefore becomes too vague to use as a principle of adjudication.[317] Allison also criticises Fuller for failing to explain what the alternative to judicial resolution of polycentric matters is. The other social institutions identified by Fuller (the legislature, mediation, contract, and managerial decision making) are similarly not ideally suited to deciding polycentric matters — although Fuller does argue that contract and managerial direction are superior. Neither does Fuller adequately explain when it would be preferable, as a matter of principle, for courts nevertheless to engage in polycentric decision making.[318] Thus, while Fuller's concept of polycentricity has important consequences for judicial adjudication of polycentric matters, it is difficult to see how it can be used as a principled basis for deciding which matters are, or should be, justiciable.

The second important issue raised by Fuller is the role of the judge. Fuller's conception of adjudication coloured his understanding of the role of the judge. For Fuller, a judge is more like an umpire who makes decisions on the basis of the evidence presented by the parties.[319]

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.[320]

For Fuller, the only way to ensure that the judiciary will not pre-judge a matter or be biased is through the adversarial procedure. As a result, he failed to consider the potential of a more inquisitorial approach, as used in many continental judicial procedures, for example, as an alternative to his strictly adversarial approach.[321] It is

316 Allison (n 312 above) 370-71.
317 As above, 372-73.
318 Fuller (n 307 above) 398-400; Allison (n 312 above) 373-74.
319 Fuller (n 307 above) 365-67.
320 As above, 366-67 (emphasis in the original).
321 Allison (n 312 above) 377 380. It was this 'Anglo-American bias', recognised by Fuller, which was one of the reasons Fuller was not prepared to publish his article: Allison (n 312 above) 377.

arguable that some of the deficiencies in the adjudication process identified by Fuller (and discussed above) could be ameliorated if the judge in a polycentric dispute adopted a more inquisitorial role.[322] In such a role, a judge would be able to help identify polycentric issues and protect the interests of potentially affected parties which are not before the court.[323] The Indian courts provide a good example of how this could be done. These courts have instituted mechanisms to ensure that adequate evidence is placed before them through the appointment of 'socio-legal fact-finding' commissions.[324] Similarly, courts can appoint an *amicus curiae* to represent the interests of those not directly before the court, or request a state body, or even a non-governmental organisation, to make representations to the courts.[325]

The third important argument, which derives from Fuller's work, is that it is very difficult for courts to choose between two equally valid policy choices.[326] While, it must be acknowledged that this statement is, on the whole, accurate, a couple of observations arise from this point. First, it may be just as difficult for a legislature or executive to make these choices. While these institutions potentially have greater access to data, they are not able to make perfect decisions based on perfect knowledge either. Indeed, the very idea of polycentricity was developed by Polanyi to argue against centralised state planning and to argue in favour of market-generated planning. The crucial difference is that the legislature and executive are democratically mandated to make these decisions — perfect or not — but that is a separate objection to judicial consideration of polycentric issues. The second point is that involving the judiciary in judicial review of social policy does not necessarily mean that the courts have to make policy choices to the exclusion of the executive and legislature, and can engage in a dialogue with the other branches of government. As the South African jurisprudence, for instance, demonstrates, courts are able to assess state policy for

322 In South Africa, eg, courts are not unfamiliar with an inquisitorial approach as there is a statutory obligation to adopt an inquisitorial approach in criminal law proceedings where this is necessary to obtain a just decision: *Rex v Hepworth* [1928] AD 265.

323 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 396; Allison (n 312 above) 376-77.

324 PN Bhagwati 'Judicial activism and public interest litigation' (1985) 23 *Columbia Journal of Transnational Law* 561 574-75; GL Peiris 'Public interest litigation in the Indian subcontinent: Current dimensions' (1991) 40 *International and Comparative Law Quarterly* 66 77-81; U Baxi 'Judicial discourse: Dialectics of the face and the mask' (1993) 35 *Journal of the Indian Law Institute* 1 7-8; SB Shah 'Illuminating the possible in the developing world: Guaranteeing the human right to health in India' (1999) 32 *Vanderbilt Journal of Transnational Law* 435 471.

325 See the discussion in ch four of interventions of *amici curiae* in socio-economic rights litigation.

326 Pieterse (n 323 above) 393.

reasonableness, and in this way, engage in a dialogue over the development of policy in line with constitutional values.[327]

In short, Fuller raises a number of important issues regarding the adjudication of polycentric decisions which are relevant to a discussion of constitutional deference. Nevertheless, it should be remembered that Fuller's work is limited in its scope and fails to deal with many issues. According to Allison, Fuller himself never regarded his article as sufficiently complete to be ready for publication. He recognised that he had failed adequately to take into consideration other forms of adjudication, developments in public law as a result of the civil-rights litigation, and that his description of adjudication was problematic.[328] Indeed, in his later work dealing with judicial review, he did not deal with polycentricity at all.[329] Fuller certainly raised important issues, but his analysis can by no means be considered the last word on the matter. Polycentricity is therefore not a bar to justiciability, but merely one consideration to be taken into account by the judiciary in deciding whether a matter should be justiciable or what the appropriate level of constitutional deference should be.

2.3 The nature of the subject matter

The third consideration relates to the nature of the subject matter under review. There are a number of ways in which this can affect the level of deference applied by a court. First, where the action is one characterised by greater political discretion, courts will tend to be more deferential to the decision making of the executive or legislature. This is clearly demonstrated in the British decision of *A* where Lord Bingham expressly stated that one of the reasons for affording deference to the executive in its conclusion that the United Kingdom is facing a 'threat to the life of the nation' is because this is a 'pre-eminently political judgment':

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the

[327] See K McLean 'Housing' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 55 for an illustration of the dialogue between the South African courts and the executive and legislature over the development of housing policy in that country.

[328] Allison (n 312 above) 377-78.

[329] LL Fuller *The morality of law* (1969), first published in 1964. Fuller's 'The forms and limits of adjudication' (n 307 above) was first written in 1957, and later revised in 1959 and 1961: JA King 'The pervasiveness of polycentricity' (2008) *Public Law* 101 105-6.

> court, because under our Constitution and subject to the sovereign power of parliament it is the function of the courts and not of political bodies to resolve legal questions.[330]

This simple distinction between 'legal' and 'political' questions, however, threatens to unravel, particularly where two competing rights or interests are at play. The example above, for instance, begs the question: why is the interpretation of what constitutes a 'threat to the life of the nation' purely a political question where it also constitutes a statutory pre-condition for legitimate derogations from the HRA? Surely this could be characterised equally as a legal question? The decision by a court to label a matter 'political', therefore, will often be used as a mask for a prior decision to afford the decision maker a high level of deference, based on one of the other two factors, or even on a non-principled factor, such as an unwillingness to become involved because of the social or political consequences of doing so. Nevertheless, in principle, the political nature of the decision may legitimately form the ground for a deferent stance by the courts.

A second instance where courts are more likely to be deferential to the decisions of the executive or legislature is where the constitution or right in question permits a wide range of legitimate responses, or where the right has to be balanced against another right. Young calls this 'substantive legislator deference'.[331] Examples of such situations can be found in the case law discussed in the previous chapter. In Canada, in both *Edwards Books* and *Irwin Toy*,[332] for instance, the key factor underpinning the Supreme Court's approach to deference was the fact that the legislative decision under review was aimed at reaching a compromise between the rights of two competing groups. Similarly, in *Kebilene* and *Roth*,[333] the House of Lords noted that where rights are unqualified, courts are well-placed to determine the content of the right and the legality of any infringement to that right; but where the Convention requires a balancing of rights, greater deference is due.

Third, when fundamental rights, highly prized in a particular society, are at issue, a court is less likely to defer to choices made by the agency in question. This approach often results in courts drawing lines between what they will protect as 'fundamental human rights' and those which are non-justiciable or which require a greater degree

330 *A v Secretary of State for the Home Department; X v Secretary of State for the Home Department* [2004] UKHL 56 para 29.

331 AL Young '*Ghaidan v Godin-Mendoza*: Avoiding the deference trap' (2005) *Public Law* 23 31.

332 *R v Edwards Books & Art Ltd* [1986] 2 SCR 713; *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927. See ch one, sec 2.3.

333 *Kebilene* (n 308 above); *Roth* (n 308 above). See ch one, sec 3.3.

of deference. This approach of differing levels of review is famously expounded by Justice Stone in the United States Supreme Court in *United States v Carolene Products Co* in the fourth footnote. In that footnote, Justice Stone explained that the new deferential method expounded by the Court in that case did not mean that the same level of deference was necessarily to be applied in all constitutional litigation and that legislation aimed at 'particular religious, or national, or racial minorities', for example, may call for a 'more searching judicial enquiry'.[334] This approach has been adopted in the United Kingdom, for instance, where the House of Lords, in *R v Carson*, affirmed that in equality matters 'severe scrutiny' is appropriate.[335]

Socio-economic rights are a good example of a category of rights where many judges would accept that a highly deferent approach should be adopted — that is, if they are to be considered justiciable at all.[336] In the same vein, decisions with resource-allocation implications are another category of cases where courts will generally show a great degree of deference to the decision making of the executive or legislature.[337] As Fredman points out, however, just as the distinction between 'legal' and 'political' decisions is dubious, the category of 'social or economic' decisions, or those with resource implications, is difficult to sustain.[338]

In addition to these three contextual factors, others can be postulated. For instance, it is arguable that the subject matter should affect the level of review imposed where the agency has an interest in the outcome and may be perceived as biased in the decision-making process. In such cases, it is important for the court to be seen as an independent arbiter. A good example is where political rights are involved, such as the right to vote. Where a dispute arises around voting regulations or practices, a court should be quick to adjudicate the matter and apply a high level of scrutiny to the actions of the

334 *US v Carolene Products Co* 304 US 144 (1938) 152, fn 4. See the discussion of this case in DJ Solove 'The darkest domain: Deference, judicial review, and the Bill of Rights' (1998-1999) 84 *Iowa Law Review* 941 989-95.

335 *R (on the application of Carson) v Secretary of State for Work & Pensions; R (on the application of Reynolds) v Secretary of State for Work & Pensions* [2005] UKHL 37 para 57.

336 This discussion is picked up again in ch three, which deals with various objections to the adjudication of socio-economic rights.

337 A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56 *Current Legal Problems* 579 588-89; Lord Hoffmann 'The Combar Lecture 2001: Separation of powers' (2002) *Judicial Review* 137 paras 19 26. Contrast M Chamberlain 'Democracy and deference in resource allocation cases: A riposte to Lord Hoffmann' (2003) *Judicial Review* 12 paras 5-10; Lord Steyn (n 257 above) 357.

338 S Fredman 'From deference to democracy: The role of equality under the Human Rights Act 1998' (2006) 122 *Law Quarterly Review* 53 58-59.

agency. This justification arises out of a more pragmatic conception of separation of powers.

3 The South African courts' approach to deference

The South African judiciary, under apartheid, has been roundly criticised for its 'executive-mindedness', its failure to uphold basic rights and its overly deferential approach to executive political will.[339] Most Appellate Division judges, steeped in the culture of parliamentary sovereignty, characterised their task as being solely to interpret and apply the intention of the legislature, with little or no regard for individual liberties, thereby allowing 'a judge in covert sympathy with a legislative programme to give full effect to his predispositions without having to accept public responsibility for doing so'.[340] The reality for many in the judiciary was at best a tacit complicity in apartheid policies and, at worst, a thinly-veiled support for that system.[341] For these reasons, some commentators have questioned the wisdom of contemporary calls for a theory of deference in post-apartheid adjudication.[342]

The term 'deference' is used in this book, in spite of its association with apartheid decision making. The main reasons in favour of doing this are that it helps to ensure that South African jurisprudence shares the terminology of other commonwealth jurisdictions, and that it seeks to 'reclaim' the term from its unduly negative associations. The theory of constitutional deference advocated in this book is markedly different to the pro-executive, and sometimes subservient, attitude adopted by the pre-democratic judiciary. Rather, it is a framework in which to interpret and critique all judicial decision making.

339 See, eg, J Dugard *Human rights and the South African legal order* (1978) 372-74; C Forsyth *In danger for their talents: A study of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (1985) 225-26; E Cameron 'Legal chauvinism, executive-mindedness and justice — LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38 52-62; D Davis & H Corder 'A long march: Administrative law in the Appellate Division' (1988) 4 *South African Journal on Human Rights* 281 284-93; CF Forsyth 'The sleep of reason: Security cases before the Appellate Division' (1988) 105 *South African Law Journal* 679 707-8; N Haysom & C Plasket 'The war against law: Judicial activism and the Appellate Division' (1988) 4 *South African Journal on Human Rights* 303-33; W de Vos & DE van Loggerenberg 'The activism of the judge in South Africa' (1991) *Journal for South African Law* 592 608.

340 Cameron (n 339 above) 60.

341 Davis & Corder (n 339 above) 295-302.

342 See, eg, DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "Deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 319-20.

Pre-democratic uses of the term 'deference' in South African judgments are mostly to be found where courts note the need to be appropriately deferent to lower courts, or tribunals with regard to factual and credibility findings of those decision-making bodies.[343] This is a form of deference to the institutional competence of the lower courts and tribunals as they are best placed to make certain findings, and continues to this day. Deference to the 'fact finder' is notably excluded from consideration in this book.[344]

Post-apartheid courts, by contrast, have begun, tentatively, to expand their use of the notion of deference to the more sophisticated sense used in this book. The first significant judgment to do so was the landmark decision of *S v Makwanyane* which abolished the death penalty.[345] Chaskalson P, with reference to the Canadian decision of *Tetreault-Gadoury v Canada,*[346] noted that, where choices have been made between 'differing reasonable policy options', courts must give the legislature a measure of deference in that choice. He cautions, however, that this deference does not afford the legislature an 'unrestricted licence' to infringe constitutional rights, and the state must still show a reasonable basis for the limitation of the right.[347]

In *Ferreira v Levin*,[348] Ackermann J, in a discussion of the broad, residual nature of the right to freedom and security of the person in section 11 of the interim Constitution, acknowledged that the German Federal Constitutional Court was more deferent to the German legislature in areas protected by the general right of 'freedom of action' in contrast to other rights which are more expressly protected. This approach, the Court noted, is analogous to the United States 'heightened scrutiny' of 'fundamental rights'. To put the discussion another way, Ackermann J found that where a right is expressly and narrowly protected in the Constitution, the Court would be less deferent to the legislature than would be the case where the interest was protected generally or through a residual right. This reasoning links to the third consideration underpinning constitutional deference: where a right is given express and precise protection, courts will be less deferent in protecting that right.

343 See, eg, *Commissioner for Inland Revenue v Louw* 1983 3 SA 551 (A) 569; *Ndlovu v AA Mutual Insurance Association Ltd* 1991 3 SA 655 (E) 659. Prior judgments which used the word used it as a synonym for 'respect', and generally in relation to other judges or academics.

344 See ch one, sec 1.

345 *S v Makwanyane & Another* 1995 3 SA 391 (CC).

346 *Tetreault-Gadoury v Canada (Employment & Immigration Commission)* (1991) 4 CRR (2d).

347 *Makwayane* (n 345 above) para 107, quoting *Tetreault-Gadoury* (n 346 above) 26.

348 *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* 1996 1 SA 984 (CC).

In a discussion of the appropriate remedy to cure a constitutional defect in the *National Coalition*[349] decision, the Constitutional Court again used the language of deference, finding that the deference owed to the legislature in deciding what constitutes appropriate relief will depend on the individual circumstances of each case. The Court held:

> It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.[350]

This passage illustrates the Court's awareness of the context-sensitive nature of the choice of remedies, and the role that deference to the legislature plays in that assessment. This passage was later quoted by the same court in *UDM v President of the Republic of South Africa*[351] in a discussion of what would constitute 'appropriate relief' in any given case.

In *Minister of Health v TAC*,[352] the Constitutional Court expressly considered the question of how deference and the doctrine of separation of powers relates to how it should adjudicate socio-economic rights. The Court raised two concerns in this regard. The first concerned the deference the Court was to show the executive regarding policy formulation and the second related to the remedy which the Court should provide. In deciding on the appropriate level of deference, the Court emphasised its institutional limitations as the most important consideration.[353] The Constitutional Court again emphasised its institutional limitations in the decision of *Bel Porto School Governing Body,*[354] but noted that an appreciation of these limitations should not undermine the court's role in interpreting and protecting rights. The Court found that, while courts should, as a

[349] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 2 SA 1 (CC).
[350] As above, para 66.
[351] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amicus Curiae*) (No 2)* 2003 1 SA 495 (CC) para 115.
[352] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC).
[353] As above, para 22. See ch four, sec 3.1.3, for a more detailed discussion of this aspect of the judgment.
[354] *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002 3 SA 265 (CC).

general principle, be deferent to the 'practical difficulties' faced by the administration, this does not mean that decision makers should not be held to account for infringement of constitutional rights: 'It is the remedy that must adapt itself to the right, not the right to the remedy.'[355]

In a discussion of the role of the judiciary in the review of administrative action which involved polycentric decision making, Cameron JA, in the Supreme Court of Appeal decision of *Logbro Properties*,[356] developed the Court's understanding of institutional competence, holding that a 'measure of judicial deference' is appropriate to the administration. The Court went on, however, to link institutional competence concerns with democratic competence issues. Deference is important, Cameron JA held, to maintain the distinction between review and appeal, to ensure that the judiciary 'appreciate[s] the legitimate and constitutionally-ordained province of administrative agencies', recognising their expertise in such matters, and to ensure that they are 'sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.'[357]

Logbro Properties was then applied in the Supreme Court of Appeal's later decision of *Phambili Fisheries,*[358] where the Court held that deference in the judicial review of government economic policies was appropriate for the same institutional and democratic competence reasons.[359] Schutz JA went on to state that

> [j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.[360]

This is particularly important, he held, where the subject matter under review is 'very technical or of a kind in which a Court has no particular proficiency'.[361] Similarly, in *Foodcorp*, the Cape High Court, following both *Logbro Properties* and *Phambili Fisheries*, acknowledged the importance of 'due judicial deference' to 'policy-laden and polycentric' administrative action which 'entails a degree

355 As above, para 186.
356 *Logbro Properties CC v Bedderson NO & Others* 2003 2 SA 460 (SCA) para 21.
357 As above.
358 *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environomental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 SCA.
359 As above, para 47.
360 As above, para 50.
361 As above, para 53.

of specialist knowledge and expertise that very few, if any, judges may be expected to have'.[362]

In *Bato Star Fishing*[363] (the appeal against the Supreme Court of Appeal decision in *Phambili Fisheries* to the Constitutional Court), O'Regan J repeated the passages cited by Schutz JA on the deference to be adopted in the judicial review of administrative agencies. She went on to say, with reference to the *ProLife Alliance* decision,[364] that 'the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself'.[365] By contrast, the High Court in *South African Jewish Board of Deputies,*[366] also referring to the judgment of Schutz JA in *Phambili Fisheries*, held that where a judicial review matter was not one which was 'very technical or of a kind in which a court has no particular proficiency', judicial deference was not appropriate at all.[367]

The Constitutional Court decision of *Bato Star* has since become one of the leading decisions on the topic of deference, and has been cited by a number of subsequent judgments.[368] An important refinement by the Constitutional Court is to be found in the recent decision of *Pillay*,[369] concerning the right of a school girl to wear a nose stud in school as part of her right not to be discriminated against on the basis of religious and cultural practices. The school authorities argued that the Court should show a measure of deference to school 'governing bodies that are statutorily required to run schools and have the necessary expertise to do so'. In making this argument, they invoked the doctrine of margin of appreciation used by the European

362 *Foodcorp (Pty) Ltd v Deputy Directory-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 5 SA 91 (C) para 68.

363 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).

364 *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 paras 75-76. See ch one, sec 3.3, for a more detailed discussion of this judgment.

365 *Bato Star Fishing* (n 363 above) para 46.

366 *South African Jewish Board of Deputies v Sutherland NO & Others* 2004 4 SA 368 (W).

367 As above, para 38, citing *Phambili Fisheries* (n 358 above) para 53.

368 See, eg, *Associated Institutions Pension Fund & Others v Van Zyl & Others* 2005 2 SA 302 (SCA) para 39, where the court held that deference was appropriate, in the sense used in *Bato Star,* to the methodology of an expert actuary; *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 2 SA 191 (SCA) para 12; *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 2 SA 199 (C) 210; *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape & Another* 2007 6 SA 442 (C) para 46; and *Tantoush v Refugee Appeal Board & Others* 2008 1 SA 232 (T) para 108.

369 *MEC for Education, KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC).

Court of Human Rights.[370] The Constitutional Court rightly rejected this argument, pointing out that it had previously decided that the doctrine 'is not a useful guide when deciding either whether a right has been limited or whether such a limitation is justified'.[371] The Court held that, while judicial deference is appropriate in the review of administrative action where the decision maker is especially well qualified to decide a particular matter, no institutional deference is necessary or desirable where a court is to determine whether the right to equality has been infringed. Specifically, the Court held:

> The question before this Court, however, is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the school bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the school's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the school to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.[372]

A number of other judgments use the language of deference in reference to the doctrine of comity. In *Kaunda*,[373] for instance, Chaskalson CJ held that the South African government is entitled to a measure of deference in deciding when, and if, it would seek assurances from another country's government that they would not impose the death penalty on South African nationals.[374] Deference is also employed to discuss the relationship between the courts and the legislature in the development of the common law. In the Supreme Court of Appeal decision in *Fourie,*[375] Cameron JA held that, because the order entailed developing the common law and did not involve any statutory provisions, it was not necessary for the Court to defer to 'the particular functions and responsibilities of the legislature'.[376] By

370 As above, para 80. See ch one, sec 3.2 above for an extensive discussion of the margin of appreciation adopted by the European Court of Human Rights, and why it is not appropriately applied within a domestic context.

371 As above, para 80 (footnotes omitted). The court referred to the *National Coalition* (n 349 above) and *Makwanyane* (n 345 above) decisions as authority for this.

372 As above, para 81.

373 *Kaunda & Others v President of the Republic of South Africa & Others* 2005 4 SA 235 (CC).

374 As above, para 102.

375 *Fourie & Another v Minister of Home Affairs & Others* 2005 3 SA 429 (SCA).

376 As above, para 46. This reasoning in the SCA judgment was repeated by the Constitutional Court in *Minister v Home Affairs v Fourie (Doctors for Life International & Others,* Amicus Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC) para 21.

contrast, in *RPM Bricks*,[377] Ponnan JA held that the common law should not be developed by the courts to allow estoppel to be raised against government where the effect of this would be to render a statutorily-prescribed *ultra vires* act valid. To do so would not show the deference due to legislative authority in prescribing the procedures to be followed before certain powers could be exercised.[378]

In other judgments, courts have recognised the role of the legislature in the South African democracy, and held that deference is due to the legislature by the other branches of government, and that a court should only interfere where it is 'absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation'.[379]

Hence, the post-1994 South African courts have quickly developed the beginnings of a jurisprudence on the doctrine of deference which mirrors that in Canada and the United Kingdom. Yet, this development is uneven: while the application of the doctrine is principled in the interpretation and enforcement of civil and political rights (such as in the *Pillay* decision), this has yet to be mirrored in its application to socio-economic rights. It is this latter point which is developed in the remainder of this book.

4 Conclusion

This chapter has attempted to adopt a 'neutral' approach to the discussion of the case law in chapter one in constructing a theoretical understanding of constitutional deference. The discussion is neutral in the sense that it has striven to examine the reasons for a court's particular approach to constitutional deference, rather than evaluate the substantive reasoning on normative grounds. It has argued that there is no single correct model for deference or single appropriate deferential position and that the courts' approach to deference will depend on a number of contextual factors as well as pre-existing attitudes of the judges and judicial culture. This should not be taken to mean that there cannot be a principled approach to deference

377 *City of Tshawne Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 SA 1 (SCA).

378 As above, para 24.

379 *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as* Amicus Curiae*)* 2003 1 SA 472 (CC) para 31. This passage was quoted with approval in *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 5 SA 281 (CC) para 69.

within a particular context, or that normative claims cannot be made in this regard. Indeed, in the following chapters some of these issues are developed in a discussion of the South African case law on socio-economic rights and normative evaluations regarding an 'appropriate' level of deference, for that country, are made.

At this point, it is worth highlighting one of the values which, it will be argued, should underpin the concept of constitutional deference: the value of transparency or justification. The value derived from a 'culture of justification' is based on the work of Mureinik, who argued that the key shift in South Africa's embrace of democracy is the rejection of the 'culture of authority', demonstrated in the courts' overly deferent attitude to the executive, to a culture of justification.[380] While Mureinik's 'culture of justification' was intended to apply primarily to the non-judicial branches of government, it is argued that it should apply equally to the reasoning of the courts, and that the notion of constitutional deference is one way in which this can be achieved.

This chapter ends with some reflections regarding the use which this discussion of constitutional deference may have for an analysis of case law. First, the principle of constitutional deference creates a framework within which to understand and critique the rhetoric of deference employed by the courts; second, it provides a perspective to understand what the courts are doing even when they do not use the language of deference; third, it allows for analysis of judicial reasoning across different types of cases and provides a framework for such an analysis; and fourth, and perhaps most importantly, it provides a framework within which judges themselves should understand their approach to a particular case. In this sense, a concept of constitutional deference is a call for greater transparency and self-reflection in judicial reasoning. There is no single or 'correct' approach to deference, or a correct deferential standard which the court should apply, just as there can never be a 'correct' understanding of democracy. Rather, what this approach to constitutional deference hopes to bring about is a greater consideration of the underpinning principles of constitutional deference and greater transparency and engagement on the part of the courts and commentators with these principles.

[380] E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32.

CHAPTER 3

OBJECTIONS TO SOCIO-ECONOMIC RIGHTS

1 Introduction

This chapter extends the discussion on constitutional deference to a more specific consideration of the various objections to the judicial review of socio-economic rights. These objections were prevalent in legal and political discourse up to the 1990s — although in some jurisdictions they linger longer — and many regard them as largely dealt with. Indeed, recent writers comment that the debate today has shifted to 'a common set of questions about the practical effect of justiciable social rights, and the potential of such rights to deliver on the promise of social transformation through law'.[381] Although ultimately unconvincing as an argument for the non-justiciability for socio-economic rights, this chapter argues that these objections are not as anachronistic as this statement would imply, since they reappear in the guise of a highly deferent approach by the courts to the review of these rights. In this way, the debates regarding the nature and justiciability of socio-economic rights are still relevant to judicial review of these rights in countries such as South Africa, and may be articulated and discussed through the principle constitutional deference.

The chapter is divided into two parts. The first part, section 2, deals with the various theoretical arguments that are made to distinguish socio-economic rights from civil and political rights, that is, the argument that only civil and political rights constitute 'rights' and that socio-economic rights do not possess the characteristics necessary to call them rights. This discussion demonstrates that there is little substance to these distinctions and, as in the debate around the separation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) from the International Covenant on Civil and

[381] R Gargarella *et al* 'Courts, rights and social transformation: Concluding reflections' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 255.

Political Rights (ICCPR), is motivated by an ideological distrust of socio-economic rights, rather than by any deep, principled objections.[382] The second part of the chapter, section 3, discusses two further objections to the judicial review of socio-economic rights which derive from the separation of powers doctrine; namely, that it is not consistent with the principles of democracy for courts to engage in review of matters of social and economic policy; and that courts lack the competence to undertake review of complex polycentric disputes. While these objections are at times overstated, and are not peculiar to the review of socio-economic rights, they nevertheless raise important issues which courts should, and do, take into consideration through the principle of constitutional deference.

2 Challenges posed to socio-economic rights as constitutional rights

This part will examine the arguments given for excluding socio-economic rights from the catalogue of protected rights. It will not be discussing the literature that argues that no rights, including civil and political rights, should be afforded constitutional protection,[383] and will instead, focus on the arguments against extending constitutional recognition to socio-economic rights, where civil and political rights have already been given some measure of constitutional protection. It is beyond the scope of this chapter to give a comprehensive account of all of these arguments and, for this reason, the two most important and pervasive of those arguments are singled out for discussion. The first argument is that socio-economic rights have a different historical origin to civil and political rights and are not rooted in the Western democratic tradition in the same way that those rights are. This argument can be challenged on its own terms and, in any event, after World War II, the concept of 'human rights' marks a disjuncture in the Western tradition. Human rights today are characterised by a political consensus on the meaning of rights, rather than by what is regarded as their historical 'naturalness'. The second argument considered in this part is that socio-economic rights lack the necessary characteristics of rights and, therefore, cannot be considered as rights properly so-called. The various facets of this reasoning are examined and it is argued that none of the objections to socio-economic rights withstands scrutiny.

[382] See Introduction, sec 1.
[383] See the citations referred to in ch two, n 264.

2.1 Historical origin

Some people have objected to socio-economic rights based on an argument that they are not part of, or consistent with, a Western, democratic tradition of rights.[384] Arguments in this vein were common during the drafting of the International Bill of Rights, and contributed to the eventual split between ICESCR[385] and ICCPR.[386] According to this objection, civil and political rights are said to emerge from the natural rights tradition of the seventeenth and eighteenth centuries as so-called 'first-generation' rights, while 'second-generation', socio-economic rights emerge from socialist conceptions of rights in the late nineteenth and early twentieth centuries.[387] This 'historical difference' in origins was then used to argue that the two sets of rights are also conceptually different, fuelled by the ideological conflict between West and East during the drafting of ICESCR.[388] Civil and political rights thus became associated with the Western, democratic discourse of rights and democracy, and were said to stem from natural rights which in turn had their historical roots in Greek philosophy, Roman law (which itself was heavily influenced by Greek thought) and the Judeo-Christian moral tradition.[389] Civil and political rights were seen as embodying 'widely-shared values to which governments are genuinely committed', as natural, or 'non-ideological' — compatible with the values espoused by Western democracies. Socio-economic rights, on the other hand, became associated with a different genesis of socialist ideology, and were seen to be incompatible with ideas of the free market economy, having 'no real governmental commitment', and concerning 'issues that are considered to be inherently intractable and unmanageable'.[390]

There are two responses to these arguments. The first is to point out that the argument that the modern conception of human rights has its origins in the natural rights tradition is by no means

384 MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 8.
385 Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.
386 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. See the discussion on this point in the Introduction, sec 1. See also MJ Dennis & DP Stewart 'Justiciability of economic, social, and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* 462 477.
387 Craven (n 384 above) 8.
388 See the discussion in the Introduction, sec 1.
389 BH Weston 'Human rights' (1984) 6 *Human Rights Quarterly* 257 258.
390 P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 159-60.

uncontested.[391] Instead, the International Bill of Rights must be understood as an agreement, between states, on the basis of many different philosophical and political traditions, to agree on the formulation of a set of rights and, as such, are not based on a coherent, underlying philosophy.[392] This view is affirmed by Glendon in her research on the drafting of the Universal Declaration, in which she points out that the 'Declaration is not just a universalization of the eighteenth-century "rights of man", but part of a new stage in the history of human rights'.[393] Similarly, Lindholm asserts that article 1 of the Universal Declaration 'is not a traditional Western natural rights foundation for a system of human rights to be implemented globally'; rather, article 1 must be understood as the justificatory foundation for the Universal Declaration, providing 'the thin, but crucially important normative basis on which representatives from several cultures could reach agreement'.[394] Thus, the Universal Declaration and modern conceptions of human rights are based on consensus, rather than a historical development from seventeenth century natural rights. Any supposed difference in historical ontology is, therefore, largely irrelevant.

A second response to this historical argument against socio-economic rights is that, even if the argument is accepted that modern human rights have their historical roots in natural rights, it does not follow that natural rights would give rise to the category of rights we now call civil and political rights.[395] This is so in two senses: first, natural rights can be said only to be the historical origin of a limited

391 Craven (n 384 above) 11; R McKeon 'The philosophic bases and material circumstances of the rights of man' in UNESCO (ed) *Human rights: Comments and interpretations* (1949) 35; AP d'Entrèves *Natural law: An introduction to legal philosophy* (1970) 17; T Lindholm 'Article 1: A new beginning' in A Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 31. For a proponent of this view, see J Morsink 'The philosophy of the Universal Declaration' (1984) 6 *Human Rights Quarterly* 309, who qualifies this position in significant ways: the Universal Declaration does not refer to 'nature' and it does contain rights which are not associated with natural rights, most notably, social and economic rights.

392 A Belden Fields & W Narr 'Human rights as a holistic concept' (1992) 14 *Human Rights Quarterly* 1-5; Craven (n 384 above) 11. See also MA Glendon *A world made new: Eleanor Rooseveldt and the Universal Declaration of Human Rights* (2001) for an excellent discussion of the drafting process and the complex interactions and compromises which resulted in the Universal Declaration.

393 As above, 177.

394 Lindholm (n 391 above) 51. Art 1 of the Universal Declaration provides that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.'

395 Craven (n 384 above) 11.

number of civil and political rights,[396] and second, it is by no means clear that natural rights would give rise only to civil and political rights, and that they may well be used to ground some modern socio-economic rights.[397]

The natural rights discourse began in the seventeenth and eighteenth centuries in the United States, Britain and France. Perhaps the two most famous examples of texts giving expression to this Enlightenment view of rights can be found in the American Declaration of Independence (1776) and the French Declaration on the Rights of Man and the Citizen (1779). Both of these documents privilege an idea of 'natural rights' and a notion of the individual rather than society. As such, they largely emphasise what we now call 'civil and political rights' in their concern for notions of autonomy, freedom and individuality.[398] Socio-economic rights, however, are similarly concerned with autonomy, freedom and individuality, and an argument can be made that an expanded understanding of natural rights could give rise to socio-economic rights. Locke's concern for property rights is illustrative of this point. Rights to property were, for Locke, simply a means of ensuring autonomy and liberty. In this sense, ownership and protection of property — or access to a certain level of minimal social and economic well-being — is necessary to ensure autonomy.

It is therefore not feasible to argue, as a matter of historical origin, that modern civil and political rights are conceptually different to modern socio-economic rights. It is true that civil and political rights are associated with the development of natural rights in the seventeenth and eighteenth century and socio-economic rights with nineteenth and twentieth century social rights, but these associations cannot be used to ground a conceptual distinction between the two. In international law, both sets of rights are a

396 CB MacPherson 'Natural rights in Hobbes and Locke' in DD Raphael (ed) *Political theory and the rights of man* (1967) 4-5. While Locke most famously promoted property rights, it should be remembered that Locke himself accepted that the right to accumulate private property was in fact limited by a right to subsistence: J Locke *Two treatises in government* (1821) 208, Book II, ch V para 25. See also TA Horne 'Welfare rights as property rights' in J Donald Moon (ed) *Responsibility, rights and welfare* (1988) 107, 107-32.

397 J Donnelly *Universal human rights in theory and practice* (2003) 31; Morsink (n 391 above) 309 326, quoting Thomas Paine as supporting the modern approach to social and economic rights.

398 J Waldron 'Natural rights in the seventeenth and eighteenth centuries' in J Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (1987) 7; R Tuck *Natural rights theories: Their origin and development* (1979).

product of dialogue and compromise, rather than the continuation of one specific tradition of thought.[399]

2.2 Socio-economic rights as 'rights'

The second set of arguments against socio-economic rights is that they are not properly rights as they lack the specificity and universality that characterise rights, are incapable of being realised immediately, and are not fundamental. Rather than constituting rights, they are said to be social and economic goals to which states should aspire. Civil and political rights, by contrast, are said to be definite, of application to individuals, universal and more readily justiciable — characteristics necessary to a definition of rights. Cranston is perhaps the most cited proponent of these arguments and his work will be used primarily to discuss these claims.[400] These four notions, of universality, the fundamental nature of rights, immediate realisation, and specificity, will be discussed separately.

2.2.1 Universality

In examining the Universal Declaration, Cranston's first argument against socio-economic rights is that they are not universal because they apply only to specific classes of people, while human rights, that is, in Cranston's view, civil and political rights, apply to all persons, irrespective of their particular circumstances or position in society. Cranston uses the example of the right to holidays with pay in the Universal Declaration, which, he points out, are 'necessarily limited to those persons who are *paid* in any case, that is to say, the *employé* class'.[401] This argument can be countered in two ways: first, it can be pointed out that certain civil and political rights are no more universal, for example, the right to vote only applies to those over a certain age, and fair trial rights only apply to those on trial.[402] Second, and more fundamentally, it can be shown that this argument demonstrates a misunderstanding of the nature of human rights: rights are universal when they apply to all persons irrespective of

[399] Glendon recounts the story of how a visitor to the UNESCO discussions on the Universal Declaration expressed amazement at how the various parties to the Universal Declaration, coming from vastly opposing ideological backgrounds, were able to agree on a list of rights. The response to the visitor was '[y]es, we agree about the rights but on condition no one asks us why': Glendon (n 392 above) 77.

[400] M Cranston 'Human rights, real and supposed' in DD Raphael (ed) *Political theory and the rights of man* (1967) 43. See also R Wasserstrom 'Rights, human rights, and racial discrimination' (1964) 61 *The Journal of Philosophy* 628 629-33; C Fried *Right and wrong* (1978); and EW Vierdag 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69 for other proponents of this view.

[401] Cranston (n 400 above) 50-51. M Cranston *What are human rights?* (1973) 67.

[402] The same point is made by Craven (n 384 above) 14; C Fabre *Social rights under the Constitution* (2000) 26-27; and Donnelly (n 397 above) 28.

whether they happen to fall into the class for whom the right operates. If a person is outside of the class and later falls into the class, she still has the right in question, both before and after she falls into the affected class. It is simply not meaningful for her to exercise the right when she falls outside of the class. Moreover, negative aspects of many rights may be applicable at all times.[403]

2.2.2 Fundamentality

Cranston's second argument against socio-economic rights is that they are not fundamental or, in Cranston's words, 'of paramount importance'. Cranston argues that we know which are fundamental rights through our 'common sense'. 'Common sense knows that fire engines and ambulances are essential services, whereas fun fairs and holiday camps are not.'[404] These examples, however, are clearly misleading, and it is open to question in what sense the right to vote is more fundamental than the right to shelter or food. As Okin points out, Cranston's choice of examples to demonstrate his point 'is no more valid than choosing a very bright yellow and a very dull red to demonstrate that yellow is brighter than red!'[405] Such arguments offer little more than cultural preferences parading as truths. Similarly, Berlin, in a discussion on the meaning of freedom, points out that for differently situated people, freedom means different things. For the poor, access to socio-economic goods may be more important than personal liberty:

> [T]o offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom ... First things come first: there are situations ... in which boots are superior to the works of Shakespeare; individual freedom is not everyone's primary need. For freedom is not the mere absence of frustration of whatever kind; this would inflate the meaning of the word until it meant too much or too little.[406]

Finally, Cranston's example of the ambulance itself undermines his argument that socio-economic rights are of lesser importance, since the right to an *ambulance* would clearly be a facet of the right to health or to emergency healthcare. This point is implicitly acknowledged by Cranston himself in the introduction to his chapter

403 See sec 2.2.1 for a discussion of negative and positive rights.
404 Cranston (n 400 above) 51-52 67-68.
405 SM Okin 'Liberty and welfare: Some issues in human rights theory' in JR Pennock & JW Chapman (eds) *Human rights, Nomos XXIII* (1981) 242.
406 'Two concepts of liberty' in I Berlin *Four Essays on Liberty* (1969) 124.

where he lists 'medical services' as one of the new socio-economic rights which he is objecting to.[407]

2.2.3 Immediate realisation and positive obligations

Third, Cranston objects to socio-economic rights since, for him, they are not capable of being realised immediately — which is, according to Cranston, a characteristic of rights generally.[408] This is said to be because civil and political rights, as negative rights, are capable of immediate enforcement because they merely depend upon the state refraining from conduct which would violate these rights. Socio-economic rights, on the other hand, require positive obligations which compel the state to undertake positive action.[409] As such, they are not capable of immediate realisation. Fried states the problem as follows:

> It is logically possible to treat negative rights as categorical entities. It is logically possible to respect any number of negative rights without necessarily landing in an impossible and contradictory situation ... Positive rights, by contrast, cannot as a logical matter be treated as categorical entities, because of the scarcity limitation.[410]

Within this objection are two related, yet conceptually distinct assumptions. The first assumption is that only negative rights (that is, civil and political rights) are capable of immediate fulfilment and therefore only negative rights are capable of being viewed as 'categorical entities'. Positive rights (that is, socio-economic rights), on the other hand, require the state to expend resources, and are therefore not '*as a logical matter*' capable of being treated as 'categorical entitles'. This assumption clearly begs the question whether the negative-civil-political versus the positive-socio-economic rights divide is valid. This assumption is dealt with immediately below, and refuted, through a discussion of the work of Shue who has convincingly undermined this distinction. The second assumption is that, because positive rights require state expenditure, they cannot all be fulfilled because resources are scarce, and therefore cannot be understood as rights. This is a far more sophisticated objection, and is also dealt with below.[411]

407 Cranston (n 400 above) 43.
408 As above, 53; Cranston (n 401 above) 66.
409 Vierdag (n 400 above) 81-82, discussing the influential criticisms of Bossuyt of social rights: M Bossuyt '*La distinction juridique entre les droits civils et politiques et les droits économics, sociaux et culturels*' (1975) 8 *Human Rights Journal* 783.
410 Fried (n 400 above) 113.
411 See sec 2.2.3.2 below.

2.2.3.1 Positive and negative rights

One of the primary differences between civil and political rights and socio-economic rights argued for by opponents to socio-economic rights, is that civil and political rights are said to be negative, that is, states are only required to refrain from activities that violate these rights; while socio-economic rights on the other hand, are said to be positive, and require that states undertake positive action in order to realise these rights. An initial response to this argument is to question the assumption that only rights that are capable of immediate implementation, and which do not require significant state expenditure should be regarded as rights. It does not follow from the distinction between positive and negative rights that rights which only give rise to negative duties against the state are rights. The fact that rights historically may have been viewed as a 'shield' rather than a 'sword' does not mean that this is the only valid conception of rights.[412]

A second response to this argument is to question the assumption that civil and political rights are negative and socio-economic rights are positive along the lines described above. Shue's influential work, *Basic rights: Subsistence, affluence, and US foreign policy*, sets out to do exactly this.[413] Shue's original work is discussed in depth in this section, not only because of its importance to the literature on socio-economic rights, but because the subsequent literature which has developed his typology has tended to lose some of the subtlety of nuance of his work, turning the tripartite description of duties into a 'new truth', divorced from Shue's original intention, and undermining Shue's work of its more progressive implications.

Shue argues that, rather than look at the distinction between positive and negative rights, one should look at the distinction between the duties which these rights generate. Shue then goes on to demonstrate convincingly that all basic rights contain both positive and negative obligations and that all rights give rise to three levels of obligation — the duty to *avoid* depriving, the duty to *protect* from deprivation, and the duty to *aid* the deprived.[414] It should be noted from the outset that Shue's analysis is directed primarily to what he calls 'basic rights', that is, 'everyone's minimum reasonable demands

412 Okin (n 405 above) 241. This point also overlaps with, and is developed in, the section immediately following it: see sec 2.2.3.2 below.

413 H Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1996) (first published in 1980).

414 As above, 51-64. This distinction has also been adopted in the South African Constitution and therefore forms a useful background to the discussion in chs four and five. Sec 7(2) provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' The Constitution of the Republic of South Africa Act 108 of 1996 sec 7(2).

upon the rest of humanity[,] ... the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept'.[415] Thus, a basic right is a right which has to be enjoyed before any other right can be enjoyed and which cannot be sacrificed. Included in Shue's basic rights are the rights to physical security and subsistence rights, that is, minimal socio-economic rights. The subsequent literature has applied his distinction to all rights, a move which Shue himself speculated about and later appears to have endorsed.[416] For the purposes of this argument, it is therefore accepted that Shue's analysis does apply to all (or most) rights. Moreover, the South African Constitution has applied his analysis of duties to all rights in that Constitution.[417]

Shue's original terminology outlined the duties to *avoid* depriving, *protect* from deprivation and *aid* the deprived. These duties have subsequently been referred to as the duties to *respect*, *protect*, *promote* and *fulfil* the right in question.[418] Shue himself was happy to accept the rephrasing of the first duty as a duty to *respect*, but resisted the loss of the wording of the duty to *aid* since, for Shue, this duty represented a 'duty of recovery' for those whose rights had already been violated by a failure to fulfil the first two duties.[419]

Shue's first duty is the duty to *respect* rights or *avoid* depriving people of rights. This is viewed *primarily* as a 'negative' duty on the state (and potentially private parties) to refrain from any action which violates an individual's right. Traditionally, civil and political rights are said to be negative,[420] but Shue demonstrates that socio-economic rights have negative dimensions also.[421] In the context of

415 Shue (n 413 above) 19. For a fuller definition of 'basic rights', see n 413 above, 18-20.

416 As above, 54-55 153-66.

417 See n 414 and the discussion in chs four and five.

418 Philip Alston and Asbjørn Eide are largely responsible for this reworking of Shue's typology: see H Shue 'The interdependence of duties' in P Alston & K Tomaševski (eds) *The right to food* (1984) 83 84-85. See also K Tomaševski 'Human rights indicators: The right to food as a test case' in P Alston & K Tomaševski (eds) *The right to food* (1984) 135 154 where the duties to provide the right food are divided into duties to recognise or respect, promote, protect, and fulfil or ensure the right to food. Shue appears to have also accepted this new terminology in the 1996 Afterword: Shue (n 413 above) 160.

419 Shue (n 418 above) 86.

420 The standard example cited for a recognition by the European Court of Human Rights that states have a negative duty not to infringe an individual's civil and political rights is *Dudgeon v UK* No 45 4 EHRR 149 (1981). Nevertheless, the European Court of Human Rights has, in the context of family rights, sometimes interpreted the duty to respect as giving rise to positive state duties. See, eg, *Marckz v Belgium* [1979] 2 EHRR 330.

421 Shue (n 413 above) 55. In the context of South African socio-economic rights, this is clearly demonstrated in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W), and *Jahfta v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 2 SA 140 (CC) para 28. See ch four, sec 3.1.4.

socio-economic rights (or subsistence rights), Shue describes the obligation to respect rights as

> a duty simply not to take actions that deprive others of a means that, but for one's own harmful actions, would have satisfied their subsistence rights or enabled them to satisfy their own subsistence rights, where the actions are not necessary to the satisfaction of one's own basic rights and where the threatened means is the only realistic one. Duties to avoid depriving require merely that one refrain from making an unnecessary gain for oneself by a means that is destructive for others.[422]

The duty to respect, therefore, encompasses a duty to refrain from action that would have the effect of undermining people's rights. This is more far-reaching than it initially appears, and includes the duty not to eliminate a person's available means of subsistence through, for instance, evictions or structuring a market-economy in such a way that people are coerced into growing non-food crops which leads to their no longer being able to provide for themselves, or which causes food prices to rise. When understood in this way, Shue's duty to *avoid* undermining basic rights is far more extensive than the state merely refraining from interfering with a person's liberty.

The second type of duty is the duty to *protect* the right. For Shue, the duty to protect is a 'secondary duty' to enforce the primary duty to respect, and only arises because there are those who fail to respect people's rights in the first place.[423] The duty to protect obliges the state to take measures to ensure that it and non-state actors do not interfere with a person's ability to exercise a right.[424] In addition to this enforcement aspect, the duty to protect also includes a duty to design laws and social institutions so that people can fulfil their duties to avoid deprivation. The duty to avoid deprivation thus also includes the enforcement of avoidance, such as ensuring that subsistence farmers are not able to sell their land to wealthy landowners, with the result that they can no longer grow crops to support themselves. This should be achieved by establishing laws which prohibit such a sale, and through supporting subsistence farmers so that they are not placed in this position in the first place.[425]

The duty to protect extends to all rights, and in this sense, all rights are positive. This fact is recognised by Holmes and Sunstein:

422 Shue (n 413 above) 55.
423 As above.
424 The European Court has demonstrated a willingness to recognise this aspect of the right. See, eg, *Plattform 'Artze Fur Das Leben' v Austria* (1991) 13 EHRR 204; *Osman v UK* (1998) 29 EHRR 245. The US, by contrast, has been reluctant to find any form of positive obligation on the state to enforce rights: *DeShaney v Winnebago County Department of Social Services* 489 US 189.
425 Shue (n 413 above) 59-60.

> To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money. Rights cannot be protected or enforced without public funding and support. This is just as true of old rights as of new rights, of the rights of Americans before as well as after Franklin Delano Roosevelt's New Deal. Both the right to welfare and the right to private property have public costs. The right to freedom of contract has public costs no less than the right to healthcare, the right to freedom of speech no less than the right to decent housing. All rights make claims upon the public treasury.[426]

It is therefore misleading to object to socio-economic rights on the basis that the protection of these rights involves resource implications. The fact that rights cost money does not mean they are not rights. Rather, if this objection to socio-economic rights is to have any substance, it must be one based on degree and not kind. Such an objection is considered in the following section.

Third, is the duty to *fulfil* the right. Shue recognises three subcategories within this duty which all relate to the provision of aid to those who are not capable of providing for themselves. First is the duty to care for those for whom one has a responsibility arising out of a special relationship; second, is the duty to provide for those where there has been a failure of earlier duties to avoid depriving and protect from deprivation; and third, there is a duty to provide for those who are the victims of natural disasters.[427] The obligation to fulfil a right has also been elaborated by the Committee for Economic, Social and Cultural Rights (ESCR Committee)[428] in the context of interpreting ICESCR, to include two further components: first there is a duty to 'facilitate', which means that the state must be actively engaged in furthering the right; second, the state must 'provide' resources directly to fulfil the right.[429]

It is this duty to fulfil which raises the clearest problems for courts (and states) in enforcing socio-economic rights, as it entails what Koch has described as a shift from a 'state governed by law paradigm' to a 'welfare state paradigm'.[430] While some courts have entertained the notion that civil and political rights may give rise to some tertiary

426 S Holmes & CR Sunstein *The cost of rights: Why liberty depends on taxes* (1999) 15. See also C Scott & P MacKlem 'Constitutional ropes of rand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 48-71 for a discussion of the positive dimensions of civil and political rights and the numerous examples cited there.

427 Shue (n 413 above) 56-58.

428 The ESCR Committee is the UN body tasked with interpreting ICESCR. The ESCR Committee issues General Comments on the interpretation of ICESCR, which are authoritative, but not binding, on state parties to ICESCR.

429 General Comment No 15 'The Right to Food' (1999) para 15.

430 IE Koch 'The justiciability of indivisible rights' (2003) 72 *Nordic Journal of International Law* 3 15.

obligations,[431] it is widely accepted that these are of a narrower scope than the positive obligations which socio-economic rights potentially demand.[432] It is true that the positive enforcement of socio-economic rights poses deep difficulties for courts regarding the appropriate role of the courts in review of state policy. As such, they point to questions around the democratic legitimacy of courts to decide matters of socio-economic policy, as well as the competence of the court to decide these complex matters. These difficulties do not, however, provide support for the view that because socio-economic rights require courts to engage in socio-economic policy and make decisions which may have budgetary implications, they are not 'rights' properly so-called.

Finally, it is important to emphasise that Shue's typology of duties is only an abstract tool for describing multi-layered duties that arise from rights, and that it is artificial to try, as some theorists and courts have done, to force duties into one of these three pigeonholes. Writing several years after the initial publication of his book, Shue appeared dismayed at the life of its own his typological description of duties has acquired. He responded as follows:

> The 'very simple tripartite typology of duties,' then, was not supposed to become a new frozen abstraction to occupy the same rigid conceptual space previously held by 'negative rights' and 'positive rights.' The critical point was: do not let any theorist tell you that the concrete reality of rights enforcement is so simple that all the implementation of any right can usefully be summed up as either positive or negative.[433]

What is important about socio-economic rights (and indeed all rights) is that we consider the nature of the right in question and recognise that there are multiple duties which need to be undertaken in order to give full effect to the right, and that at times it is not helpful to try and classify duties into negative, positive, or duties to protect, promote and fulfil. As Waldron described it, rights contain 'successive waves of duty'.[434] The distinction between negative-civil and political and positive-socio-economic rights does not withstand scrutiny, and cannot be used to exclude socio-economic rights from the list of recognised rights.

[431] Eg *Lopez Ostra v Spain* (1994) 20 EHRR 277; and *D v UK* (1997) 24 EHRR 423. The South African Constitutional Court has also expressly recognised that civil and political rights in the South African Constitution may give rise to positive obligations: *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 2 SA 359 (CC) para 70.

[432] Koch (n 430 above) 27-28.

[433] Shue (n 413 above) 160.

[434] J Waldron *Liberal rights: Collected papers 1981-1991* (1993) 25.

2.2.3.2 Resource constraints

A further, and more developed, objection to socio-economic rights, which flows from their 'positive nature', is that, because there are scarce resources, and not all of the positive dimensions of these rights can therefore be met, they cannot be described as 'rights'. More specifically, the argument is that because socio-economic rights cannot be *immediately fulfilled*, they are not rights. This view is articulated by Sumner:

> In the case of these [socio-economic] rights we would normally be more reluctant to say that governments are obligated to ensure their full enjoyment by all citizens, or that the failure to do so in any particular case would necessarily constitute an injustice. Our reluctance to say these things stems in part from our recognition that ensuring everyone's full enjoyment of these rights is likely to be beyond the resources of any but the wealthiest nations. Because governments can have a legitimate excuse for failure in this area we may often refrain from labelling such failure a dereliction of duty or an injustice. Thus rights in this second category may lack the conceptual connections with the notions of obligation and justice, and thus also the distinctive cutting edge, of rights in the first category [of civil and political rights].[435]

This objection can be countered by defining rights so as to take resource constraints into account, and by recognising that socio-economic rights may be subject to progressive realisation. Fabre, for example, responds to Sumner's argument by adopting an understanding of rights based on the work of Raz, which allows socio-economic rights to be defined in relation to the level of social and economic development in a country. Raz's (and Fabre's) definition of a right for X is that '"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[436] In deciding whether X's interest is 'sufficient reason' to find that she has a right, one must 'adjudicate between people's competing interests *before* one assigns rights to them'.[437] In other words, socio-economic rights are defined in terms of scarce resources, such that if a particular country has very limited resources, the citizens of that country simply may not have any rights to social and economic goods.

Raz's theory of rights, however, is an abstract justification for rights on the basis of sufficient interest, and is predicated on an assumption that written rights are not already explicitly recognised. Where rights have been entrenched in a bill of rights, the legislature

[435] LW Sumner *The moral foundation of rights* (1987) 16-17 (footnotes omitted).
[436] J Raz *The morality of freedom* (1986) 166.
[437] Fabre (n 402 above) 30.

performs the same role in determining which interests are sufficiently important to give rise to rights. These rights, however, still have to be interpreted by the courts, and it is at this point that the courts have discretion to take scarce resources into account in giving content to the right — whether it is a civil, political or socio-economic right. In the case of the South African Constitution, the constitutional drafters explicitly recognise the role that scarce resources play in interpreting and giving effect to socio-economic rights, by stating that the state has a duty to realise the relevant socio-economic right within its available resources and subject to progressive realisation.[438] The ways in which the South African courts have dealt with scarce resources in defining socio-economic rights are discussed in the chapters below.[439]

This discussion demonstrates that, while scarce resources may raise difficulties in defining the scope of socio-economic rights, these difficulties are not insurmountable and may be countered by either adopting a restrictive definition of the rights, or by acknowledging that its implementation will be subject to progressive realisation.

2.2.4 Specificity and lack of remedies

A further criticism of socio-economic rights, which flows from the criticism above that socio-economic rights are not capable of immediate realisation, is the argument that these rights are not sufficiently specific to constitute rights and that there are no remedies available to enforce these rights.[440] Again, a first response is to question this argument on its own terms. It is questionable whether legal remedies are indeed a requirement of rights — at the very least, it can be pointed out that such an argument is contingent on a particular understanding of rights, which is not uncontested. If rights are understood as political demands to social goods, then it is not strictly relevant whether the right is capable of immediate or full realisation.[441]

A second, and perhaps more appropriate, response to this objection to the supposed vagueness of socio-economic rights is to argue that this view is no longer justified, and has more to do with the undeveloped notion of socio-economic rights that was prevalent when

438 The same is true of ICESCR, which expressly states that the obligation on state parties is to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights' in ICESCR: ICESCR (n 385 above) art 2(1).

439 See specifically ch four, sec 3.3.2, and ch five, sec 4.

440 Cranston (n 400 above) 47; Fried (n 400 above) 108-31. See also S Stoljar *An analysis of rights* (1984) 3-4 105-16.

441 See J Donnelly 'Human rights as natural rights' (1982) 4 *Human Rights Quarterly* 391 393.

writers like Cranston and Fried were writing, than with any inherent flaw within socio-economic rights themselves. As the jurisprudence of the ESCR Committee, through its General Comments, and of domestic jurisdictions, such as South Africa, has demonstrated, socio-economic rights are capable of relatively precise formulation (or at least as precise as civil and political rights) and are capable of being enforced through judicial remedies — and the more they are enforced, the more a clear jurisprudence will emerge regarding their interpretation.[442] Moreover, these rights are capable of detailed elaboration through domestic legislation, which courts are well suited to interpret and enforce. Where there is remaining uncertainty regarding the meaning and fulfilment of socio-economic rights, for example, the right to 'adequate healthcare', it cannot be said that this is any more vague than the interpretation of many civil and political rights, such as the 'right to free speech'.[443] Indeed, it is the very latitude within the interpretation of the right which allows the executive, parliament and the courts to develop the right over time, and adapt the normative content of the right to address changing social and economic circumstances.

Thus, when one examines the arguments of Cranston and similar writers in detail, it appears that there is little substance to his objections — at least insofar as these objections relate to a distinction between civil and political and socio-economic rights. Of course, there are many theorists who question the existence of rights at all, or the wisdom of entrenching rights in a constitution where courts are then empowered to judicially review state (and potentially private) action for consistency with rights.[444] It is not possible to grapple with these objections properly in this chapter, as these objections go to the heart of what is understood by democracy. Suffice it to say that these arguments cannot claim normative status as they rest on a particular conception of democracy, and therefore cannot be used to normatively justify that conception.

[442] Koch (n 430 above) 7. See also the Limburg Principles for a detailed discussion of the core entitlements which each of the rights in ICESCR gives rise to. The Limburg Principles are a body of principles which were adopted by a group of respected international experts in 1986 and are regarded as an authoritative interpretation of ICESCR: 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/CN.4/1987/17. For a discussion of the Limburg Principles, see EVO Dankwa & C Flinterman 'Commentary by the Rapporteurs on the nature and scope of state parties' obligations' (1987) 9 *Human Rights Quarterly* 136. The Limburg Principles were later elaborated in the Maastrict Guidelines on Violations of Economic, Social and Cultural Rights (1997).

[443] Scott & MacKlem (n 426 above) 76-77.

[444] See ch two, n 264 above for examples of such arguments.

3 Challenges posed by socio-economic rights for judicial review

Despite the convincing arguments that socio-economic rights are not fundamentally different to civil and political rights, it must be acknowledged that the judicial enforcement of socio-economic rights does raise a number of difficulties — even if these are only difficulties of degree and not kind — and that these issues need to be addressed. These difficulties can be grouped into two categories which both relate to the separation of powers doctrine — those dealing with the principled division of functions between the three branches of government, which is an aspect of democracy, and those dealing with the institutional competence of the judiciary to adjudicate socio-economic rights claims. Before discussing these issues in detail, this part will begin with two sections that examine the concepts of separation of powers and justiciability, respectively. This consideration will form the backdrop to the discussion of the problematic aspects of judicial review of socio-economic rights in the two sections following.

3.1 Separation of powers

The separation of powers doctrine emerged in the seventeenth and eighteenth centuries with the writings of Locke and Montesquieu, and was initially viewed as primarily a functional division of powers between the three branches of government — the executive, legislature and the judiciary — to ensure that the different functions of government were carried out by separate institutions and that the one branch did not encroach into the functional area of the others. According to this traditional understanding, the legislature makes the law; the executive implements and enforces that law, and formulates policy for the implementation of that law; and the judiciary interprets the law and administers justice. One of the clearest expressions of the importance of the separation of powers doctrine to eighteenth-century constitutionalism can be found in the 1789 French Declaration of the Rights of Man which states that '[a]ny society in which the guarantee of rights is not ensured, nor a separation of powers is worked out, has no constitution'.[445] The doctrine also received extensive treatment in the 1789 United States document, The Federalist Papers, which linked the doctrine with the protection of

[445] Art 16 of the French Declaration of the Rights of Man (1789), translated by Xavier Hildegarde, available at http://www.magnacartaplus.org/french-rights/1789.htm#en1 (accessed 28 June 2005).

liberty.[446] Similarly, Montesquieu emphasised the importance of separation of powers for the preservation of liberty:

> When the Legislative Power is united with the Executive Power in the same person or body of magistrates, there is no liberty because it is to be feared that the same Monarch or the same Senate will make tyrannical laws in order to execute them tyrannically. There is again no liberty if the Judicial Power is not separated from the Legislative Power and from the Executive Power. If it were joined with the Legislative Power, the power over the life and liberty of citizens would be arbitrary, because the Judge would be Legislator. If it were joined to the Executive Power, the Judge would have the strength of an oppressor. All would be lost if the same man, or the same body of chief citizens, or the nobility, or the people, exercised these three powers, that of making laws, that of executing public decisions, and that of judging the crimes or the disputes of private persons.[447]

Even a cursory knowledge of political reality, however, demonstrates that these boundaries are, both conceptually and practically, far from watertight, and that all three functions are carried out to a greater or lesser degree by all three branches of government.[448] For this reason, the doctrine has also come to justify a more flexible 'balance of powers' approach and the boundaries of the three branches are bent to accommodate particular circumstances. Power is to be divided up so that it cannot be concentrated in the hands of one branch of government.[449] The institution of judicial review is one of the clearest examples of this 'checks and balances' approach to the separation of powers doctrine.[450]

This distinction between the more traditional, functional account of separation of powers and the more flexible, 'checks and balances' approach has also been described by Barendt as a distinction between a 'pure' and 'partial' doctrine of separation of powers.[451] A 'pure' theory, according to Barendt, constructs a complete separation between the legislature, executive and judiciary, while the 'partial'

446 N Barber 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* 59 65. See also A Hamilton *et al The federalist papers* (2002).

447 *L'Esprit des Lois*, Book XI ch VI quoted in I Jennings *The law and the Constitution* (1959) 22.

448 See, eg, Jennings (n 447 above) 9-28, app I 281-82 303-4, who argues that there is no material difference between the three functions performed by the executive, legislature and judiciary; G Marshall *Constitutional theory* (1971) 124; and Lord Hoffmann 'The Combar Lecture 2001: Separation of powers' (2002) *Judicial Review* 137 para 5.

449 See PB Kurland 'The rise and fall of the "Doctrine" of separation of powers' (1986) 85 *Michigan Law Review* 592 593 598 for a discussion of this change in emphasis in the context of the US Constitution.

450 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 386.

451 E Barendt 'Separation of powers and constitutional government' (1995) *Public Law* 599 601.

theory recognises that there are overlapping powers in order to allow the checks and balances to operate. These overlapping powers create deliberate tension between the branches, so that none of the branches is capable of operating, in all respects, autonomously.[452] For Barendt, the primary purpose of the separation of powers doctrine is 'the prevention of the arbitrary government, or tyranny, which may arise from the concentration of power'.[453] The partial theory of separation of powers therefore ensures that liberty is adequately protected by making state action more difficult and by dividing up power so that no one branch of government becomes too powerful.[454]

> The separation of powers principle is therefore not simply a formal guide to the organization of state power. It can be given teeth by constitutional courts to reinforce the protection conferred by the constitution on individual rights, and to prevent one branch of government from accumulating excessive powers.[455]

As Barber points out, however, Barendt's conception of a separation of powers is predicated upon a particular conception of democracy, and cannot claim to be a neutral analysis. Instead, what Barendt has done is to equate 'the doctrine of separation of powers with a theory of the state'.[456] For Barber, 'there are no value-neutral assessments that can be made of constitutions … [S]eparation of powers is a theory of the ordering of collective action; it must be prefaced by a political theory if it is to possess any normative force.'[457] Thus, it is not conceptually possible to construct a one-size-fits-all model of separation of powers outside of political theory. All that is possible is a discussion of the general factors that will underpin a particular conception of separation of powers. The model adopted in a particular country will necessarily be dependent on a range of contextual factors, including historical development, the constitutional values espoused in that community, particularly those that can be derived from the constitution, and the context of day-to-day politics.[458] On this understanding, an analysis of separation of powers in the context of South Africa, for example, can be meaningfully undertaken only together with a detailed contextual discussion of these factors in that country.

452 As above, 608-13. See also E Barendt *An introduction to constitutional law* (1998) 14-17.
453 Barendt (n 451 above) 606.
454 This approach to separation of powers also receives some support in the US: In *Myers v US*, Brandeis J (dissenting) held that the purpose of separation of powers 'was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.' *Myers v US* (1926) 272 US 52 293.
455 Barendt (n 451 above) 613.
456 Barber (n 446 above) 61-62.
457 As above, 63.
458 As above, 66-71.

A further elaboration of the separation of powers doctrine is provided by the work of Ackerman. Ackerman asserts that, rather than viewing a separation of powers as a coherent doctrine, it should be seen as fulfilling different functions — which are not necessarily best fulfilled through the same division of powers and functions in a particular model of government.[459] He argues that there are three motivating factors behind the separation of powers doctrine, namely, the ideal of democracy; the 'professional competence' of the members of the three branches, that is, a functional specialisation; and the 'protection and enhancement of fundamental rights'.[460] For Ackerman, the division of powers into the triadic legislature, executive and judiciary is, however, inadequate to fulfil these functions. What is required instead is a model of 'constrained parliamentarianism' (along the model of the British parliamentary system), where this central power is 'checked and balanced by a host of special-purpose branches, each motivated by one or more of the three basic concerns of separationalist theory'.[461]

Separation-of-powers concerns are important to the judicial review of socio-economic rights, since review of these rights appears to strain at the conventional role of the courts. For this reason, many opponents to constitutionally entrenched socio-economic rights have argued that they are inherently non-justiciable.[462] As this discussion on separation of powers reveals, however, a pure theory of separation of powers is no longer appropriate. Rather, separation of powers is predicated on a system of checks and balances where courts are, in fact, required to ensure that public power is being exercised consistently with the constitution. Moreover, in a constitutional democracy such as South Africa, where courts are expressly mandated to enforce a bill of rights, which includes socio-economic rights, it cannot be said that the judicial review of socio-economic rights, in itself, violates the separation of powers doctrine.[463] For these reasons, any bald assertion that socio-economic rights are non-justiciable because they violate the separation of powers doctrine must be rejected. This is not to suggest that facets of the doctrine, in particular the democratic roles of the various branches of government, are not relevant to the judicial review of socio-economic rights: only that they are relevant to constitutional deference, and cannot ground a claim of non-justiciability in itself.

459 B Ackerman 'The new separation of powers' (2000) 113 *Harvard Law Review* 633 697-702.
460 As above, 640. Note the similarity between these three factors and the three factors which underpin constitutional deference.
461 As above, 727.
462 See, eg, as above, 724-25.
463 This is the view of the South African Constitutional Court: see ch four, sec 2.

3.2 Justiciability

The debate around the inclusion or non-inclusion of socio-economic rights in treaties and constitutions usually hinges around the notion of *justiciability*. Despite the centrality of this notion of justiciability, there appears to be little consideration of what is meant by the term in the context of arguing whether a particular category of rights is justiciable. The issue is complicated by the conflation, by some writers, of the notion of justiciability with the notion of enforceability.[464] Clearly, the notion of enforceability is related to the notion of justiciability, but they are distinct: enforceability deals with the ability of the courts to fashion a remedy to protect or enforce the interests or entitlements it wishes to protect or enforce, while justiciability concerns the question of whether a matter is suitable for judicial resolution.[465] Justiciability deals with the 'subject matter jurisdiction' before a court.[466]

Opponents to socio-economic rights argue that they are, by their nature, non-justiciable, and proponents argue that there are no principled reasons for distinguishing socio-economic rights from other categories of rights, and that they are therefore justiciable. Both of these arguments are flawed. Rather than viewing justiciability as a separate objection to socio-economic rights, justiciability is better understood as the culmination of prior objections to these rights, such as those discussed in the previous section and in the following sections of this chapter. In this sense, the notion of justiciability is really a 'conclusion' to another set of arguments, and not an argument in itself.[467] Justiciability is a legal 'short-hand' of the courts to demarcate the issues that they will consider (based on a prior consideration) and those that they will not. The notion of justiciability is, therefore, a facet of the separation of powers doctrine.

Justiciability is 'a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability'.[468] For these reasons, Marshall describes the concept of

[464] See, eg, Vierdag (n 400 above) 73, where he equates the two terms directly, and concludes that because the rights in ICESCR are unenforceable by individuals, they are also non-justiciable.

[465] MK Addo 'The justiciability of economic, social and cultural rights' (1988) 14 *Commonwealth Law Bulletin* 1425.

[466] LM Sossin *Boundaries of judicial review: The law of justiciability in Canada* (1999) 2.

[467] C Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769 833.

[468] Scott & MacKlem (n 426 above) 17 (footnote omitted).

justiciability as relating to 'the aptness of a question for judicial solution',[469] while Sossin similarly recognises the contextual nature of justiciability and defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court.[470]

On this understanding of justiciability, it is misleading to ask the question: are socio-economic rights *inherently* justiciable? Instead, the question of justiciability can only be answered in a given context, and based on a specific set of facts.[471] Moreover, the question of justiciability does not necessarily apply in a blanket-like fashion. It may be that a court will find a matter to be generally justiciable, but that certain aspects are, in the circumstances, not appropriate for judicial resolution, and therefore non-justiciable.

In the South African context, the Constitutional Court has already declared that socio-economic rights are justiciable, and the question is therefore, on the face of it, moot.[472] This is not, however, the end of the matter. A closer reading of the Sossin quote above reveals that the same three factors which underlie the judicial consideration of justiciability underlie the principle of constitutional deference outlined in chapter two. The notion of justiciability may, therefore, be understood as a close relation to constitutional deference, where a finding by a court that an issue warrants an extreme degree of constitutional deference, will mean that the court will find the matter to be non-justiciable. By the same token, even where a court finds a matter to be justiciable, that is, capable of judicial resolution, it may still adopt a highly deferential position in the adjudication of that matter. Thus, a finding that socio-economic rights are justiciable does not solve the difficulties surrounding judicial resolution of socio-economic rights. Rather, it means that, instead of dealing with these difficulties under a label of justiciability, they are dealt with instead through a consideration of constitutional deference. In this way, while all of the objections discussed in this chapter may not constitute a convincing argument for the non-justiciability of socio-

469 G Marshall 'Justiciability' in A Guest (ed) *Oxford essays in jurisprudence* (1961) 269.
470 Sossin (n 466 above) 2.
471 Dennis & Steward (n 386 above) 464.
472 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 77. See the discussion on this judgment in ch four, sec 2.

economic rights, they nevertheless resurface within the adjudication process. The ways in which this occurs may be understood, and criticised, through a discussion of constitutional deference.

3.3 Democratic deficit

The following two sections deal with the substantive objections to judicial review of socio-economic rights. The first major objection is that it is 'undemocratic' for courts to engage in review of these matters. It is beyond the scope of this book to engage in a lengthy discussion of what is meant by the term democracy or of the relative merits of the various types of democracy that have been espoused by political theorists. For the purpose of this book, democracy is defined broadly and loosely to mean the political system of a country in which the government (that is, the legislature and the executive indirectly, at any level of government) is appointed through a process of regular and free elections. As a corollary to this, the government is understood to represent, in some way, the wishes of those who are able to vote, and to be accountable to the electorate — even if this is simply on the basis that they can be voted out of power at the next election. The government is therefore viewed as having 'democratic legitimacy' and its decisions are accepted on that basis.

Opponents to the judicial review of socio-economic rights have argued that the review of these rights would be 'undemocratic' because the courts lack the same democratic legitimacy as the elected branches of government. There are two related aspects to this argument: the first is that it is undemocratic for courts to decide matters which have budgetary implications or which involve matters of policy, most properly decided by the elected branches; and the second is that empowering the courts to engage in this type of review places them in a position which is unacceptable from a democratic perspective. These two arguments are dealt with separately.

3.3.1 Policy and budgetary decisions

The objection to judicial review of socio-economic rights hinges around the notion that, because socio-economic rights involve issues of *policy*, they are not suitable to be decided through a process of judicial decision making and should rather be considered by the democratically elected branches, namely the legislature and, to a lesser extent, the executive. Related to this objection is the argument that because the adjudication of socio-economic rights has budgetary implications, it is not democratically legitimate for the judiciary to engage in this type of review. While these objections are closely related, they remain conceptually separate.

The argument that courts are not the democratically legitimate institution to decide matters of policy is not an argument that pertains solely to review of socio-economic rights, but to judicial review in general, and is premised on a particular understanding of democracy as majority rule.[473] This 'counter-majoritarian dilemma', as it has been called, is one that has received considerable judicial and academic attention over the past decades and relates to a wider debate over the 'proper' role of the courts and the function of judicial review which is unlikely to ever be resolved. As a facet of the separation of powers doctrine, the argument that there even is a counter-majoritarian dilemma is predicated on a particular conception of democracy and, like the separation of powers doctrine, a counter-majoritarian argument against socio-economic rights cannot have any normative force without first asserting a theory of the state and democracy.[474] This objection cannot, therefore, be regarded as a blanket objection to socio-economic rights in that it does not provide a principled reason for distinguishing socio-economic rights from other types of rights, or constitutional review from other forms of administrative judicial review. Certainly socio-economic rights decisions may raise issues of policy, but this will only be relevant to influence the ways and the circumstances in which the courts review the policy before it and the remedy it grants — it cannot be a bar to adjudication. It is in this sense only that the counter-majoritarian dilemma will be relevant to the question of constitutional deference.[475]

The second objection to the judicial review of socio-economic rights on democratic grounds is that the review of socio-economic rights has substantial budgetary implications, and it is therefore unacceptable for courts to engage in this type of review. Again, it cannot be said that socio-economic rights are the only types of rights which have budgetary implications; and judicial review of administrative action and civil and political rights commonly has implications for the national fiscus.[476] The problem again is shown to be one of degree, not kind. In addition, it should be pointed out that the enforcement of socio-economic rights may not always have budgetary implications, especially where the 'negative' aspect of the right is enforced. And even where the 'positive' dimension of the right is enforced, the budgetary implications may be so small that courts do not view them as an obstacle to enforcement. This is illustrated in the Canadian judgment of *Eldridge*,[477] which involved the provision of

[473] Koch (n 430 above) 28.
[474] See the discussion above on the separation of powers doctrine, sec 3.1.
[475] See ch two, sec 2.1.
[476] This was the view adopted by the South African Constitutional Court in the *Certification Judgment* (n 472 above) para 78.
[477] *Eldridge v British Columbia (AG)* [1997] 3 SCR 624.

sign language services for the deaf in the provincial health department. The court held that the cost of providing these services was so minimal relative to the infringement of the right that it could not constitute a 'reasonable basis' for justifying the infringement of the appellant's rights under the Canadian Charter.[478]

Thus, the fact that the adjudication of socio-economic rights may involve a consideration of policy issues and may raise budgetary concerns is not a principled reason for arguing that socio-economic rights are not justiciable, since the same issues are involved in the judicial review of administrative action and in the review of civil and political rights. Of course, in practice, justiciability relates to pragmatic considerations of degree, rather than absolute considerations of what is capable of judicial consideration and what is not. For this reason, a court may find that in a particular matter before it, while socio-economic rights do not raise new problems for judicial consideration as such, the combined effect of a consideration of policy issues, which have budgetary implications, is to render them so problematic that it should view the matter as non-justiciable. The point to be made here is that this will be a decision of an individual court, and must not be seen as a foregone conclusion. This argument should not therefore be raised against the judicial review of all socio-economic rights matters. Rather, courts should assess each matter before them on a case-by-case basis and decide, on the basis of a consideration of the particular issues which that matter raises (whether civil, political or socio-economic) whether it is a matter which should be considered justiciable or not. Moreover, in a constitutional democracy, it could be argued that courts should, as a matter of principle, find the matter to be justiciable, but then engage in discussion, through the principle of constitutional deference, to take into consideration the difficulties raised by the matter. This approach would be consistent with the separation of powers doctrine under which courts are given a constitutional mandate to protect rights.

3.3.2 Politicisation of the judiciary

A further and related argument to that regarding the democratic deficit of socio-economic rights adjudication is the view that, by forcing the judiciary to adjudicate socio-economic rights, they are

[478] As above, para 87. The amount that it would require the provincial government to provide sign language services in the provincial health departments was estimated to be 0,0025% of the provincial health budget. It should also be noted that this case was decided under sec 15(1) of the Charter (the equality provision) and not under a traditional social rights provision. See the discussion of budgetary implications in the adjudication of socio-economic rights claims in South Africa in ch four, sec 3.3.2, and ch five, sec 4.

placed in a democratically unacceptable position. Clearly, this objection to socio-economic rights relates to a far wider discussion on the role of the judiciary in society. This discussion has already been elaborated on in chapter two, through a discussion of the Waldron-Dworkin debate and will not be repeated in detail here.[479] In brief, one may respond to this objection by questioning whether the adjudication of socio-economic rights places the courts in any more a compromised position than the adjudication of civil and political rights?[480] And, even if it is accepted that socio-economic rights do have a greater potential to involve policy and resource-allocation decisions, a second response to this point is to argue that courts are the proper and legitimate forum in which all disputes about rights should be decided. It is precisely because of the political nature of rights that the legislature and executive cannot be trusted to decide whether these rights have been fulfilled, and that the courts, which are supposed to be non-partisan, or which should aspire to be non-partisan, and which specialise in the evaluation of rights, are the most appropriate (or at the very least, not inappropriate) forum for deciding these matters.

3.4 Institutional competence

The final objection to the constitutional entrenchment of socio-economic rights considered here is the argument that courts lack the competence to decide matters which involve complex issues of public policy. One of the key ideas underpinning this argument is the concept of polycentricity. Fuller's work on polycentricity has already been discussed fully in the previous chapter in a discussion of the institutional competence of courts, in the context of constitutional deference.[481] As noted in that discussion, Fuller observes that almost all judicial decisions contain elements of polycentricity and that the distinction between polycentric and non-polycentric decisions is really one of degree.[482] It is only when a polycentric decision has reached a sufficiently high degree of polycentricity that it falls outside of the limits of adjudication.[483] Fuller does not argue that such decisions are incapable of resolution, only that their resolution should not be undertaken through the judicial system. Moreover, the question whether a court should adjudicate a polycentric decision or not is dependent on the way in which precedent operates in a

479 See ch two, sec 2.1.
480 Numerous examples can be cited here to demonstrate this point, eg, *Brown v Board of Education* (1954) 347 US 483, and more recently in the UK, *A v Secretary of State for the Home Department; X v Secretary of State for the Home Department* [2004] UKHL 56.
481 See ch two, sec 2.2.
482 LL Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 397.
483 As above, 398.

particular legal system. The more rigorously courts apply the doctrine of *stare decisis*, the less inclined courts should be to decide polycentric issues, since successive courts will be bound to a rigid decision. If, on the other hand, 'judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process as a whole is enabled to absorb these covert polycentric elements'.[484] Fuller's understanding of the problems relating to polycentric adjudication is therefore dynamic and involves an understanding of the specific consequences of polycentric adjudication on the legal system in question. He does not draw a bright line between polycentric decisions as non-justiciable and non-polycentric decisions as justiciable. Instead, his work can be used to support a more subtle approach, where the degree of polycentricity is one of the factors that influences a court's approach to justiciability or constitutional deference.

In short, like all of the objections discussed in this chapter, the institutional competence of the judiciary (or lack thereof) cannot be raised as a bar to the justiciability of socio-economic rights in all circumstances. While the adjudication of these rights may well raise polycentric issues, this is only one of many considerations to be taken into account in determining whether a particular matter is justiciable and, if it is, then in determining the appropriate level of constitutional deference.

4 Conclusion

This chapter has discussed the major objections to the judicial adjudication of socio-economic rights, grouping them under the broad headings of philosophical objections, and objections based on the doctrine of separation of powers. As the discussion has demonstrated, the various objections to socio-economic rights cannot be sustained as principled reasons for excluding these rights from the ambit of judicial review. At most, they are value-laden assertions based on particular conceptions of the state, democracy and of rights, and cannot constitute an objective, theoretical argument against the constitutionalisation of socio-economic rights.

Nevertheless, these objections, while not amounting to an absolute bar to the justiciability of socio-economic rights, do raise important practical considerations which the courts will need to take into consideration if faced with deciding a socio-economic matter. As already emphasised, the way in which the courts do so may be

[484] As above, 398.

examined through the framework of constitutional deference set out in the previous chapter. The following two chapters undertake this analysis within the context of South Africa.

CHAPTER 4

ADJUDICATION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

1 Introduction

The transition to democracy heralded a new era of constitutional supremacy, marking a decided break with the previous culture of parliamentary supremacy. Indeed, one of the founding values of the Constitution is the '[s]upremacy of the Constitution and the rule of law',[485] and section 2 of the Constitution proclaims: 'This 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.' South African courts, in turn, are bound by the Constitution and are obliged to apply the Constitution in carrying out their judicial function.[486] In particular, the Constitutional Court is the 'highest court in all constitutional matters', and must confirm any order of invalidity made by another court or an Act of national or provincial government or conduct of the President.[487] The Constitutional Court is therefore the authoritative interpreter of the Constitution, and its interpretations are binding on all organs of state.[488] Being the authoritative interpreter of the Constitution does not, however, mean that the Constitutional Court is the sole interpreter. Indeed, since all organs of state are bound by the Constitution, they must therefore engage in an exercise of interpretation of what the Constitution means in order to carry out their functions. Where, however, there is a conflict of interpretations, the interpretation adopted by the Constitutional Court is authoritative. Furthermore, in appropriate circumstances, the Court may choose to prefer the interpretation of the Constitution

[485] The Constitution of the Republic of South Africa Act 108 of 1996 sec 1(c).
[486] As above, sec 165(2).
[487] As above, secs 167(3)(a) & 167(5).
[488] As above, sec 165(5).

adopted by another organ of state, such as parliament. In such circumstances, the Court can defer to that interpretation,[489] although it should be noted at the outset that it is the Court's decision when and to what extent it should defer to that interpretation, rather than the outcome of a mechanical operation of the separation of powers doctrine.

Perhaps the most significant sea change brought about by the Constitution and, in particular, the Bill of Rights, is the 'culture of justification' which it ushers in.[490] For Mureinik, the Constitution can be understood as a bridge from a 'culture of authority', underpinned by parliamentary sovereignty, and a parliament elected by only a minority of the population, to a 'culture of justification' in which 'every exercise of power is expected to be justified'.[491] This notion of a culture of justification can be traced back to his earlier work, based on Dworkin's notion of 'law as integrity'.[492] As has already been intimated in earlier chapters, it is this foundational value of justification which is crucial to the approach to deference advocated in this book.[493]

In chapter three, in the discussion of the doctrine of separation of powers, it was noted that there is no neutral or correct model of separation of powers.[494] Rather, every country will develop its own dynamic model of the separation of powers based on its constitutional culture, responses to historical injustice as well as a political assessment of the effectiveness of checks and balances elsewhere in government. This approach to separation of powers is expressly adopted by the South African Constitutional Court,[495] and informs the discussion of constitutional deference and the analysis of the case law in this chapter. The chapter begins (in section 2) by outlining some of the general issues of justiciability of socio-economic rights in South

489 RE Barkow 'More supreme than court? The fall of the political question doctrine and the rise of judicial supremacy' (2002) 102 *Columbia Law Review* 237 239; C Shackleford 'Developing South African constitutional law: A joint enterprise' unpublished DPhil thesis, Oxford University, 2006 16.

490 E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32.

491 As above, 32. Mureinik emphasises the centrality of the limitations clause, as well as the right to just administrative action and the right to freedom of information, to achieving this new political order: as above, 33-44. Note that Mureinik is also critical of the limitations clause (in the interim Constitution) for failing to render certain rights absolute: as above, 33-38.

492 D Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11 17. Dworkin's notion of 'law as integrity' is to be found in R Dworkin *Taking rights seriously* (1977).

493 See ch two, sec 4. See also M Hunt 'Sovereignty's blight: Why contemporary public law needs the concept of "due deference"' in N Bamforth & P Leyland (eds) *Public law in a multi-layered constitution* (2003) 337 340; D Dyzenhaus & M Hunt 'Deference, security and human rights' in B Goold & L Lazarus (eds) *Security and human rights* (2007) 125 137-45.

494 See ch three, sec 3.1.

495 *De Lange v Smuts NO & Others* 1998 3 SA 785 (CC) para 60.

Africa. In section 3, it moves on to a discussion of the four primary Constitutional Court decisions, examining the reasoning of the Court through the concept of constitutional deference. In the following chapter, some of the more important findings which emerge from this discussion are teased out and discussed in greater detail. The chapter ends with some general observations regarding the approach of the South African courts.

2 Justiciability

In the Introduction, the drafting history of the South African Constitution leading up to the inclusion of socio-economic rights was discussed.[496] One of the unusual features of that process was the 'certification process', whereby the newly established South African Constitutional Court certified that the 'new' 1996 Constitution complied with a set of pre-defined Constitutional Principles. These Constitutional Principles were created during the political negotiations which resulted in the holding of South Africa's first democratic elections on 27 April 1994. They (and, in turn, the Constitution) are therefore best understood as a political compromise which facilitated the hand-over of power.

In the hearings for the *Certification* judgment,[497] the inclusion of socio-economic rights in the 1996 Constitution was challenged on three main grounds, namely, that socio-economic rights are not 'universally accepted fundamental rights' in accordance with Constitutional Principle II; that socio-economic rights are inconsistent with the doctrine of separation of powers in accordance with Constitutional Principle IV; and that socio-economic rights are not justiciable.[498] The first objection was easily dismissed on the grounds that, although socio-economic rights are not 'universally accepted fundamental rights', Constitutional Principle II did not exclude the inclusion of such rights.[499] In response to the second objection, the Court found that:

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. … In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred

496 See Introduction, sec 3.
497 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
498 As above, paras 76-78.
499 As above.

> upon them by a bill of rights that it results in a breach of the separation of powers.[500]

Similarly, in response to the third objection, the Court found that the fact that socio-economic rights judgments may have budgetary implications would not constitute a bar to their justiciability. Thus, the South African Constitutional Court does not draw a sharp distinction between rights that have budgetary implications and those that are justiciable; nor does it maintain a sharp distinction between the enforcement of civil and political rights and socio-economic rights.

Despite this principled acceptance of the justiciability of socio-economic rights, the South African courts still display a reluctance to engage with socio-economic rights in the same way and to the same extent as they do civil and political rights.[501] Socio-economic rights are, in this sense, viewed as warranting a high level of deference in their interpretation and enforcement. Arthur Chaskalson, the former Chief Justice of the South African Constitutional Court, conceded as much when he stated that socio-economic rights are on the 'border of the separation of powers between the judiciary and the executive'.[502] The remainder of this chapter will consider the specific reasoning of the South African courts (in particular, that of the Constitutional Court) in socio-economic rights adjudication and explore the ways in which this reasoning may be better understood through the concept of constitutional deference.

3 Overview of the case law

To date, there have been six major socio-economic rights decisions from the South African Constitutional Court. In addition, there are several High Court decisions dealing with socio-economic rights, as well as numerous administrative law decisions in the High Courts, the Supreme Court of Appeal and the Constitutional Court, which review socio-economic policy, or which are relevant to the adjudication of socio-economic policy. These High Court and administrative law decisions will be discussed insofar as they illustrate and illuminate the discussion of the Constitutional Court jurisprudence, which will form the focus of the consideration in this section. The discussion of these cases has been grouped into three sections dealing with the rights to

[500] As above, para 77.
[501] DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "Deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 314.
[502] A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law* 590 601.

healthcare, housing and social welfare respectively, roughly mirroring the chronology of the Constitutional Court judgments.

At the time of finalising this text, the Constitutional Court had only recently handed down decisions in the matters of *Mazibuko v City of Johannesburg*,[503] dealing with the right to water and *Abahlali BaseMjondolo v Premier, KwaZulu-Natal*,[504] concerning a constitutional challenge to provincial legislation dealing with the right to adequate housing and eviction. These decisions have consequently not been considered in detail below.

3.1 The right to healthcare and emergency medical treatment

The first Constitutional Court decision to consider a socio-economic right is *Soobramoney v Minister of Health, KwaZulu-Natal*.[505] The matter began in the Natal High Court where the applicant, Mr Soobramoney, sought an order directing the state to provide him with continuing dialysis treatment.[506] His claim was made on the basis of section 10 (the right to dignity) and on section 27, in particular section 27(3), which provides that '[n]o one may be refused emergency medical treatment'. The argument regarding dignity does not appear to have been pursued. On the facts, the Court found that Mr Soobramoney could not rely on section 27(3) because his condition did not constitute an emergency medical condition as contemplated by the constitutional drafters.[507] In the sections below, two aspects of the judgment are considered: the negative nature of the right not to be refused emergency medical treatment in section 27(3) of the Constitution; and the nature of the state's obligations to realise socio-economic rights more generally, through an elaboration on what has become known as the reasonableness test.

The second socio-economic rights decision of the Constitutional Court dealing with healthcare (and the third altogether) is *Minister of Health v Treatment Action Campaign* (*TAC*).[508] This case dealt with an appeal against a High Court order which found that the state's policy to limit the provision of an anti-retroviral drug called Nevirapine to pilot sites was unreasonable and thus in violation of

503 *Mazibuko & Others v The City of Johannesburg & Others* 2009 ZACC 28.
504 *Abahlali BaseMjondolo Movement SA & Another v Premier, KwaZulu-Natal & Others* 2009 ZACC 31, an appeal against the decision in *Abahlali BaseMjondolo Movement SA & Another v Premier, KwaZulu-Natal & Others* 2009 3 SA 245 (D).
505 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).
506 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 430 (D).
507 As above, 440.
508 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC).

section 27(2) of the Constitution.[509] Nevirapine is used for the prevention of 'mother-to-child-transmission' of HIV at birth and was offered free of charge, for a period of time, to the South African government by one of the major pharmaceutical companies in the country. The Department of Health's position was that Nevirapine should be made available only as part of a comprehensive programme, including formula feed, vitamin supplements and antibiotics, as well as appropriate testing and counselling prior to the administration of Nevirapine. As it was not yet possible to provide this comprehensive programme throughout the country, and because the state had concerns over the 'safety and efficacy' of Nevirapine, it was planned that the provision of the drug would be restricted to two pilot sites for each province for two years and that, thereafter, an assessment would be made as to whether and how it would be available in the rest of the country. The evidence placed before the Court, however, was that there were, already at that time, many more hospitals throughout the country which were willing and able to provide Nevirapine including the 'full package', but which were prevented from doing so by the state's policy. In the High Court, Botha J found that the state's policy to limit the provision of Nevirapine to pilot sites was unreasonable and an 'unjustifiable barrier to the progressive realisation of the right to healthcare'. In this sense, the state's policy amounted to a 'breach of their negative obligation' to refrain from interfering with the right of access to healthcare.[510]

On appeal to the Constitutional Court, the Court considered two arguments of the applicants.[511] The first was that it was unreasonable for the state to restrict the provision of Nevirapine to two pilot sites per province, thus prohibiting the distribution of Nevirapine at public hospitals outside of those sites. The second issue was whether the state was constitutionally obliged to plan and implement a comprehensive programme for the prevention of mother-to-child-transmission of HIV throughout South Africa.[512] In the discussion below, two aspects of the decisions are considered in detail: the first is a discussion of the doctrine of deference and separation of powers, and how this would shape the Court's approach to adjudication of socio-economic rights; and the second is a consideration of the Court's approach to negative and positive components of socio-economic rights.[513]

509 *Treatment Action Campaign & Others v Minister of Health & Others* 2002 4 BCLR 356 (T).
510 As above, 384.
511 The applicants were actually the respondents before the Constitutional Court, but referred to as applicants in the judgment. For ease of reference to the judgment, the same terminology is used here.
512 *TAC* (n 508 above) paras 4-5 18 44.
513 In secs 3.1.3 & 3.1.4 respectively below.

3.1.1 Emergency medical treatment

This section begins the discussion of the Court's treatment of the right to healthcare by considering both the the High Court and the Constitutional Court's approach in *Soobramoney* to one of the Constitution's component rights: the right not to be refused emergency medical treatment in section 27(3) of the Constitution. In its analysis of this section, the High Court began by focusing on the negative nature of the right, pointing out that section 27(3) does not create a right to emergency medical treatment; rather it creates a negative right not to be refused emergency medical treatment.[514] In other words, the treatment must already be 'possible and available' and the right is not to have that available emergency treatment refused. In this sense, the right is contextually constrained by the existing resources and is subject to budgetary constraints.[515] In this case, the state successfully demonstrated that 'there [were] no funds available to provide patients such as the applicant with necessary treatment'.[516] In making this finding, Combrinck J distinguished his findings from those of Brand J in *Van Biljon*.[517] *Van Biljon* concerned an application based on section 35(2)(e) of the Constitution (the unqualified right of detained persons to medical treatment) by a group of HIV-positive prisoners, for the provision of anti-retroviral drugs. The state contended that the Court should not entertain the application since it was a matter which was to be determined by budgetary considerations, and was therefore non-justiciable.[518] The applicants, however, argued that the state could not rely on budgetary constraints as a legitimate reason to refuse adequate medical treatment since this right was entrenched in the Constitution.[519] The Court accepted this assertion by the applicants, but then went on to find that budgetary considerations were nevertheless relevant in determining what constitutes 'adequate medical treatment'.[520] On the facts, the Court found that the state had not shown that they could not afford anti-retroviral treatment for

514 n 506 above, 439.
515 As above, 440.
516 As above, 441.
517 As above, 440. *Van Biljon & Others v Minister of Correctional Services & Others* 1997 4 SA 441 (C).
518 *Van Biljon* (n 517 above) para 45.
519 As above, para 48.
520 As above, para 60. See ch five, sec 4 for a fuller discussion on the role of budgetary limitations in socio-economic rights adjudication.

prisoners and the Court therefore ordered that the state provide this medicine.[521]

On appeal to the Constitutional Court, Soobramoney based his claim on section 11 (the right to life) and again on section 27(3). Chaskalson P (writing for the majority; there were separate concurring judgments by Madala and Sachs JJ) found that the right to life could not be used to ground a claim for emergency medical treatment since such a right was already explicitly provided for in section 27(3). The Court, however, rejected the argument that the treatment claimed constituted 'emergency medical treatment' and therefore, arguably, should have considered (or at least explained why it would not consider) the argument based on the right to life, particularly in light of the consideration that the right to access to healthcare is qualified, whereas the right to life is not.[522] In doing so, the Court shut the door on any possible expansive reading of the right to life as inclusive of socio-economic rights where such rights are specifically provided for elsewhere in the Constitution.[523] This also demonstrates a trend by the Court to subsume all socio-economic rights claims under the qualified rights in sections 26 and 27.[524]

3.1.2 Reasonableness

Chaskalson P then turned his attention to section 27 as a whole and began his discussion of socio-economic rights by conceptualising those rights within the general constitutional project in South Africa:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate

[521] A similar judgment may be found in *E N & Others v Government of RSA & Others* 2007 1 BCLR 84 (D) para 35, where the Durban and Coast Local Division of the High Court handed down a structural interdict, requiring the state to provide anti-retroviral drugs to HIV-positive prisoners meeting specified criteria, and to file an affidavit before the Court setting out how this was to be achieved. In that case, budgetary contraints were, however, not in issue. It should be noted that the rights of prisoners to adequate healthcare are strenghted by sec 35(2)(e) of the Constitution, which provides that all detained persons have the right to 'conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adqueate accommodation, nutrition, reading material and medial treatment'. See K McLean 'Housing' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 55-54 for a discussion of prisoners' rights to housing.

[522] M Pieterse 'A different shade of red: Socio-economic dimensions of the right to life in South Africa' (1999) 15 *South African Journal on Human Rights* 372 382.

[523] *Soobramoney* (n 505 above) paras 15 & 19. This expansive approach to the right to life has been adopted by the Indian Supreme Court, and was expressly rejected by the Constitutional Court: n 505 above, paras 15-19.

[524] See sec 3.2.1 below for a discussion of the Constitutional Court's treatment of sec 28(1)(c).

> health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[525]

Chaskalson P considered the socio-economic rights provided for in sections 26 and 27 and noted that the duty imposed on the state by these rights was 'dependent upon the resources available for such purposes', and that the right was, in turn, correspondingly 'limited'.[526]

On the facts, Chaskalson P found that section 27(3) was not applicable, as this was not an instance of 'emergency healthcare' and that Mr Soobramoney's claim should instead be determined through sections 27(1) and (2) — the internally-qualified right of everyone to access to healthcare.[527] It was in this context that the Court then turned to an assessment of the measures undertaken by the hospital in question to provide access to dialysis treatment. Mr Soobramoney had been refused dialysis treatment in accordance with a hospital policy which prioritised those persons for whom the treatment was a potential cure or for whom the treatment was a temporary measure, pending a kidney transplant. This policy operated to exclude patients, such as Mr Soobramoney, for whom the treatment would be indefinite as they could not be cured and were not eligible for a transplant.[528] The Court found that in the context of severe budget constraints, the state's policy complied with the obligations imposed on the state under section 27, that is, that its measures were reasonable.[529] In the words of Chaskalson P: 'It has not been shown ... that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations.'[530] As Liebenberg points out, however, this scrutiny of policy failed to consider the question of whether the budgetary allocation to dialysis treatment was sufficient.[531] In this way, the reasonableness approach, like that in administrative law review, restricts the consideration by the court to the decision on its own terms.

525 *Soobramoney* (n 505 above) para 8.
526 As above, para 11. See the further discussion of the relationship between parts (1) and (2) of secs 26 and 27, and its relationship to the 'reasonableness test' in ch five, secs 2.1 and 2.2.
527 *Soobramoney* (n 505 above) paras 21-22.
528 As above, para 3.
529 The appellant conceded as much: as above, para 25. His claim, rather, was that the state had a positive obligation in terms of sec 27(3) to provide dialysis treatment as part of emergency medical treatment.
530 As above, para 36.
531 S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2003) 33-33.

Thus, the Court's analysis focused on the 'reasonableness' of the state's 'legislative and other measures, within its available resources' to realise the right to healthcare services. It is this focus on the reasonableness of state action and policy that has become the basis of the Court's approach to socio-economic-rights adjudication. It is difficult, on the basis of *Soobramoney* alone, to examine the standard of scrutiny of the reasonableness test which the Court employed in this judgment. Chaskalson P appeared to adopt a fairly strict level of scrutiny, examining the policy decisions of the hospital in light of the budgetary constraints facing the hospital and the health sector in general, and discussing the consequences which an order in the appellant's favour would make.[532] Yet, ultimately Chaskalson P found the policy to be 'reasonable' and deferred to decisions made by the authorities. In reaching this decision, he cited *ex parte B*[533] as authority for the argument that the courts should not make decisions on how best a limited health budget should be allocated to patients — ignoring the fact that the United Kingdom does not have a justiciable right to healthcare and that the context in which that decision was made therefore differs considerably from that in South Africa.[534] Indeed, the fact that there is a justiciable right to healthcare appears to have made little difference to the way in which the case was decided, and the same judicial reasoning could have been followed using the notion of reasonableness in administrative judicial review. In this way, the Court adopted a fairly deferential attitude to the state's decision on how resources should be allocated in the provision of dialysis treatment.[535]

An interesting counter-example to *Soobramoney* illustrating this point is to be found in the United Kingdom decision of *Rogers*.[536] The judgment concerned the decision of a local health authority to refuse the provision, at state expense, of a drug for the treatment of early-stage breast cancer, as the applicant could not demonstrate 'exceptional circumstances' as to why she should be given the drug — in accordance with the local health authority's policy. The Court of Appeal found that, since the matter concerned the 'life or death' of the appellant, it would subject the decision of the local health

532 *Soobramoney* (n 505 above) paras 22-36.
533 *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898.
534 *Soobramoney* (n 505 above) paras 30-31.
535 See K McLean 'Deconstructing deference: A comparative analysis of judicial approaches to healthcare in South Africa and Canada' in PE Andrews & S Bazilli *Law and rights: Global perspectives on constitutionalism and governance* (2008) 115 for a comparative discussion on the nature of the courts' approach to deference in the adjudication of healthcare decisions in South Africa and Canada, discussing the decisions of *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) and *Chaoulli v Quebec (Attorney General)* 2005 SCC 35 respectively.
536 *Rogers v Swindon NHS Primary Care Trust, The Secretary of State for Health* [2006] EWCA Civ 392.

authority to 'rigorous scrutiny'.[537] Upon such scrutiny, the Court found that, since the health authority had not provided evidence to the Court that it could, on medical grounds, distinguish between exceptional and non-exceptional circumstances for the provision of the drug, the policy was irrational and therefore unlawful.[538] Clearly the facts differ from those in *Soobramoney* where, in that case, the hospital had a clear and rational basis for distinguishing between the class of patients eligible for dialysis treatment and those not — and *Rogers* is not cited in order to illustrate the differing outcomes. Rather, *Rogers* is cited for its similarity with *Soobramoney*, since the approach to judicial scrutiny of the two policies was the same, illustrating that the reasonableness review adopted for the review of socio-economic rights is the same standard as that applied to review in administrative action.

In short, it is precisely because the Court, through an (inexplicit) consideration of the factors underpinning constitutional deference, wishes to adopt a restrictive approach to the interpretation and enforcement of socio-economic rights, that it adopts a quasi-administrative law reasonableness standard of review. While lauded by some,[539] this approach masks an unexamined and unexplained acceptance that socio-economic rights require a different approach to that adopted in the review of civil and political rights. Clearly, an express discussion of the factors which underpin constitutional deference would contribute to greater transparency in judicial reasoning — and in turn, allow the courts (and others) to reflect on whether its restrictive approach is indeed necessary or justified.

3.1.3 Deference and separation of powers

In *TAC*, the Constitutional Court finally initiated a discussion on the doctrine of separation of powers and whether it would mean that the Court should approach the adjudication of socio-economic rights differently to that of civil and political rights. The Court did so by raising two preliminary issues. The first concerned the deference the Court was to show the executive regarding policy formulation and the second related to the remedy which the Court should provide. In the words of the Court: 'These considerations are relevant to the manner in which a court should exercise the powers vested in it under the Constitution.'[540] This is notable as the first time the Court expressly considered the question of how deference, or the doctrine of

537 As above, para 56.
538 As above, para 81.
539 Eg CR Sunstein *Designing democracy: What constitutions do* (2001) 234; M Kende 'The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective' (2003) 6 *Chapman Law Review* 137 142-50.
540 n 508 above para 22.

separation of powers, relates to the *approach* which it should adopt in the adjudication of socio-economic rights rather than the broader, but related, question of *whether* it should adjudicate them.[541]

In a discussion of why the Court should not adopt a minimum core interpretation of sections 26(1) and 27(1),[542] it found that

> [C]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards ... should be, nor for deciding how public revenues should most effectively be spent ... Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focussed role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation ... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[543]

The Court therefore emphasises its institutional limitations as the primary reason for adopting its particular position in relation to constitutional deference. Notably, the Court grounds this position firmly in the text of the Constitution, carefully constructing the façade of its being a neutral interpreter of the Constitution, rather than acknowledging the open-ended nature of the text, its multiple interpretations, and the fact that it is the Court which chooses any particular interpretation of sections 26 and 27. Again, it would be preferable for the Court to acknowledge its choices openly, using the explanatory framework of constitutional deference, thereby facilitating a dialogue with the state, and other parties, as to the appropriate role of courts in socio-economic rights adjudication. It is not helpful for the Constitutional Court to obfuscate its thinking in a cloud of seemingly neutral interpretation. A culture of justification should require not only the legislature and executive to be open and accountable — it should also push courts to engage openly in a discussion on their role in transforming South African society.

In a later discussion on the appropriate remedy to be granted, the Court addressed a similar argument made by the state, also under the separation of powers doctrine, that the only appropriate remedy is for the Court to issue a 'declaration of rights', as it is the executive's prerogative solely to make policy.[544] The Court responded as follows:

[541] See the discussion on justiciability above in sec 2.
[542] See the discussion on minimum core in ch five, sec 3.1.
[543] *TAC* (n 508 above) paras 37-38.
[544] As above, paras 96-97.

> This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.[545]

The Court was therefore clear that it would not adopt a rigid adherence to a functionalist separation of powers and would, where necessary, make declaratory or mandatory orders that impinge on the traditional roles of the other branches of government, when this is 'mandated by the Constitution itself'.[546] While this flexible approach is to be welcomed, it still begs the question of how the Court interprets what the Constitution mandates. Again, a more transparent approach to constitutional deference would be useful here.

3.1.4 Negative and positive rights

The Constitutional Court then moved on to a consideration of the obligations of the state in terms of section 27 of the Constitution. The first issue considered by the Court was phrased by the applicants as a violation of the negative obligation of the state in providing access to healthcare: 'the first issue is whether [the] respondents are *entitled to refuse* to make Nevirapine (a registered drug) available to pregnant women who have HIV and who give birth in the public health sector.'[547] The Court appears to have accepted this argument that the state's action undermined a 'negative obligation' to respect and protect section 27(1).[548] In response, the state provided four justifications for this policy: first, it had concerns over the efficacy of the drug in the absence of appropriate breastfeeding alternatives; second, there was concern about the development of resistance to Nevirapine by the mother and child at some future date; third, the state was concerned about unknown safety risks from the use of Nevirapine; and finally, the state wished to evaluate the 'operational challenges' of providing the full package of care, which it believed was necessary for the administration of Nevirapine.[549] The Court considered these reasons carefully, concluding that the reasons given by the state were either not supported by the evidence, were contradictory, or were irrelevant.[550] The Court ultimately found that, in the circumstances, it was unreasonable for the state to limit the

[545] As above, para 98 (footnote omitted).
[546] As above, para 99.
[547] As above, para 18 (my emphasis).
[548] As above, para 46.
[549] As above, paras 10-17 51-56.
[550] As above, paras 57-66.

provision of Nevirapine to two pilot sites per province where there was capacity for it to be administered in public hospitals elsewhere.[551] Although the Court does not say so, it appears that on its interpretation, the state's policy would even have been found to have been *Wednesbury*-unreasonable, if that standard had been applied.[552]

Despite finding that the state's reasons for infringing the negative right of access to healthcare were not reasonable, the Court then went on to apply a *reasonableness* inquiry to determine the constitutionality of the state's restriction of the provision of Nevirapine to pilot sites where the evidence indicated that many other hospitals had the resources and capacity to provide the drug. The Court thus applied the same test in considering the constitutionality of the infringement as it would for the infringement of a positive obligation, citing and applying the test for reasonableness set out in *Grootboom*.[553] This is surprising, as one would have expected the Court to adopt a more rigorous degree of scrutiny to the infringement of a negative right.[554] Instead, the second stage of the enquiry functions almost as a limitations test — one which the state policy ultimately failed.[555]

The second issue before the Court was whether the state was obliged to develop and implement a programme to prevent the mother-to-child transmission of HIV, that is, whether its existing programme for the prevention of mother-to-child transmission of HIV was reasonable. The Court found that this issue was closely intertwined with the first.[556] In deciding whether the existing programme was reasonable, the Court focused on the rigidity of the scheme, thus linking it to the first issue:

551 As above, paras 80-81.

552 The so-called *Wednesbury* test for unreasonableness arises from the oft-cited English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The court created the (un)reasonableness test for judicial review of administrative action as being action which is so unreasonable that no reasonable person could have made it. This high threshold for unreasonableness (or low threshold for reasonableness) indicates a willingness on the part of the court to defer to the executive with respect to the legality of its action. See ch one, sec 3.2 for a discussion on the relationship between the doctrine of margin of appreciation and Wednesdbury unreasonableness. See also the discussion in ch five, sec 2.1 below on the nature of the reasonableness test adopted by the Constitutional Court.

553 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC) paras 68-73.

554 P de Vos 'Pious wishes or directly enforceable human rights: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67 94.

555 See Liebenberg (n 531 above) 33-18 to 33-19 for a discussion on the confusion between negative and positive duties in *TAC*.

556 *TAC* (n 508 above) para 82.

> The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole will have to be reviewed.[557]

The language of reasonableness, and the seemingly neutral scrutiny that this entails, obscures the fairly robust analysis of the health policy and the evidence supporting that policy which the Court engages in. If the state's case were to be put slightly differently, it argued, in line with its policy, that it wanted to provide Nevirapine only as part of a full package of care, and to do so, it first wanted to assess the logistics for the provision of Nevirapine and the full package of care before deciding whether, and how, to provide the drug throughout the country. While some might disagree with this position, it could be argued that it was entitled to a measure of deference. Nevertheless, the Court tackled this question directly: 'The real dispute between the parties on this aspect of the case is … whether it was reasonable to exclude the use of Nevirapine for the treatment of mother-to-child transmission … where testing and counselling are available and where the administration of Nevirapine is medially indicated', but is short of the full package of care.[558] The Court found that it was not. Instead of deferring to the views of the executive, the Court engaged in a detailed discussion of the state's policy and found that where hospitals had existing capacity (which did not extend to the full package of care), they had to be allowed to prescribe Nevirapine, and that the state had to take steps 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'.[559] Thus, the Court issued a declaratory order, that

> [s]ections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the right of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.[560]

In this way, the Court indicated that section 27 places clear positive obligations on the state to develop and implement a reasonable policy. The Court therefore adopted a fairly low level of deference, mainly due to the nature of the interests involved, the minimal budgetary implications for the state, and the seriousness with which it viewed the HIV-AIDS epidemic in the country.

[557] As above, para 95.
[558] As above, para 50.
[559] As above, para 95.
[560] As above, para 135.

Notably, there was a change in government policy prior to handing down the judgment with an accelerated expansion of the programme to provide Nevirapine throughout the country. This fact illustrates well the political pressure placed on government to change its policy — which it did, pre-empting the handing down of the judgment. This shift in policy could also have been influential in the Court's decision to issue a declaratory order only, since any other order would have been pointless.[561] The relatively high level of deference found in the remedy is therefore to be understood in the context in which the order was made.

3.2 The right to adequate housing

Government of the Republic of South Africa v Grootboom[562] was the second socio-economic rights decision handed down by the Constitutional Court, and arguably the most important. The decision concerned a community who settled on private land, after leaving the deplorable conditions of their previous settlement. The owner of the land sought and obtained an eviction order under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, and the community then sought shelter on a municipal sports field. After requesting assistance from the relevant local government authority to no avail, the community brought an application against the municipality in the Cape High Court for an order granting temporary shelter, relying on sections 26(1) and (2) (the internally-limited right of everyone to adequate housing), and on section 28(1)(c) (the unqualified right of children to shelter) of the Constitution. Davis J granted an order in terms of section 28(1)(c), which instructed the respondents to provide shelter for the children in the community along with their parents. The state appealed against this order to the Constitutional Court and, after the intervention of various *amici curiae*, the claim based on sections 26(1) and (2) was also reargued.

The Court held that the right in section 26, and in section 28, did not entitle 'the respondents to claim shelter or housing immediately upon demand', yet emphasised that socio-economic rights were nevertheless justiciable rights, which could be enforced by courts in certain circumstances.[563] Rather than directly regulating the way in which the government fulfils its duty to provide housing, the Court issued a declaratory order to the effect that the state must have in place a reasonable plan to realise the right to housing over time and

561 As above, paras 117-22. The High Court, by contrast, issued a structural interdict.
562 n 553 above.
563 As above, paras 20 94-95.

within its budgetary constraints, and that this programme must include relief for those in desperate need.

3.2.1 Children's rights to shelter

In the High Court decision of *Grootboom*,[564] Davis J, relying on the precedent set by the Constitutional Court in *Soobramoney*, found that the respondents had 'produced clear evidence that a rational housing programme [had] been initiated at all levels of government and that such programme [had] been designed to solve a pressing problem in the context of the scarce financial resources'.[565] As such, the application based on section 26 had to fail. The Court was, therefore, easily satisfied that the state had demonstrated that it had put in place a reasonable housing programme.

The High Court next considered the alternative claim based on section 28(1)(c) and found that, while the primary obligation to maintain and shelter children rests with their parents, when parents are unable to provide shelter, there is an obligation on the state to do so.[566] In coming to this conclusion, Davis J noted the textual difference between the qualified right of everyone to have access to adequate housing, and the unqualified right of children to shelter, and interpreted this textual difference as according a stronger right of shelter to children:

> Accordingly the question of budgetary limitations is not applicable to the determination of rights in terms of section 28(1)(c) ... The right is conferred upon children. That right has not been made subject to a qualification of availability of financial resources.[567]

In making this finding, Davis J was quick to point out that this did not mean that the right would be enforceable on demand by all children, and that all claims would have to be evaluated on their facts. Moreover, each case should be interpreted in the context of the Constitution as a whole.[568] For this reason, Davis J went on to hold that:

> A parsimonious interpretation of section 28(1)(c) which denied shelter to 276 infants as well as other children would be incongruent with a constitutional instrument which envisages the establishment of a society based on freedom, equality and dignity. To implement the right in this

564 *Grootboom v Oostenberg Municipality & Others* 2000 3 BCLR 277 (C).
565 As above, 286.
566 As above, 288. See generally S Rosa & M Dutschke 'Child rights at the core: The use of international law in South African cases on children's socio-economic rights' (2006) 22 *South African Journal on Human Rights* 224 245-59.
567 n 564 above, 291.
568 As above.

> case so that shelter will be provided for the children in circumstances where they will be denied the psychological comfort and social support of their parents would be to permit the breakup of family life of a kind which the new Constitution is determined to prevent. In my view such a conclusion cannot be justified and hence the relief given must allow the parents to move with their children to the shelter provided to the latter as the bearers of such right.[569]

Thus, Davis J interpreted section 28(1)(c) to mean that children (in certain circumstances) have an unconditional right to shelter. Whether this right is enforceable against the state will depend on the facts in any given case. In *Grootboom*, the parents of the children applicants were unable to provide shelter for their children and therefore the children had a claim against the state. Moreover, since it was in the best interests of the children that they remain with their parents, this meant that the parents of the applicant children similarly derived a right to shelter.

The interpretation of the High Court is in line with the interpretation adopted in the *travaux préparatoires*, which acknowledge the difference in wording and notes that children's rights are not qualified in the same way as sections 26 and 27 of the Constitution. In explaining the differences in wording, the Panel of Constitutional Experts stated:

> The international instruments dealing with children's rights do not limit the rights of children by requiring reasonable and progressive steps. This is because of the view that it is inappropriate for children's rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also, children cannot be expected to participate actively in the human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do. The difference in formulation means that the state would undertake to make a greater effort in order to secure the rights of children.[570]

The constitutional drafters therefore adopted an interpretation of children's socio-economic rights which is in line with international law — affording greater protection to children than adults.[571] It was this differentiation in approach that the Constitutional Court found problematic, as demonstrated in the following passage where the Court discussed the findings of the High Court:

[569] As above.
[570] *Travaux Préparatoires* Memorandum of the Panel of Constitutional Experts on 'Children' (5 February 1996) 2.
[571] See also De Vos (n 554 above) 88.

> This reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing [note the use of the word *housing* rather than *shelter*] under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.[572]

There are two main problems with this reasoning. First, the Court conflates shelter and housing, finding that there is no 'real distinction' between the two.[573] As a result, parents are accorded two overlapping rights — a right to housing, subject to available means and progressive realisation, in section 26, and a right to *housing* on demand in section 28(1)(c). These two rights conflict, producing 'an anomalous result' which undermines the 'carefully constructed constitutional scheme for progressive realisation' of the right to housing. This reasoning is wrong because, first, the constitutional drafters clearly intended there to be a difference in meaning between shelter and housing; second, as Yacoob J points out in the quote above, this reading undermines the construction for progressive realisation in section 26 in a way that the High Court judgment does not; and third, the result of this reasoning is that section 28(1)(c) is narrowed down effectively to apply only to children without parents — a reading that is neither justified by the text, nor consistent with the constitutionally entrenched 'best interests of the child' principle.

The second problem with the reasoning of the Court is that it focuses on the rights of the parents rather than the child, thereby subsuming children's rights under general socio-economic provisions. This is made clear a few paragraphs later where the Court states that

> [t]he obligation created by s 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by ss 25(5), 26 and 27 of the Constitution ... There is an evident overlap [in content] between the rights created by ss 26 and 27 and those conferred on children by s 28. Apart from this overlap, the s 26 and 27 rights are conferred on everyone including children while s 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents.[574]

[572] *Grootboom* (n 553 above) para 71.
[573] As above, para 73.
[574] As above, para 74.

The Court then solves this 'problem' by reading sections 28(1)(b) and (c) together. Section 28(1) provides:

> Every child has the right —
>
> …
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic healthcare services and social services;

The Court read these two sections together and held that 'appropriate alternative care' in section 28(1)(b) is what is outlined in section 28(1)(c). This means that when children are in the care of their families, they are entitled to basic nutrition, shelter, basic healthcare services and social services from their parents, and it is only when they are not in family or parental care that they are entitled to these social goods from the state.[575] Where children are in the care of their parents but their parents are unable to provide these social goods to their children, these children can have no claim against the state. Again, this reading is not justified by the text, and results in a watering down of children's rights — particularly disturbing in a country where a large proportion of parents cannot afford to provide adequate care for their children. This cannot be in the best interests of children; is not in line with international law on children's rights; nor does it accord with the intention of the drafters to afford greater protection to children. Moreover, the Court's reasoning fails to appreciate that, according to the current housing subsidy scheme programme, it is only adults who can apply to benefit from low-cost housing. Children are therefore effectively denied state-provided housing under section 26 if they have no living parents or a guardian to provide housing on their behalf. This leaves a significant gap when the head of a household is a child — a phenomenon which is increasing significantly in number as a result of the ravages of HIV/AIDS. Such households are not, in practice, under the care of the state, and are therefore not able to claim housing or shelter under either section 26 or section 28.

An appropriate question, at this juncture, is why the Court adopts this interpretation of children's socio-economic rights. Perhaps the most obvious answer to this question is that the Court, for reasons of constitutional deference, did not want to confront the interference with executive policy implied by unqualified socio-economic rights,

[575] See also J Sloth-Neilsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*' (2001) 17 *South African Journal on Human Rights* 210 224-30.

and preferred to retreat to the 'safe' and already well-worn path of reasonableness review used for qualified socio-economic rights. Whatever its reasons, an explicit engagement by the Court with the principles underlying constitutional deference would be far preferable to the present violence done to the text and the consequent undermining of children's socio-economic rights.

The issue of children's socio-economic rights was again considered in *TAC*,[576] where the harsh interpretation adopted by the Constitutional Court in *Grootboom* was, to some extent, ameliorated. The Court found that its interpretation of sections 28(1)(b) and (c) in *Grootboom* did not mean that the state had no obligation to care for children who were still in the care of their families; rather that '[t]he state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking'.[577] It is difficult to reconcile this reasoning with that in *Grootboom*, but the *dicta* in *TAC* can be read as a welcome clarification of the Court's intended approach to socio-economic rights. Nevertheless, it should be noted that the order of the Court appears not to be grounded on reasoning based on section 28(1)(c) (since the order refers only to the rights of pregnant women and not the rights of children) and, if children's socio-economic rights were relevant at all, the Court's discussion of section 28(1)(c) was simply used to bolster the findings that had already been made under its consideration of section 27.[578] In addition, if the section 28(1)(c) right did inform the Court's order, then it is seems to place exactly the same obligation on the state as does section 27, that is, to have a reasonable programme in place in order to realise the right to healthcare. Clearly, the Constitutional Court still views the primary socio-economic right as that provided in section 27 with rights such as those in section 28(1)(c) to be subsumed under section 27.

In two significant judgments brought by the Centre for Child Law, the High Courts have followed the Constitutional Court in interpreting the obligations placed on the state in section 28(1)(c), but afforded greater protection to children outside the care of their parents or guardian. In a discussion of the rights of unaccompanied, non-national children facing repatriation to their home countries, De Vos J stated the following:

> In view of the fact that children's socio-economic rights are neither described as a right of 'access to' the relevant rights nor qualified, as in

[576] n 508 above.
[577] As above, para 79.
[578] The discussion of sec 28(1)(c) is confined to six paragraphs: as above, paras 74-79.

> ss 26 and 27, one may conclude that these rights impose a direct duty on the state to ensure that those children who lack basic necessities of life are provided with them. However, in *Grootboom* it was decided that the primary duty to fulfilling a child's socio-economic rights rests on the child's parents or family. I agree … that this suggests that the state is under a direct duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the state to provide those children with the rights and protection set out in s 28.[579]

Similarly, in the second matter brought by the Centre for Child Law, Murphy J also noted the lack of an internal limitation in section 28, and granted a structural interdict to ensure that conditions in the hostel in which the children were being held, be improved.

> What is notable about the children's rights in comparison to other socioeconomic rights, is that s 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate. Insofar as polycentric issues may arise from the courts becoming involved in budgetary or distribution matters, our Constitution recognises, particularly in relation to children's rights and the right to a fair trial, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal-costs or budgetary-allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.[580]

The socio-economic rights of children, then, are given some recognition where the children in question are outside of the care of an adult. It is to be hoped that future jurisprudence of the Constitutional Court will develop the socio-economic rights of children in a more progressive manner to extend to all children.

3.2.2 International law and the right to housing

In *Grootboom*, the Court commenced its analysis of section 26 by stating that, since socio-economic rights are included in the Constitution and since section 7(2) requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights', the Court is 'constitutionally bound to ensure that they are protected and

[579] *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 6 SA 50 (T) para 17.

[580] *Centre for Child Law & Others v MEC for Education, Gauteng, & Others* 2008 1 SA 223 (T) 227-28.

fulfilled'. Thus, for South African courts, the issue is 'not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'.[581] The Court then outlined its approach to interpreting section 26. It began by stating that section 26 must be understood in its context in the Constitution and amongst the socio-economic rights entrenched in the Constitution, as well as within the context of the broader social and historical context which gave rise to the provision.[582] The Court emphasised the complex inter-relationships between all the rights entrenched in the Constitution and the importance of socio-economic rights for the full realisation of equality, dignity and freedom.[583]

After situating the interpretation of section 26 within this broad contextual framework, Yacoob J went on to consider the relevance of the international law of housing to the interpretation of the section. Yacoob J began by noting that there are two important differences between the text of section 26(1) of the South African Constitution and ICESCR,[584] which are 'significant in determining the extent to which the provisions of the Covenant may be a guide to the interpretation of s 26'.[585] First, he noted, section 26 does not provide a right to housing itself, but only a right to have *access* to adequate housing, in contrast to article 2(1), which provides a right to adequate housing. Second, Yacoob J points out that, while the Covenant obliges state parties to take 'appropriate steps' to realise the right to an adequate standard of living,[586] section 26 provides that the South African state must take 'reasonable legislative and other measures' to realise the right to have access to adequate housing.[587]

Yacoob J then considered the argument by the *amici* that the Court should adopt the minimum core jurisprudence of the ESCR Committee.[588] This was rejected on the basis that there was inadequate information before the Court for it to determine the minimum core of the right to adequate housing. As Bilchitz points out, however, this detailed information was not necessary for the Court to outline the general, abstract principles which define basic housing

581 *Grootboom* (n 553 above) para 20.
582 As above, paras 19 21-25.
583 As above, para 23.
584 International Covenant on Economic, Social and Cultural Rights. Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.
585 *Grootboom* (n 553 above) para 28.
586 ICESCR (n 584 above) art 11(1).
587 *Grootboom* (n 553 above) para 28. This latter point is not pursued in the judgment, and it is not clear whether there is any difference between 'appropriate' and 'reasonable' steps in fulfilling the respective rights.
588 See the further discussion in ch five, sec 3.1, on minimum core.

needs.[589] Moreover, the Court overlooked the fact that the ESCR Committee had already gone some way in defining the minimum core to housing in one of its General Comments,[590] and that the South African government had already accepted the ICESCR interpretation of 'adequate housing' in the Housing Code — one of the key documents outlining South Africa's housing policy. In explaining what the word 'adequate' means in section 26(1), the Code states that

> [t]he wording of the housing right provision corresponds with the International Covenant on Economic, Social and Cultural Rights (1966). In that context, 'adequate housing' is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. South Africa's housing policy concurs with this concept of housing.[591]

Thus, Yacoob J's interpretation of what constitutes adequate housing is more restrictive than the interpretation adopted by the National Department of Housing. Of course, courts are free to set a lower constitutional standard than that adopted in state policy. In light of the express adoption of the ICESCR definition by the state, however, the Court's lower standard suggests two things. First, it reveals the Court's inadequate assessment of the policy before it. It is particularly important for the Court to have an accurate and balanced understanding of what state policy is before it decides whether it is reasonable or not[592] Second, the Court's rejection of the ESCR Committee definition says less about differences in wording between the Constitution and ICESCR, and more about the Court's unwillingness to engage in a discussion over the substantive meaning of section 26(1).[593]

Yacoob J then turned to a definition of the right of 'access to adequate housing' in section 26(1), contrasting it with the right to

589 D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* 484 488. See also P de Vos 'The essential components of the human right to adequate housing - A South African perspective' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 23 24-27 and M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284 301.

590 General Comment No 4 'The Right to Adequate Housing' (1991).

591 National Housing Code (2000), parts 1 & 7 (footnotes omitted).

592 Of course, this point could be used to bolster the argument that courts, due to institutional limitations, are poorly placed to assess social and economic policy. This is not, however, the point which is being made here: rather, it is argued that the Court is well placed to assess whether state housing policy is consistent with international norms and, in order to do so, greater and better evidence should be put before the Court with regard to the nature and content of state policy. If this is not done, the Court should call for more detailed evidence or research the area itself.

593 See the further discussion of this point in ch five, sec 3.2.

'adequate housing' found in ICESCR. His definition, however, begins by describing the content of the right as opposed to its scope, that is, it describes what constitutes *adequate* housing rather than what *access* to adequate housing means. It is only at the end of the paragraph that Yacoob J deals specifically with the notion of *access* to adequate housing, and his interpretation appears to interpret 'access to' adequate housing as giving rise to a more expansive notion of adequate housing:

> The right delineated in s 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing s 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.[594]

The Court thus recognised that the state's obligation must be context-sensitive: its policy must cater for both those who can afford to pay for adequate housing themselves, and those who require state assistance. Consideration must also be given to whether the person requiring assistance lives in a rural or urban area, and there may be differences across provinces and cities.

In turning to section 26(2), Yacoob J found that this subsection was part of the positive obligation of the state to 'devise a comprehensive and workable plan' to meet its obligations, and that the duty on the state is to take 'reasonable legislative and other measures' towards the realisation of the right in section 26(1).[595] This obligation is qualified in two main ways: it must be within the state's 'available resources' and it must be progressively realised. In interpreting 'reasonable measures', Yacoob did not consider the jurisprudence of the ESCR Committee which finds that the state must show that it has taken steps which are 'deliberate, concrete and targeted as clearly as possible' towards fulfilling that right.[596] Instead, he emphasised that the programme itself must not only be

[594] *Grootboom* (n 553 above) para 35.
[595] As above, para 38.
[596] General Comment No 3 'The Nature of State Parties' Obligations' (1990) para 2.

reasonable, but must also be 'reasonably implemented',[597] and this must in turn be considered in its 'social, economic and historical context'.[598] The programme should address the short, medium and long-term housing needs of the community, and must cover all sectors of the community: 'A programme that excludes a significant segment of society cannot be said to be reasonable'.[599] Lastly, the idea of reasonableness must be assessed with reference to the Bill of Rights.[600]

The duty on the state to take reasonable legislative and other measures is qualified in two ways: the right need only be progressively realised, and the state need only act within its available resources.[601] In interpreting the term 'progressive realisation', the Court referred to General Comment 3 of the ESCR Committee, finding that this phrase in the Constitution had the same meaning as that in the Covenant. The Court noted that this provision did not mean that the state could simply take as long as it liked in realising the right, and that it must 'move as expeditiously and effectively as possible towards that goal'.[602] Finally, Yacoob J observed that the obligation on the state to take reasonable measures is subject to the resources available for this purpose.[603] Importantly, the qualification that the state need only fulfil its right within 'available resources' is different to the wording in article 2(1) of ICESCR, which provides that a state must take steps 'to the maximum of its available resources'.[604] In a discussion on the nature of state parties' obligations under article 2(1), the Committee argued for a 'minimum core obligation' in order to meet the 'minimum essential levels of each of the rights' in ICESCR. This means that, in order to meet its obligation, a state party 'must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter

597 *Grootboom* (n 553 above) para 42.
598 As above, para 43.
599 As above.
600 In this judgment the Court was at pains to emphasise the inter-relatedness of the rights in the Bill of Rights.
601 This analysis of the state's obligation as a duty to take reasonable measures with two qualifiers is slightly different to the Constitutional Court's analysis of the structure of sec 26(2), which sees sec 26(2) as consisting of three elements: 'The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".' Little turns on this distinction.
602 General Comment No 3 (n 596 above) para 9, quoted in *Grootboom* (n 553 above) para 45.
603 *Grootboom* (n 553 above) para 46.
604 ICESCR (n 584 above) art 2(1) states that '[e]ach state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

of priority, those minimum obligations'.[605] As already mentioned, the Court rejected an interpretation of section 26 which would have included a minimum core component.

In short, the Court's analysis of sections 26(1) and (2) is a restrictive reading of the right in section 26, often ignoring a more practical and progressive understanding of the state's duty laid down in national legislation and international law. While this cautious approach is understandable, it is not consistent with the courts' obligation to develop domestic law in line with a treaty that has been signed, but not yet ratified under the Vienna Convention.[606] Viewing the Court's approach through the lens of constitutional deference, it is fair to argue that the Constitutional Court has adopted a highly deferential approach in interpreting the scope and meaning of section 26 of the Constitution, and that this approach is motivated by a wariness of socio-economic rights. Although the reasons for this wariness are not articulated, it is suggested (for reasons which are discussed in the following sections) that the Court is motivated by all three of the principles underpinning constitutional deference, set out in chapter three above.

3.2.3 Reasonableness

After discussing the broad interpretative approach to section 26, the Court turned to an evaluation of the reasonableness of state policy. While reasonableness may be considered to be a fairly high level of scrutiny in administrative law grounds of review, for constitutional adjudication it is lower than the standard usually adopted. In constitutional review, the South African courts generally adopt what can be described as a proportionality test in the protection of fundamental rights.[607] In the adjudication of socio-economic rights, on the other hand, the Constitutional Court has adopted a reasonableness standard of review, best understood as an administrative model of review.[608] This is explained by Chaskalson CJ,

[605] General Comment No 3 (n 596 above) (1990) para 10. The importance of the minimum core obligation to the Covenant is demonstrated in the following extract: '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*.'

[606] See the discussion in the Introduction, sec 3 on the Vienna Convention on the Law of Treaties. See also *S v Makwanyane & Another* 1995 3 SA 391 (CC) para 35.

[607] T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92 97. See also K O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 *South African Law Journal* 424 436-37 for a discussion on the emerging levels of review in constitutional and administrative law adjudication. In Canada, in some instances, an even higher level of review is adopted for the review of fundamental rights, namely a 'correctness' standard: JM Evans 'Deference with a difference: Of rights, regulation and the judicial role in the administrative state' (2003) 120 *South African Law Journal* 322 328.

[608] Sunstein (n 539 above) 234.

in a discussion of the reasonableness test adopted in *Grootboom*, as follows:

> Courts have to judge the issue of 'reasonableness'. That is a legal principle that courts are often required to apply when there is a challenge to the validity of administrative action by the executive. In this way, policy is collapsed into principle, and techniques similar to those used in administrative law can be adopted to give effect to the constitutional standard of 'reasonableness'.[609]

Thus, in deciding on the level of scrutiny to be applied, the Court focused on the nature of socio-economic rights and chose to apply a lower standard than that applied to other constitutional rights, precisely because it allows courts to review policy without adopting 'an unacceptable managerial role'.[610] In adopting this test, the Court appeared to be influenced by the arguments against the judicial review of socio-economic rights outlined in chapter three. These arguments appeal to all three of the constituent components of deference: first, they appeal to democratic arguments that, since socio-economic rights involve issues of policy, they should, as a matter of democratic principle, be left to the executive. Second, socio-economic rights are said to involve polycentric decision making, and are therefore best left to the executive and legislature, and finally, for reasons included in the first two objections, socio-economic rights are arguably seen to be of a lower status, or at least not as important, as civil and political rights. For all three of these reasons, socio-economic rights are perceived to be in some way not fully justiciable, and therefore subject to a lower standard of review. The reasonableness test allows the courts to defer to the executive or legislature on how the problem is defined; the budget which is available to address the problem; and the choice (within the parameters of reasonable measures) of measures which are used to address the problem. Nevertheless, there is very little discussion in the judgment of the level of scrutiny to be applied — the Court seems to accept that the test is self-evident from the wording of the constitutional provision.[611]

In addition to helping articulate reasons for the adoption of the reasonableness test, the principle of constitutional deference assists in examining the manner in which the Court assesses whether the state has complied with this test. In *Grootboom*, the Court adopted a fairly rigorous analysis of the evidence before it in assessing the reasonableness of the state's action and did not simply accept the state's argument that it had met its constitutional obligations. The

609 Chaskalson (n 502 above) 604.
610 Sunstein (n 539 above) 222.
611 *Grootboom* (n 553 above) para 63. See the discussion in ch five, sec 2.1, on the reasonableness test.

evidence provided by the state included evidence of the pre-1994 housing crisis in order to contextualise historically its approach to the drastic housing shortages in the country, as well as evidence of the legislative and policy measures which it had adopted at national and provincial level to address its constitutional obligations.[612] In particular, the Court focused, in detail, on the provisions of the Housing Act 107 of 1997.[613] The Court also remarked, in passing, that the national housing budget appeared to be 'substantial', although it did not elaborate any further or indicate what the consequences would be of an 'insubstantial' budgetary allocation.[614] In discussing the state's housing policy, the Court noted that it centred on the definition of housing provided in the Housing Act which provided for 'sustainable public and private residential environments' and made[615]

> no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need.[616]

The Court therefore found that, to the extent that state policy failed to cater for those in desperate need, it was unreasonable, and to that extent, inconsistent with the obligations imposed by section 26 of the Constitution. In coming to this conclusion, the Court surveyed an impressive body of evidence which the state placed before it. The fact that the state placed such detailed evidence before the Court indicated an acceptance by the state that its legislation and policy would be rigorously scrutinised by the Court in assessing the state's constitutional compliance.[617] The Court, in turn, gave careful consideration to the reasonableness of the state action, although it should be noted that the Court did not analyse the budgetary allocations of the state in any meaningful way. Thus, at this stage of the adjudicative process, the Court displayed a minimal degree of deference to the evaluation of whether the government had complied with the test set out by the Court. Here the Court appeared undeterred by arguments regarding polycentricity. It may be that the Court's robust approach was due to its already restricted approach to the level of scrutiny; nevertheless, it engaged fully with the reasonableness of state action.

612 n 553 above, para 47.
613 As above, paras 47-51.
614 As above, para 47.
615 As above, para 52.
616 As above.
617 This stands in contrast to *Khosa*; see sec 3.3 below.

Lastly, it is useful to examine the remedy formulated by the Court through the lens of constitutional deference. In *Grootboom*, this aspect is arguably where the Court showed the greatest degree of deference and is one of the most problematic areas of the judgment. The Court simply made a declaration that the state was in breach of its constitutional obligations, yet failed to make any order which provided substantive relief to the respondents. The Court considered and rejected the possibility that the respondents should be afforded special relief on the basis that to do so would be to give preference to the respondents and their occupation of the Wallacedene sports field.[618] Yet, the declaration failed to provide any guidance as to when the state should implement measures to cater for those in the same circumstances as the respondents,[619] and failed to provide any mechanism which would allow the respondents, or anyone else, to return to the Court, should the state fail to undertake any changes to its policy. This declaration is all the more surprising when contrasted with the interim order issued by the Court a few months prior to issuing the final order. In the interim order, the Court set out detailed provisions of what the state had to provide for the Grootboom community pending the final order, including the provision of toilet facilities and taps at state expense, and the setting aside of R 200 000 in order to purchase materials to waterproof the community's existing shelter and building materials for each household. Moreover the state was to report in writing to the Court on the implementation of the order.[620]

In making the final order, the Court was probably influenced by the fact that counsel for the state reported to the Court that the municipality had, by the time of the hearing, adopted a programme that would cater for people such as the Wallacedene community[621] — this turned out not to be true.[622] Moreover, the Court failed to identify which institution in government was responsible for reforming policy which has meant that, for four years after the judgment was handed down, there were no changes in policy which affected the Wallacedene community.[623] In this way, the Court adopted a highly deferential attitude toward the state and its willingness and ability to comply with the Court's declaratory order.

618 *Grootboom* (n 553 above) para 81.

619 T Roux 'Understanding *Grootboom* — A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41 47.

620 *Grootboom & Others v The Government of the Republic of South Africa & Others* (interim order of court) (Case CCT 38/00 dated 21 September 2000) para 1.

621 *Grootboom* (n 553 above) para 60.

622 See McLean (n 521 above) 55-21 to 55-22 for a discussion of the state's ongoing failure to implement the emergency housing programme and case law commenting on this fact.

623 B Schoonakker 'Treated with contempt' *Sunday Times* 24 March 2004 available at http://www.suntimes.co.za/2004/03/21/insight/in01.asp (accessed 30 March 2004).

To sum up the Constitutional Court's approach to socio-economic rights in *Grootboom*: first, the Court has been extremely reluctant to consider the review of unqualified children's socio-economic rights, and has effectively ignored them in favour of qualified socio-economic rights; second, where the Court has shown a willingness to adjudicate qualified socio-economic rights, it has done so on a lower standard than other entrenched rights. In doing so, the Court has taken into account the nature of socio-economic rights and the arguments regarding the justiciability of these rights. In choosing a reasonableness test, the Court demonstrated that it would adopt a more deferential attitude to the adjudication of socio-economic rights. Third, despite its adoption of the reasonableness test, the Constitutional Court adopted a fairly rigorous analysis of the policy of the state. The one exception to this rigorous analysis is the Court's reluctance to explore fully the state's budgetary allocation to housing. Fourth, the Court has shown its greatest degree of deference in formulating the remedy which it did. The Court's approach to remedies has become less deferent in subsequent case law and ultimately it may well be that the Court's hesitant approach may be ascribed to the fact that *Grootboom* was the first major socio-economic rights case which the Court adjudicated in which it gave a judgment against the state. A notable exception to this trend toward less deference in remedies is to be found in the *Olivia Road* decision discussed immediately below — where the Court engaged in an exercise of judicious avoidance.

3.2.4 Meaningful engagement

The decision of the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*[624] marks an important development in the Court's approach to remedies in the context of the adjudication of socio-economic rights.

The decision concerned an eviction application by the City of Johannesburg, in the High Court, to evict a number of people occupying several buildings in the inner city of Johannesburg.[625] The application was brought in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1997 (NBRA), the Health Act 63 of 1977, and the city's fire by-laws, for an order to 'evaculate' the respondents on the grounds that the buildings being occupied were unfit for human habitation, were dangerous and unhygienic, that evicting them would promote public health and

[624] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

[625] The High Court judgment is reported as *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 1 SA 78 (W).

safety, and that their eviction would reverse inner-city decay in terms of the Johannesburg Inner City Regeneration Strategy.[626] The application was opposed on two main grounds: first, that the respondent's right of access to adequate housing in section 26(1) of the Constitution would be infringed if the eviction order were to be granted; and second, that the city had failed to meet its positive obligations to achieve the progressive realisation of the right of access to adequate housing, and was therefore prevented from evicting the respondents.[627]

Jajbhai J found in favour of the respondents and dismissed the application. He also issued a declaratory order regarding the applicant's failure to comply with its constitutional obligations, and placed an obligation on the municipality not to evict the respondents until such time as it had 'developed a pragmatic, constructive and coherent programme [to] deal with the predicament that the respondents [had] to endure'.[628] The order of the Court is worth setting out in full:

> (1) It is declared that the housing programme of the applicant fails to comply with the constitutional and statutory obligations of the applicant. The applicant has failed to provide suitable relief for people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.
>
> (2) The applicant has failed to give adequate priority and resources to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.
>
> (3) The applicant is directed to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing for people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.
>
> (4) Pending the implementation of the programme referred to in para 3 above, alternatively, until such time as suitable adequate accommodation is provided to the respondents, the applicant is interdicted from evicting or seeking to evict the current respondents from the properties in this application.

The declaratory order of the High Court is thus far-reaching in its implications for the city's housing policy, and displays little deference

626 As above, paras 2-5.

627 As above, paras 10-15; and see n 624 above, para 7. The respondents also opposed the application on the grounds that the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ought to be applicable to the eviction of the respondents; that the applicant had infringed the respondents' rights to just administrative action in failing to afford them a hearing prior to taking a decision to evict them; and that sec 12 of the NBRA was unconstitutional.

628 n 625 above, para 67.

to the city in its policy-making exercise. It does, however, remain at the level of a declaratory order, and there are no direct orders for the city to amend its housing policy, or to report back to the Court on how it has done so. In this sense, the order has little bite.

The city then appealed to the Supreme Court of Appeal.[629] The Supreme Court of Appeal reversed the judgment of the High Court, finding that the deprivation of unsafe housing did not amount to an infringement of the right of access to adequate housing,[630] but that the eviction itself triggered an obligation on the city to provide emergency basic shelter to those who then found themselves in a crisis situation.[631] Consequently, the Court found that section 12 of the NBRA was not unconstitutional.[632] The Court therefore granted an eviction order against the occupiers, but ordered the city to provide housing assistance in terms of the Emergency Housing Programme set out in chapter 12 of the National Housing Code.[633]

The decision of the Constitutional Court in the subsequent appeal took a different approach to the two previous orders in dealing with the city's housing policy and focused on the decision-making process of state institutions prior to taking a decision to evict. In essence, the Court required the city to engage meaningfully with the occupiers prior to taking a decision to evict them. The failure of the city to engage meaningfully with the occupiers was not only the substantive finding of the Court, but also its remedy. Two days after the hearing before the Constitutional Court, the Court ordered the parties to engage with one another to attempt to reach a settlement over the issues raised on appeal and on ways to improve the safety of the buildings occupied by the appellants. The parties were then to file affidavits on the outcome of these discussions, and these were to be considered by the Court in handing down its final judgment.[634]

There are two observations to be made of this judgment. The first is positive, and recognises the value of rendering explicitly an obligation on municipalities to engage meaningfully prior to instituting eviction orders. The Court located this obligation within the constitutional obligation of the state to act reasonably in section

629 The decision is reported as *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 6 SA 417 (SCA).
630 As above, para 46.
631 As above, para 47.
632 As above, paras 51-56.
633 As above, para 78. The Emergency Housing Programme was established in order to give effect to the obligation elucidated by the Constitutional Court in the *Grootboom* decision, that the state's policy was unconstitutional to the extent that it failed to cater for those in desperate need: see sec 3.2.3 above. See McLean (n 521 above) 55-20 to 55-24 for a discussion of the policy and its weaknesses.
634 n 624 above, para 5.

26(2) of the Constitution,[635] and the 'need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity'.[636]

> In the light of [the] constitutional provisions [to respect, protect, promote and fulfil the rights in the Bill of Rights] a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.[637]

The obligation on state institutions to engage meaningfully prior to taking a decision to institute eviction proceedings is an important one, and adds a significant requirement to the list set out in *Grootboom* for reasonable state action. While this obligation was, to some extent, prefigured in the Court's decision in *Port Elizabeth Municipality*,[638] again in the context of engaging in consultation with affected persons threatened with eviction, it is the *Olivia Road* decision which fleshes out this obligation. To this extent, then, the decision of the Constitutional Court is to be applauded.

Despite this contribution to the jurisprudence on housing rights, there is a second noteworthy aspect to the judgment, which is more negative. This is the failure of the Court to engage with the substance of the attack on the constitutionality of the city's housing policy and to seek to resolve the dispute through encouraging the parties to settle. The Court noted that there were a number of outstanding issues between the parties which remained in dispute, namely, the failure of the city to formulate and implement a housing plan for persons similarly situated to the appellants; the city's policy in dealing with so-called 'bad buildings'; the constitutionality of section 12(4)(b) of the NBRA; the review of the city's notices to the occupiers; the applicability of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998; and the 'reach and applicability of sections 26(1), 26(2) and 26(3) of the Constitution'.

Despite identifying all of these remaining disputes, the Court declined to decide all but one of them, preferring to leave their resolution to the 'negotiations' between the parties — even where the occupiers complained that they had not been able to reach agreement previously. The following extract provides a sample of the Court's reasoning:

635 As above, para 17.
636 As above, para 10.
637 As above, para 16 (footnotes omitted).
638 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217(CC) paras 39-43.

> It is not necessary for this court to consider the question of 'permanent housing solutions' for the occupiers. The city has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this court to consider this question at this stage ... It is the duty of both parties to continue with the process of negotiation and for the occupiers or the city to approach the High Court if this course becomes necessary.[639]

Hence, the Court, rather optimistically, fails to decide the critical issue, that is, the constitutionality of the city's approach to housing the occupiers (and those similarly situated), and leaves it open to be resolved through consensus and negotiation.

The only (rather narrow) issue which was decided by the Court was the constitutionality of the criminal sanction imposed in the event of non-compliance with the section 12 notices issued in terms of the NBRA, where there was no court order ordering the eviction. The Court held that the absence of a court order was the flaw in the section, and cured the defect by reading in a phrase that the criminal sanction may only be imposed where a court order for eviction had been issued.[640] The only other finding of substance was that the city was found to have been obliged to consider the potential homelessness of the occupiers in making a decision on whether or not to issue the notice ordering vacation of the building.[641]

This course of action of the Court signals an apparent desire to avoid engaging with the primary dispute before it at all. In this sense, the approach of the Court is different to 'judicial avoidance', or minimalism, where courts seek only to decide the narrow constitutional issues before it.[642] Rather, it appears to be a more extensive unwillingness to decide the issue at all. Moreover, this approach does not fit with the scheme of constitutional deference discussed in this book, which calls for transparency in judicial reasoning, rather than an abdication, or unwillingness to engage in judicial scrutiny.

The decision in *Olivia Road* appears to signal a new trend in Constitutional Court jurisprudence in socio-economic rights decisions in the emphasis on meaningful engagement. Shortly before finalising

639 n 624 above, para 34.
640 As above, paras 47-51 54.
641 As above, paras 43-46.
642 I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

this manuscript, the decision of *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes*[643] was handed down. The judgment concerned an application for the relocation of 4 386 households (approximately 20 000 residents) who were the applicants before the Constitutional Court from the Joe Slovo settlement to an area known as Delft (which was less well located than Joe Slovo) to make way for a low-cost housing development.[644] The conditions in the Joe Slovo settlement were described as 'deplorable' and 'unfit for reasonable human habitation'.[645] The High Court ordered that the occupiers were to be evicted according to a schedule provided by the Court, and that the state was to report back to the Court every two months on the implementation of the order and the allocation of permanent housing to those affected by the order.[646] The residents appealed this decision to the Constitutional Court.

In the Constitutional Court, the Court found that there were two distinct issues before it: first whether the applicants were properly evicted in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE Act); and second, whether the state had acted reasonably in seeking the eviction of the applicants. On the first question before the Court, the majority of the Court found that the applicants were 'unlawful occupiers' (as defined in the PIE Act) at the time that eviction proceedings were instituted, and that this triggered an obligation to seek an eviction in terms of that Act.[647] The Court then ordered an eviction in terms of the PIE Act.

Five judgments were handed down, all supporting the same order, but for slightly different reasons. The Court ordered the eviction of the applicants but subject to certain conditions, including relocation to temporary residential units in another location. A time-table, over the subsequent 12 months, was attached to the order as an annexure, detailing the date by which households would be relocated, beginning 17 August 2009, and setting weekly deadlines for the relocation of a number of households.[648] The Court then ordered the parties to engage meaningfully with each other if they wished to agree on a different time-table for the dates of relocation, and for this engagement to be completed by 30 June 2009 — three weeks after the handing down of the order.[649] The parties were then to place their

643 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16.
644 As above, para 8.
645 As above, para 24.
646 *Thubelisha Homes & Others v Various Occupants & Others* Case No 13189/07, Western Cape High Court, Cape Town, 10 March 2008, unreported.
647 n 643 above, para 4.
648 See Annexure A of the order.
649 n 643 above, para 7. The order was handed down on 10 June 2009.

agreement, assuming they arrived at one, before the Court on 7 July 2009, and the Court would consider whether this was an appropriate order or not, and whether to give effect to it. In addition to the general engagement on the time frame for relocation, the state was ordered to engage with each affected resident who was to be relocated at least a week prior to the relocation.[650] While this deadline was fairly tight, it had the benefit of putting the state on terms to negotiate with the occupiers if they wished to amend the court-imposed time-table for relocation and meaningful engagement prior to such relocation.[651]

The Court distinguished its order from that of the High Court as follows:

> The main differences between the High Court order and the order made by this Court are the following. First, this Court's order imposes an obligation upon the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to those people who are currently resident there or who were resident there but moved away after the N2 Gateway Housing Project had been launched. Secondly, this Court's order specifies the quality of the temporary accommodation in which the occupiers will be housed after the eviction; and thirdly, this Court's order requires an ongoing process of engagement between the residents and the respondents concerning the relocation process.[652]

The first main issue before the Court dealt with whether an eviction ought to be granted in terms of the PIE Act. In this regard, the question of whether the occupiers could have been said to have occupied the land owned by the City of Cape Town 'with consent' is important since the eviction order could be granted only if it was established that the residents occupied the settlement without consent. The residents claimed they had either express or tacit consent to occupy, and that they were therefore not unlawful occupiers. This issue was treated differently in the various judgments. On the facts, Yacoob J (with the concurrence of Langa CJ and Van der Westhuisen J) found that they did not have the municipality's consent.[653] In doing so, he adopted a narrow, private law approach to the question of consent, one which the other judges clearly found to be inappropriate in the circumstances. Moseneke J, for instance, while not explicitly referring to the decision of Yacoob J, impliedly describes the approach as a 'mechanistic application of legal rules of

650 As above, para 7.
651 Unfortunately, the text of this book was completed prior to this process taking place, so the outcome of this process was not able to be included in this chapter. See also n 685 below.
652 n 643 above, para 5.
653 As above, paras 72-83.

private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights'.[654]

Mosenke DCJ, O'Regan and Sachs JJ, by contrast, in separate judgments, found that the municipality had, through it actions, given the applicants tacit consent,[655] but that this consent had been terminated, again through the actions of the city in taking the decision to implement the N2 Gateway Project and its engagement with the residents in this regard.[656] Ngcobo J, too, found that the residents were 'allowed to remain on the land until suitable alterative accommodation to alleviate their plight could be found' and during this period could not be said to be unlawful occupiers. It was only after they were requested to move to Delft that their occupation become one without consent.[657] Later in his judgment, however, he fudges this distinction, finding that the 'branding' of the occupiers as 'unlawful, in the context of South Africa's history, is an affront to their dignity':

> It seems to me that on the facts and the circumstances of this case, it is not necessary to first 'brand' residents as 'unlawful occupiers' before they may be relocated. This is inimical to the foundational values of human dignity as evidenced by the provisions of sections 26 and 25 of the Constitution. It would be more consonant with human dignity of landless people to pose the questions whether it is in the public interest and thus just and equitable to evict the residents for the purposes of implementing the government plan aimed at providing the residents with adequate housing. To this extent I have grave doubts whether the provisions of section 6(1) of PIE are the appropriate vehicle for dealing with the situation of the residents in this particular case.[658]

Notwithstanding these reservations, Ngcobo J finds that '[e]ffect must, however, be given to the statute [PIE] that the government has resorted to in order to secure the eviction and the relocation of the residents'.[659] The effect of this reasoning is unclear: it would appear to imply that notwithstanding a finding that the residents were not 'unlawful occupiers' within the meaning of the PIE Act, since the term 'unlawful' was inimical to their dignity, the PIE Act would be applied to effect their eviction.[660] If applied by the lower courts, this reasoning would effectively widen the net of those facing eviction —

654 As above, para 146. See also the decision of O'Regan J at para 351.
655 As above, paras 149 278 358 respectively.
656 As above, paras 160 286-90 359-60 respectively.
657 As above, para 180. Ngcobo J's reasoning differs from that of Moseneke DCJ in that he found that the municipality's performance of its obligations in providing basic services to residents in Joe Slovo did not, in and of itself, constitute consent to occupy land: as above, paras 209-11.
658 As above, para 218.
659 As above, para 219.
660 See as above, para 291 for the response of O'Regan J to this finding.

provided it could be shown it was just and equitable to evict them. Happily, this reasoning is in the minority.[661]

A further requirement for an eviction to be granted under the PIE Act is whether it would be 'just and equitable' to do so.[662] There was some dissensus between the judges on whether it would be 'just and equitable' to grant an eviction in these circumstances. Yacoob J was fairly easily satisfied that an eviction to make way for a low-cost housing development would be just and equitable,[663] while Moseneke DCJ (with the concurrence of Sachs J) was clear that he only considered the eviction just and equitable in these circumstances as the applicants themselves would benefit directly from the development.[664] Otherwise, for Moseneke J, the 'eviction and relocation order would have made the residents of Joe Slovo sacrificial lambs to the grandiose national scheme to end informal settlements when the residents themselves stood to benefit nothing by way of permanent and adequate housing for themselves'.[665]

The second issue before the Court (and to some extent, overlapping with the requirement that it be just and equitable to order the eviction) was whether the policy choice which necessitated the eviction, that is, the decision to develop the area, was reasonable. It is at this level that the Court arguably displayed an inappropriate level of deference to the policy choices of the state, and failed to engage in a proper assessment of the reasonableness of state action. The notion of 'meaningful engagement' was again used to plaster over the divisions between the occupiers and the province.

Part of the dispute between the parties was over the type of housing which was to be developed in the N2 Gateway Project, and whether the residents of Joe Slovo would themselves benefit from the project. The state has in place a number of different housing programmes, which include the development of so-called 'RDP houses' (or more recently referred to as 'BNG housing', which is given, free of charge, to qualifying beneficiaries, with certain beneficiaries being required to make a financial contribution); social housing (rental housing to qualifying beneficiaries in housing stock managed, generally, by non-profit organisations, and constructed with government subsidies); credit-linked subsidised housing

[661] The judgment of Ngcobo J is concurred in by Moseneke J and Sachs J. Interestingly, Moseneke J and Sachs J also concur in the separate judgments of each other, in which there is a clear finding that the municipality had withdrawn its consent to occupy, meaning that the residents were 'unlawful occupiers' as defined within the four corners of the PIE Act. It is difficult to reconcile the reasoning of these three judgments in this regard.

[662] Sec 6(1) of the PIE Act.

[663] n 643 above, para 116.

[664] As above, paras 138-39.

[665] As above, para 138.

(partially subsidised housing, where the beneficiary is required to finance, usually through a mortgage bond, the bulk of the cost of the house); emergency housing (temporary shelter to be provided to those who find themselves in emergency situations) and informal settlement upgrading programmes (where informal settlements are upgraded *in situ* and all occupants thereby benefit, and subsidised construction of houses follows later for qualifying households).[666]

The state appears to have changed the type of housing to be developed in the N2 Gateway Project over time, and some of this confusion is reflected in the judgments. The judgment of Yacoob J, for instance, states that the project is to consist of social housing (that is, subsidised rental housing) and credit-linked bonded housing.[667] According to Yacoob J, then, no RDP housing was to be built, and by definition, the development would exclude most of the occupiers in Joe Slovo who could not afford the rental, and who would not qualify for mortgage finance. The judgment by Ngcobo J, by contrast, relying on the High Court papers, states that the majority of housing opportunities would be BNG houses.[668] Here, Ngcobo J is clearly referring to what are known as 'RDP houses' which are based on an ownership model. Ngcobo J states that '[w]hen completed, the project will have constructed 9 500 houses in Delft and 1 885 in Joe Slovo'.[669]

This appears to be the crux of the dispute — and is set out in the fifth judgment of Sachs J. It would appear that the applicants claimed that they were informed that the project would consist of RDP housing, and that they had been promised that 70% of the houses would be allocated to qualifying residents of the Joe Slovo community.[670] At some point, the project shifted and emphasis was placed on social (rental) housing, and bonded (or credit-linked) housing, which would be unaffordable for the majority (over 80%) of residents in Joe Slovo. With regard to social (rental) housing, the residents of Joe Slovo settlement claim that they were initially promised that the rental would be between R150 and R300 per month — rates that were simply unsustainable, and presumably never

666 See McLean (n 521 above) 55-4 to 55-30 for a discussion of the various types of housing programmes available in South Africa.
667 n 643 above, para 30.
668 As above, para 206, n 18.
669 As above.
670 As above, para 373.

seriously contented[671] — and it was on this basis that they originally agreed to relocate for the first phase of the N2 Gateway Project.[672]

O'Regan J clarifies that it was only after the hearing that the state 'informed the Court that no fewer than 1 500 Breaking New Ground permanent houses would be built at Joe Slovo' in phase 2 and 3 of the development.[673] This undertaking is expressly included as part of the order of the Court, and puts an obligation on the state to inform the Court, within 14 days of the order being handed down, as to whether this was likely to change.[674] Yet it is unclear whether what is referred to here is 'RDP housing' (that is, housing given to qualifying beneficiaries who would become the owner of the housing) or social (rental) housing. It would appear to be the latter, as order 17 of the order, defines BNG houses as 'low-cost government housing available at low rentals'. If this is so, it is unclear how the provision of social housing will benefit the vast majority of the residents of Joe Slovo.

This understanding of what is being developed in the N2 Gateway Project does not fit comfortably with other statements of the Court, where it says that '[t]hose who cannot be accommodated in Joe Slovo after it has been developed will be allocated permanent housing in Delft'.[675] This statement ignores the fact that the housing being developed in the N2 Gateway Project is simply unaffordable to the majority living in Joe Slovo, and that there would be many in the community who would not qualify for housing (whether RDP or social housing) at all.

In assessing the reasonableness of the N2 Gateway development, Yacoob J followed the test established in *Grootboom*, finding that the applicants' eviction was just and equitable in the circumstances, and 'constitute[d] a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution'.[676] Moreover, the state had acted reasonably in engaging with the community,[677] and the policy, as a whole, was therefore reasonable. Yacoob J's reasoning is summed up in the following passage:

671 McLean (n 521 above) 55-29 to 55-30 discusses the problems with social housing in this regard, pointing out that social housing, as currently defined and implemented, was never intended, and could never, cater for the housing needs of the poorest segments of society. See the judgment of Ngcobo J at para 251 where he acknowledges that the residents had complained that the majority could not afford the rental needed in social housing.

672 n 643 above, para 374.

673 As above, para 308.

674 As above, para 11, order 18.

675 As above, para 188.

676 As above, para 115 (footnote omitted).

677 As above, para 117.

> It is true, as is emphasised by the amici, that this relocation would entail immense hardship. I have considerable sympathy with the applicants, but there are circumstances in which this Court and all involved have no choice but to face the fact that hardship can only be mitigated but can never be avoided altogether. The human price to be paid for this relocation and reconstruction is immeasurable. Nonetheless it is not possible to say that the conclusion of the City of Cape Town, to the effect that infrastructural development is essential in the area and that the relocation of people is necessary, is unreasonable. There are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later. Significantly, they are ameliorated by the state undertaking to provide transport and to ensure that schooling is available to children and that people moved to Delft can get to work.[678]

The judgment of Yacoob therefore appears to envisage a two-tier process of meaningful engagement: at the first tier, there must be engagement regarding the decision to implement the development, and second, more detailed engagement is required at the point of individual relocations.

Moseneke J, O'Regan J and Sachs J, by contrast, found that there had not been meaningful engagement,[679] yet proceeded nonetheless to concur with the order granting an eviction.[680] The following passage from O'Regan J's judgment is illustrative:

> The question we have to ask in this case is whether the failure to have a coherent and meaningful strategy of engagement renders the implementation of the plan unreasonable to the extent that the respondents have failed to establish a right to evict the occupiers. On balance I think not. First, we cannot ignore that this is one of the first attempts at a housing development in terms of the new housing policy. Given the huge numbers of people living in inadequate or makeshift housing in Cape Town (and indeed many of our municipalities), and given the fact that this is a pilot project, it is not surprising that it has not been implemented without controversy. Secondly, it is clear that the respondents have engaged in some consultation with the applicants, although they admit that it has not been coherent or comprehensive and that at times it has been misleading …
>
> Thirdly, a consideration that to my mind weighs heavily in the balance is that it is not only the occupiers who are affected by the plan. Thousands of other households have already co-operated with the respondents in the hope that their co-operation will hasten the building of the housing project and result in their receiving permanent housing. Refusing an order of eviction in this case might give some temporary relief to the applicants, but it would be against the interests of those waiting

678 As above, para 107. See similar statements by Moseneke J at para 174.
679 As above, paras 167 301 384 respectively.
680 As above, paras 167 303 384 respectively.

> anxiously in Delft and in backyards in Langa for the houses to be built. Finally, the order of eviction that is made can seek to remedy, at least to some extent, the failure of government to engage meaningfully in consultation with the applicants up to this stage.[681]

It is concerning that this reasoning of the majority undermines the gains won in *Olivia Road* in finding, in essence, that even though meaningful engagement may not have occurred, the ends justify the means in ordering an eviction. It is to be hoped that future courts will not similarly find that provided the government policy is found to be sufficiently laudable, it is permissible for the state to ride rough-shod over the requirement of meaningful engagement.

Ngcobo J, citing *Olivia Road*, found that where people are to be evicted in circumstances such as those in Joe Slovo, the residents must be informed and consulted on a wide range of issues, including the purpose of the relocation, consequences of the relocation and how those who cannot be accommodated in the developed area will be provided with permanent housing.[682] Nevertheless, he emphasised that 'the process of engagement does not require the parties to agree on every issue', and that '[u]ltimately, the decision lies with government'.[683] For Ngcobo J, it would appear that the central problem between the parties was the lack of meaningful engagement: if this had occurred, the residents would have understood and accepted the project, and there would have been no need for the courts to have become involved.

The importance of meaningful engagement appears, in the decision of *Joe Slovo*, to be unravelling. The order of the Court, however, is more flexible than past orders in allowing any party, unhappy that the order is not being complied with, to approach the Court.[684] Moreover, the parties are directed to file affidavits by 1 December 2009 setting out a report on the implementation of the order and the allocation of 'permanent housing opportunities to those affected by the order'.[685] It may, therefore, be too early to tell whether this approach of the Court is effective or not.

681 As above, paras 302-3.
682 As above, para 242.
683 As above, para 244.
684 As above, para 7, order 21.
685 As above, para 7, order 16. On 24 August 2009, the Constitutional Court suspended its eviction order after the newly appointed Western Cape provincial MEC for Housing submitted a report to the Court indicating that he had 'grave concerns' over the viability of the N2 Gateway Project.

3.3 The right to social welfare

The *Khosa* judgment[686] deals with two cases which arose from High Court decisions concerning applications by permanent residents to have sections of the Social Assistance Act 59 of 1992 declared unconstitutional since they extended child support grants, social grants to the elderly, and care dependency grants to South African citizens only. *Khosa* differs, therefore, from previous judgments in two important respects. It is the first socio-economic rights judgment to engage with legislation, rather than executive policy, and it deals with the complete exclusion of a group of persons on grounds prohibited by the Constitution (the analogous ground of citizenship)[687] rather than with the temporal exclusion of groups who would eventually benefit from the progressive realisation of a programme designed to realise a socio-economic right.[688]

> Section 27(1) of the Constitution provides that
>
> Everyone has the right to have access to —
>
> ...
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The challenge was therefore made that the sections were unconstitutional in that they extend social welfare benefits only to South African citizens and not to 'everyone' as the Constitution directs. The applicants also alleged that their rights to equality (section 9), dignity (section 10) and life (section 11) were infringed and that such an infringement could not be justified under the general limitations clause. Furthermore, with regard to the child care grants, the applicants alleged a breach of children's right to social services (section 28(1)(c)).[689] In the High Court, the applications were unopposed, and the Court made orders striking down the relevant provisions that referred to citizenship as a criterion for social welfare grants.[690] This had the effect of rendering all residents — whether

686 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC).

687 As above, para 71. Citizenship is not a 'listed' ground for discrimination in sec 9 of the Constitution, but is recognised as an analogous ground: *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 1 SA 745 (CC) para 20. This means that there is no automatic presumption that the discrimination is unfair, and places the onus on the applicant to prove such unfairness.

688 LA Williams 'Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis' (2005) 21 *South African Journal on Human Rights* 436 450. *Soobramoney* (n 505 above) also dealt with the exclusion of a category of persons, but that category was delineated on medical, rather than discriminatory grounds.

689 *Khosa* (n 686 above) para 38.

690 As above, paras 5-8.

permanent or temporary — eligible for social benefits.[691] The Constitution requires that all High Court orders declaring legislation constitutionally invalid must be confirmed by the Constitutional Court before they are of any force or effect[692] — hence the matter was referred to the Constitutional Court for confirmation. It should be noted that, in the Constitutional Court, the state conceded that citizenship was not a relevant consideration in assessing child-care grants[693] and sought only to defend its denial of social grants to the elderly who were not citizens.

Prior to the hearing, the Court requested that the state express its intention whether or not to oppose the matter and, if it chose not to, to appoint counsel to present argument on its behalf on the issues raised.[694] The relevant minister failed to do either by the deadline set by the Court and, after enquiries by the Court, subsequently decided to oppose the matter, requesting a postponement. Although the Court castigated the state for its failure to oppose the matter in the High Court and for its failure timeously to oppose the matter in the Constitutional Court, it granted the postponement in the interests of justice.[695] This failure of the state to take its duty to defend seriously, or at least to explain its legislative choices, and to heed the directions of the Court, undermines the Court's authority and is a serious derogation from the participation expected of the state in a constitutional dialogue over the realisation of socio-economic rights.

This failure of the state to engage adequately with the courts is not limited to this occasion. In the Eastern Cape (one of the poorest provinces in South Africa) for instance, there are numerous High Court judgments dealing with access to social welfare benefits which indicate a stubborn reluctance on the part of that provincial government to take seriously its constitutional obligations. For several years, residents in the Eastern Cape have struggled to obtain social grants to which they are entitled, leading to a series of judgments against the province. The problems experienced are in part due to corruption within the department and with fraudulent claimants,[696] as well as to the 'conspicuous and endemic failure' by the department to implement the social welfare policy reasonably.[697] As a result, literally hundreds of cases have been brought before the

691 As above, para 9.
692 Constitution (n 485 above) sec 172(2) read with sec 167(5).
693 n 686 above, para 78.
694 This was in terms of sec 8(2) of the Constitutional Court Complementary Act 13 of 1995.
695 *Khosa* (n 686 above) paras 12-25.
696 M Swart 'Social security' in Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 56D-10 to 56D-12; *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) para 5.
697 *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 3.

Eastern Cape High Courts[698] in an effort to compel the department to deal with applications timeously and fairly. The failure of the state to remedy the situation, and its repeated opposition to applications, demonstrates a level of callousness and obstinacy not conducive to good governance in South Africa.

3.3.1 Reasonableness expanded

The majority of the Court in *Khosa* began its analysis by noting that the socio-economic rights conferred by sections 26 and 27 of the Constitution are conferred on 'everyone', and whether this extends only to citizens, or to a broader class of persons, will depend on the interpretation of 'everyone' adopted.[699] Mokgoro J, adopting a 'purposive interpretation', found that the term 'everyone' cannot be read as being restricted to citizens only.[700] It is not clear, however, why the Court does not then use the same 'purposive interpretation' to find that permanent residents are included in the group covered by 'everyone', as this task would surely involve an interpretation of the constitutional text, a task which the Constitutional Court is obliged to undertake and in which its interpretation is authoritative. Instead, the Court moved on to a reasonableness-test interpretation regarding the state's social security policy, that 'non-citizens have no legitimate claim of access to social security'.[701] In other words, the Court interpreted the requirement to take 'reasonable legislative and other measures' in section 27(2) to mean that the term 'everyone' in section 27(1) is also subject to a reasonableness enquiry, in the manner of a limitations analysis. In this way, 'the s 36 justification analysis ends up getting subsumed into the internal limitations clause'.[702] Later in the judgment, Mokgoro J writes that: 'In essence, the Constitution properly interpreted provides that a permanent resident need not be a citizen in order to qualify for access to social

698 See C Plasket 'Administrative justice and social assistance' (2003) 120 *South African Law Journal* 494 497-522 for a discussion of some of these cases.

699 *Khosa* (n 686 above) para 46. This is despite the fact that the Court observed that the right to access to land extends to 'citizens' only, and that it would therefore be a logical inference that 'everyone' included non-citizens. Sec 25(5) of the Constitution provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.

700 As above, para 48.

701 As above, para 50.

702 K Iles 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *South African Journal on Human Rights* 448 458. This approach largely confirms earlier academic speculation that there was no role for a limitations analysis where the courts have already found a limitation of an internally-limited socio-economic rights provision. See J de Waal *et al The Bill of Rights handbook* (2001) 451. See also S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999) 41-7 to 41-8; P de Vos (n 554 above) 79-80; and M Pieterse 'Towards a useful role for section 36 of the Constitution in social rights cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*' (2003) 120 *South African Law Journal* 41.

security'.[703] Despite this acknowledgment that the reasoning involved was a question of textual interpretation, the Court persisted in its enquiry as to whether the state's interpretation was reasonable.

In undertaking its analysis, the Court was quick to point out that it accepted that there are a wide range of possible measures that the state could adopt which would be reasonable, and that it is not the role of the Court to prefer one measure over another. The Court will simply assess the state's chosen measures for consistency with the principle of reasonableness. The principle of reasonableness, it held, must be understood within the broader context of the Bill of Rights. The following passage is illustrative of the Court's approach.

> In dealing with the issue of reasonableness, context is all important. We are concerned here with the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is also necessary to have regard to the impact that this has on other intersecting rights. In the present case, where the right to social assistance is conferred by the Constitution on 'everyone' and permanent residents are denied access to this right, the equality rights entrenched in section 9 are directly implicated.[704]

The Court then engaged in a lengthy reasonableness enquiry, considering the purpose of the provision of social security; the use of reasonableness to differentiate those who are to be afforded social benefits; financial limitations; the state's goal of self-sufficiency among foreign nationals; equality or unfair discrimination; and the impact of the exclusion on permanent residents.[705] Mokgoro J ends the reasonableness analysis with a balancing enquiry, weighing the negative impact of the policy on permanent residents against the financial and immigration policies of the state. She concluded that

> the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.[706]

703 n 686 above, para 56.
704 As above, para 49.
705 As above, paras 48-82.
706 As above, para 82.

In finding the state's actions were not reasonable, the Court considered a wide range of factors (factors which are normally dealt with in a limitations analysis) as well as a proportionality enquiry. In this way, the Court went well beyond the traditional reasonableness enquiry of administrative law. The remedy favoured by the Court also indicates an expanded role for the Courts' enquiry, where the Court 'read in' the words 'or permanent residents' into the relevant provisions in the statutes.[707] Thus, in *Khosa*, the Court adopted an expanded reasonableness test to assess the legality of state action — one which incorporates a consideration of other rights in the Bill of Rights, and one which uses the reasonableness test to determine the interpretation of subsections (1) of sections 26 and 27 respectively.

The minority, by contrast, adopted a different reasoning process. Ngcobo J found that there had been a violation of section 27(1) since the right to social security is afforded to 'everyone' in the Constitution, and the state clearly did not provide social security to everyone, only to citizens. He then moved on to a limitations analysis to determine whether the state's restriction of social security could legitimately be restricted to citizens only.[708] Ngcobo J thus rejected the majority's approach of enquiring whether the meaning of 'everyone' could be restricted through the reasonableness enquiry in section 27(2):

> The term 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.[709]

On the facts, the minority found that while the restriction on child care grants was not justified, the limitation on old-age pensions to citizens was a justifiable limitation on the applicant's rights.[710] The test applied by the minority (although not the outcome) is far more convincing as it is, simply, logical and does not place undue strain on the reasonableness test. Nor does it extend the reasonableness test to cover enquiries that are best dealt with as a matter of textual interpretation and a limitations analysis. It is stretching logic too far

[707] As above, para 98.
[708] Ngcobo J concluded that the state could legitimately restrict social grants for the elderly to citizens in terms of sec 36; as above, para 134. Nevertheless, it must be emphasised that this differing result to the majority was not due to the difference in approach, but due to different findings in the enquiry — in other words, the majority and the minority simply differed over whether it was reasonable for the state to restrict social grants to the elderly to citizens only.
[709] As above, para 111.
[710] As above, para 140.

to argue that the meaning of 'everyone' can be determined by the reasonableness of the measures undertaken by the state.[711]

3.3.2 Budgetary considerations

In deciding the reasonableness of state policy, Mokgoro J considered the role of budgetary limitations. The state provided evidence that it had spent considerable sums on increasing the scope and amount of social assistance grants over the previous years, and submitted that if it had to make provision for the extension of welfare benefits to permanent residents, 'the costs [would] be large and [would] result in shortfalls in provincial budgets particularly in the poorer provinces'.[712] It was not, however, clear what the precise costs would be as there was no information on the exact number of permanent residents who would qualify for welfare grants, but the state estimated that it would be between R243 million and R672 million.[713] In response, Mokgoro J found that after one had taken into account the child care grants (which the state had already conceded it should provide), the additional increase was 'less than 2%'. This, she concluded, would 'be only a small proportion of the total cost'[714] and could not justify the exclusion of the benefit to permanent residents. The minority, by contrast, adopted a far more deferential position on this question:

> Policymakers have the expertise necessary to present a reasonable prediction about future social conditions. That is precisely the kind of work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.
>
> The fact that the increase is not huge is not relevant.[715]

The minority thus emphasised the institutional roles of the various branches of government in adopting a fairly traditional view on constitutional deference. The majority, however, gives little or no reason for its assessment that 2% of the social welfare budget is so insignificant so as to warrant no deference to the executive in this regard. Given the awkward reasoning in this judgment conflating equality and socio-economic rights jurisprudence, it is unclear

711 The same approach is adopted by Liebenberg in a discussion of whether socio-economic rights can be limited to citizens only. 'Legislation which restricts access to socio-economic benefits to citizens would constitute a limitation of both the relevant socio-economic rights and the right to equality. It would thus be incumbent on the state to justify the limitation under the general limitations clause (sec 36).' Liebenberg (n 702 above) 41-26.

712 n 686 above, para 60.

713 As above, paras 61-62.

714 As above, para 62.

715 As above, paras 128-29.

whether this signals a new, more robust defence of socio-economic rights by the courts, or whether it is more appropriate to interpret the judgment as the application of the equality principle, and therefore of little significance to more general socio-economic rights adjudication where unfair discrimination is not involved. On the basis of a single judgment, it is perhaps wise to be cautious in reading too much into this decision.

3.3.3 Equality and socio-economic rights

From the above discussion, it is clear that the analysis of reasonableness in *Khosa* is closely tied up with equality jurisprudence. The Court acknowledges this from the outset, stating that equality, like dignity, is a foundational value in the South African Constitution, as well as an enumerated right.[716] Thus, where the state chooses to limit the provision of social welfare benefits to certain categories of persons, it must do so consistently with the value of equality. Williams identifies this as a 'nascent concept of "minimum core"' where the Court articulates

> at least one 'minimum core obligation', namely that under the Constitution, permanent residents must be included in social security benefits in terms of the Social Assistance Act 59 of 1992. In *Khosa* the Constitutional Court finally provided an interpretation of one of the socio-economic rights that effectively granted certain individuals, that is, permanent residents, a constitutional individually enforceable entitlement.[717]

It is not clear that this description is accurate, since it would be open to the state to 'level down' the provision of social welfare benefits, provided it did so without unfairly discriminating against a particular group. It is therefore not correct to say that *Khosa* confers an 'individually enforceable entitlement' upon permanent residents.

This leads to the question of what has been added to the socio-economic rights jurisprudence through the inclusion of the value of equality, rather than relying on the right to equality directly. At this point, it is difficult to see that much could be added using a notion of 'formal equality', that is, that the state must not discriminate unfairly in the provision of socio-economic benefits, as this conclusion is just as easily reached relying on equality as *right*, rather than as a *value* informing socio-economic rights interpretation. The *Khosa* judgment is, it is suggested, best treated with caution as an awkward conflation of socio-economic rights and equality jurisprudence. It would have been far better for the Court to have dealt with this

[716] As above, paras 41-42.
[717] Williams (n 688 above) 450.

matter as a question of equality, and not to have muddied the waters by extending the reasonableness test.

4 Conclusion

The Constitutional Court has made it clear that the socio-economic rights entrenched in the Constitution are justiciable. Despite this, the Court has not dealt with the adjudication of socio-economic rights in the same way that it has treated civil and political rights, evidenced primarily through the adoption of a lower standard of review, and deferential remedies. The reasons for this deferential approach appear to be that the Court, despite acknowledging the equal status of socio-economic rights, retains a number of unarticulated and unexamined reservations to the adjudication of socio-economic rights. The notion of constitutional deference can be used to examine and explain these reservations. This concluding section ends with five general observations on the Constitutional Court's approach to interpretation and enforcement of socio-economic rights based on the discussion in this chapter. In the following chapter, some of these observations are extended through a more specific, thematic analysis.

First, it is clear that the test adopted by the Constitutional Court to review socio-economic rights is the reasonableness test — a standard of review lower than the standard of proportionality used for the review of civil and political rights. This test is used as it allows the courts to support a restrictive approach to the interpretation and review of socio-economic rights. Following on from this point, the reasonableness test also allows the courts to avoid engagement with a normative interpretation of the scope of the right, demonstrated in the Court's refusal to entertain an interpretation of the right which includes a minimum core, in *Grootboom* and *TAC*. Hence, a second feature of the Court's approach is its restrictive interpretation of socio-economic rights and rejection of a more expansive reading of the right found in international law and domestic legislation. These two issues are expanded upon in the discussion in chapter five.

Third, because of the Court's preference for the reasonableness test used to interpret sections 26 and 27 of the Constitution, it has shown a tendency to attempt to adjudicate all socio-economic rights matters brought before it using this test. Hence, in *Soobramoney*, the Court refused to consider an expansive reading of the unqualified right to life where the applicant's claim could be decided under the more restrictive right of access to healthcare. This allowed the Court to be more deferent to the hospital policy decision makers, as all they had to demonstrate was that their policy was reasonable, rather than that their policy was a justified limitation of the right to life under section 36 (the limitations clause) of the Constitution. Similarly, in

Grootboom (and to a lesser extent in *TAC*), the Court decided claims based on section 28(1)(c) (unqualified children's socio-economic rights) under sections 26 and 27 respectively, thereby watering down children's rights to socio-economic goods. In *TAC*, the Court decided the constitutionality of a violation of a negative aspect of the right to healthcare using the reasonableness test, rather than a more exacting level of scrutiny. And finally, in *Khosa*, the Court used the reasonableness test to interpret the term 'everyone' in the manner of a limitations analysis.

The final two points relate to an expanded consideration of the concept of constitutional deference. The fourth reflection relates to the nature of the state action which the Court is reviewing, noting that the discussion on constitutional deference has until now focused on judicial approaches to deference, and has paid little attention to the nature of the decision maker and whether that does or should have any impact on the level of deference applied by the courts. As a general principle, courts should more readily defer to the decisions of parliament than the executive,[718] as parliamentary decision making, or legislation, is the product of a directly democratically-elected body, in a way which the executive is not, and because of the deliberative process to which legislation is subjected before enactment.[719] This is not borne out in the case law, as the only decision involving review of legislation (*Khosa*) displayed the least deference out of the four Constitutional Court decisions. Nevertheless, as noted above, if *Khosa* is understood primarily as an equality decision, its reasoning is less remarkable.

The final observation relates to the remedies used. A further refinement of the approach to constitutional deference is to consider its role in the enforcement of socio-economic rights. The discussion to this point has deliberated constitutional deference primarily in relation to the interpretation, and limitations or proportionality analysis, of socio-economic rights. Deference also operates, however,

[718] Lord Steyn 'Deference: A tangled story' (2005) *Public Law* 346 349. See *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 para 83.

[719] Deference may also occur in developing the common law, where the courts, eg, defer to the legislature to make choices regarding the development of the common law where it is inconsistent with the Constitution. An example can be found in *Minister of Home Affairs v Fourie (Doctors for Life International and Others,* Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC), where the Court deferred to the legislature in developing the common law of marriage by according the legislature a period of time to amend the common law definition of marriage. This deference could be criticised since the courts are mandated in sec 39(2) of the Constitution to develop the common law in the light of the 'spirit, purport and objects of the Bill of Rights', and therefore, arguably, should set a higher threshold for deferring to the legislature in developing the common law. See ch five, n 794 for a further discussion of this case.

in the remedies that are provided, and it is important to tease out the differences in approach in these two aspects of the adjudication process. Moreover, the reasons for adopting a particular approach to constitutional deference in interpretation and enforcement respectively may differ. There are two main ways in which the approach to interpretation and enforcement can relate: either they can reinforce the other, or they can counteract the effect of the other. In the first instance, the approach to constitutional deference in interpreting the right or statute in question is mirrored by the approach to constitutional deference in the remedy. Thus, for instance, if a court adopts a highly deferential approach in interpreting a right restrictively, and in assessing the evidence before it, it may similarly be deferential in granting an unobtrusive remedy, such as a declaration of unconstitutionality.

The second, and more interesting, relationship is that where the approach to the one is used to counteract the other. For example, where a court adopts a low level of deference to the interpretation of a right and level of scrutiny, and then finds that the state has infringed the right, it may, for reasons of constitutional deference, adopt a highly deferential remedy, or vice versa. One could also speculate that where a court, or similar institution, is bound by its constitution to adopt a deferential remedy, or where its findings are not binding, it may be less deferential in its interpretive enquiry and scrutiny of evidence. An example already discussed can be found in the United Kingdom, where British courts may make orders of incompatibility only where they find an infringement of the HRA (although, in practice, these are always acted upon by the government).[720] The South African courts seem also to have adopted this latter approach, preferring a more rigorous level of scrutiny of the evidence and justifications put before it by the state, to counter the effect of adopting a fairly weak interpretation of the right and a weak remedy. In *Grootboom* and *TAC*, the weak remedy was partly attributable to the actual or perceived shift in state policy prior to the order being handed down, rendering a more forceful remedy unnecessary. And in *Olivia Road* and *Joe Slovo*, the Court effectively goaded the parties into reaching their own resolution of the dispute. It is only in *Khosa* that a direct, positive obligation is imposed upon the state. In the following chapter, these observations are explored in more detail.

[720] See ch one, sec 3.1.

CHAPTER 5

THE INTERPRETATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

1 Introduction

This chapter extends the discussion in the previous chapter on the socio-economic rights jurisprudence of the South African courts through a thematic consideration of four interpretive issues.[721] The chapter begins with a consideration of the nature of the reasonableness test adopted by the courts, by looking at the constituent elements of the textual rights in the South African Constitution, and the way in which the Constitutional Court has interpreted that relationship. In section 3, the argument that the socio-economic rights in the Constitution need to be interpreted to contain a 'minimum core' entitlement to the right is then considered. This preoccupation in the secondary literature with the notion of minimum core has tended to obfuscate some of the interpretative issues. This chapter argues that, while South African courts are not required to adopt the minimum core approach, and there may well be good reasons for not doing so, they should nevertheless engage in some consideration of the substantive content of the right.

Along with the discussion of minimum core obligations, the role of budgetary limitations in interpreting and enforcing socio-economic rights is one of the most difficult interpretive issues for these rights. This issue is dealt with in section 4, where it is argued that budgetary limitations are relevant to interpreting socio-economic rights, but are relevant in different ways in different parts of the interpretative analysis. Finally, in section 5, the chapter concludes with a discussion of the remedies provided by the court. The South African courts have broad remedial powers, but have been hesitant to utilise them fully.

[721] This chapter does not purport to deal with all interpretative issues, and only four issues have been selected for consideration, which focus on the nature of the relationship between the courts, and the executive and legislature. Notably, the chapter does not consider the horizontal application of socio-economic rights or the development of the common law in line with socio-economic obligations.

This is arguably the area in which the courts have displayed the greatest degree of deference.

2 The test for constitutionality

This first part considers the test which the Court has adopted in its consideration of internally-limited socio-economic rights, that is, sections 26 and 27 of the Constitution. It begins with a discussion of the nature of the reasonableness test and its implications for the conceptual distinction between the two parts of the right. This leads to a discussion of the relationship between the two parts of the right and an argument that they should be conceptually separated.

2.1 The reasonableness test

From the discussion in the previous chapter, it is clear that the courts have adopted a 'reasonableness test' for assessing the constitutionality of state socio-economic policy. According to this approach, the courts engage in a reasonableness review similar to that used in administrative law review, where a measure of deference is afforded to the executive if reasonable choices have been made to give effect to socio-economic rights. In *Khosa*, the Court expanded the reasonableness enquiry to include consistency with other rights in the final Constitution and a range of factors usually considered under the general limitations clause.[722] This test has, so far, been used to assess all socio-economic rights claims made on the basis of sections 26 and 27 — including those in section 28, the unqualified right of children to socio-economic rights.

The wording of the obligation in sections 26(2) and 27(2) reads as follows: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right].' The wording of the test therefore does more than simply establish a reasonableness standard of review: it also requires that the legislative and other measures which the state must take are reasonable. In this sense, it requires both substantive reasonableness by the state in taking steps positively to realise the right, as well as scrutiny by the courts of these steps on a reasonableness standard of review. This is not to imply any strict separation between the two — only that there is (or should be) a conceptual distinction between the steps the state is obliged to take, and the standard on which the constitutionality of those measures will

722 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC) para 44. See ch four, sec 3.3.1.

be assessed. The reasoning of the Constitutional Court has tended to conflate these two meanings but, it will be argued in this chapter, this ought to be undone, and the Court should engage more fully with the normative content of the right, that is, an assessment of the reasonableness of the policy itself.[723]

It is important to examine the second aspect of the reasonableness test, namely, the standard of review adopted by the courts, in more detail. The standard adopted is clearly wider than a *Wednesbury*-style[724] threshold, yet it is difficult to pinpoint its exact nature owing to the limited number of judgments handed down by the Court. The Court has also preferred not to define the test, and to develop its approach on a case-by-case basis.[725] *Soobramoney*[726] and *TAC*[727] are the least difficult judgments to explain, as the state action was clearly reasonable in the case of *Soobramoney*[728] and clearly unreasonable in the case of *TAC*,[729] on any standard of reasonableness-review which the Court could have devised, even on a rationality test. In *Olivia Road*[730] and *Joe Slovo*,[731] the standard of review is difficult to discern as the emphasis of the Court in both judgments was on achieving consenses between the parties in balancing their respective interests, rather than on scrutinising the state's policy for compliance with its obligations under section 26(2) of the Constitution. In *Grootboom* (on the section 26 enquiry), the Court expanded the reasonableness test set out in *Soobramoney* to include the substantive requirement that the state's housing policy should provide relief for those in desperate need, and in *Khosa*, the Court found that the enquiry into reasonableness should embrace a consideration of other rights in the Bill of Rights. What is clear is that the extant reasonableness test allows the Court considerable freedom when assessing the constitutionality of state action.

723 See the discussion below at sec 3.2.

724 See ch four, n 552 above for a discussion of the meaning of *Wednesbury*-unreasonableness.

725 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC) para 92.

726 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

727 *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC).

728 D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 33 40.

729 D Bilchitz 'Health' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 56A-16; Brand (n 728 above) 50-51. For a contrary assessment of the *TAC* judgment, see C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 279.

730 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

731 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16.

Reasonableness review potentially could include a range of levels of scrutiny, from rationality (as a fairly minimal level of scrutiny), through to proportionality (as an intermediate level), and a correctness standard as the most rigorous degree of scrutiny, where a court prefers its interpretation as authoritative. Brand describes the reasonableness test in the South African socio-economic rights jurisprudence as a 'means-end effectiveness test, rising only in exceptional cases to the level of a proportionality enquiry',[732] while Pillay, more generously, characterises the test as a proportionality enquiry.[733] Other writers, such as Wesson, argue that the Court engaged in a 'close evaluation' of the reasons for the 'particular shape and form' of the state's housing programme (in *Grootboom*),[734] and Roux describes the test as one which 'requires the court to substitute its view of what the constitution requires', but which 'stops short, however, of a full-blown proportionality test'.[735] Thus, the dominant view in the secondary literature is that the approach adopted by the South African courts is a fairly robust level of scrutiny, but one which is something less than a full proportionality enquiry.

Unfortunately, this flexible reasonableness test threatens the conceptual distinction between section 26(1) and section 27(1), on the one hand, and section 26(2) and section 27(2), on the other. By focusing solely on the reasonableness of state action, the Court has failed to give appropriate substantive content to the rights to 'adequate housing', 'healthcare services' 'sufficient food and water' and 'social security'.[736] This is problematic as, without the clear articulation of the objective or the purpose of a socio-economic right, it is extremely difficult for the state (or any other party) to make an internal assessment as to whether its action (or inaction) would pass constitutional muster.[737] It is also very difficult for a court to determine the reasonableness of state action intended to realise a right without having some point of reference regarding what the state is obliged to achieve.[738] Such a reference point would require that the court first carve out a greater normative conception of the right. In *Grootboom*, *Olivia Road* and *Joe Slovo*, for instance, the Court

732 D Brand 'Food' in Woolman *et al* (n 729 above) 56C-7 to 56C-8 (footnote omitted).
733 A Pillay 'Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?' (2005) 122 *South African Law Journal* 419 432.
734 M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284 295.
735 T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92 97. See also Brand (n 728 above) 41.
736 See Bilchitz (n 729 above) 56A-20 to 56A-21, who points out that the Constitutional Court failed to undertake any analysis of the right to healthcare in *TAC*.
737 K Iles 'Limiting socio-economic rights: Beyond the internal limitations clauses' (2004) 20 *South African Journal on Human Rights* 448 454.
738 Brand (n 728 above) 48-49.

accepted the state's version of what adequate housing entails and then went on to assess the reasonableness of the state's measures in securing adequate housing in light of these objectives. While the state's current understanding of what constitutes adequate housing arguably makes such deference in these cases acceptable, one can easily imagine the difficulties that might present themselves were the state to set its sights considerably lower.[739] A clearly defined ambit of the right to adequate housing will not determine the reasonableness of state action, but it will provide a meaningful framework for undertaking the reasonableness enquiry.

In addition to these interpretative difficulties, the current reasonableness test is also problematic as it is so wide as to allow the Court to engage in an analysis of subsection (1) and to achieve (arguably — in the light of *Khosa*) any result it thinks just. The failure to articulate clearly the objective or the purpose of a socio-economic right leaves the courts with far too much discretion. Moreover, the absence of clear guidelines for judicial review of socio-economic rights complicates immeasurably the process by which lower courts assess constitutional challenges brought in terms of sections 26 and 27.

This interpretative approach to socio-economic rights can also be criticised for undermining the two-part rights analysis and for being analogous to 'pre-limitations deference', discussed in chapter one.[740] In pre-limitations deference, a court defers to the executive or legislature in interpreting and defining the scope of the right. In doing so, it undermines its own role by substituting the judgment of the executive or legislature for its own judgment. The problem with applying pre-limitations deference is that the court gives up its interpretive role to the executive and legislature, thereby effectively undermining the separation of powers doctrine and, in turn, undermining the effectiveness of the Constitution. This has been explained well in the Canadian Supreme Court by McLaughlin J in *RJR MacDonald v Canada* in the context of judicial deference in interpreting the Canadian Charter:

> Care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and

739 The state's fulfilment of the right to food in South Africa provides a good example as, until recently, there was no policy on the right to food at all, despite the fact that the Constitution of the Republic of South Africa Act 108 of 1996 in sec 27(1)(b) provides that '[e]veryone has the right to have access to - … sufficient food and water': Brand (n 732 above) 56C-24.

740 See RA Edwards 'Judicial deference under the Human Rights Act' (2002) 65 *Modern Law Review* 859 869. See ch one, sec 3.4.

> justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded.[741]

Of course, pre-limitations deference is not exactly the same as the approach adopted by the Constitutional Court in collapsing the two stages of the rights analysis, but it amounts to much the same thing, since in both cases, a deferential approach is integral to the court's interpretation of the right. The choice of this approach, rather than a more exacting one, reveals a wariness of socio-economic adjudication that plays out in a deferential attitude in the adjudication of socio-economic rights.

2.2 The relationship between parts (1) and (2) of the internally-limited right

This discussion warrants a more detailed consideration of the relationship between the two parts of the internally-limited rights. This issue is one that is crucial to the interpretation of South African socio-economic rights, and one which has received considerable academic attention. In Klaaren's words:

> The relationship of subsections 1 and 2 encapsulates the social dynamic of the Constitution itself. To this extent then, the interpretative battle over the relationship of these two subsections mirrors the interpretive battle over the Constitution itself.[742]

The Constitutional Court first addressed the nature of the relationship between subsections (1) and (2) of section 27 in *Soobramoney*, where Chalskalson P wrote:

> What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.[743]

741 *RJR MacDonald v Canada* [1995] 3 SCR 199 para 136.
742 J Klaaren 'An institutional interpretation of socio-economic rights and judicial remedies after *TAC*' in Botha *et al* (n 728 above) 105 107.
743 *Soobramoney* (n 726 above) para 11.

In this passage, the Constitutional Court distinguishes between the obligations imposed on the state by sections 26(2) and 27(2) and the 'corresponding right'. While the obligations on the state are clearly circumscribed by available resources, it is not entirely apparent what the Court means when it states that the 'corresponding rights themselves are *limited* by reason of the lack of resources' (emphasis added). This sentence could be interpreted in two ways: The Court could be saying that the rights in sections 26(1) and 27(1) are 'limited' by the nature of the state's obligation. That is, while the content of the right might remain the same, any relief granted against the state will be contingent upon 'available resources'. In other words, a claim against the state at a particular time may be less likely to succeed than a similar claim against the state at a later time because more resources are available at the later date, but the 'right' remains the same.[744] Alternatively, the Court could be saying that the ambit of the right itself must be restrictively interpreted, that is, 'available resources' and 'progressive realisation' truncates or delimits the scope of the right.[745] This would mean that the scope of the right would change over time (or possibly even between litigants), depending on available resources. Another way to view the distinction is that the former interpretation entitles applicants to a right to adequate housing, healthcare services, sufficient food and water and social security, with the duty (and corresponding claim) on the state to provide for the respective right progressively and within available resources. The latter approach, however, in collapsing the right and the duty, reduces the right of applicants merely to a right to a reasonable policy to realise the relevant socio-economic good.[746]

One consequence of the first reading is that section 26(2) acts in the manner of an internal limitations clause with regard to section 26(1), in the same way that the general limitations clause enables a justifiable limitation of a right. Hence, the 'content of the right is not limited to the duties in section 26(2) or the prohibitions in

744 This is similar to the interpretation adopted by Budlender, where he argues that sec 26(1) creates a general right, while secs 26(2) and 26(3) are best regarded as 'manifestations of the general right': G Budlender 'Justiciability of the right to housing - The South African experience' in S Leckie (ed) *National perspectives on housing rights* (2003) 207 208.

745 See FI Michaelman 'The Constitution, social rights and reason: A tribute to Etienne Mureinik' (1998) 14 *South African Journal on Human Rights* 499 503-4, who acknowledges the ambiguity of this passage, and argues forcefully for the court to adopt the former interpretation in subsequent decisions. By contrast, Steinberg (n 729 above) 266 argues in favour of the latter interpretation: 'The two subsections must be read together as defining the scope of the right and the corresponding obligation on the state.' This statement is undermined immediately afterwards where Steinberg acknowledges that the 'negative content of the socio-economic right … is not subject to the considerations enumerated in subsec (2) … Subsec (1) does give rise to an independent free standing right in the context of the negative content of the right:' n 729 above, 267.

746 Brand (n 728 above) 38-40.

section 26(3)'.[747] On the second (Hohfeldian) reading, the content of the right is *determined* by section 26(2) duties, which are, in turn, prescribed by issues such as available resources. The first interpretation appears to be adopted in the minority concurring judgments of Madala and Sachs JJ in *Soobramoney*. According to Madala J:

> Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.[748]

Similarly, Sachs J held, in the context of discussing the interdependency of rights, that:

> Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.[749]

In *Grootboom*, Yacoob J accepted the approach adopted by Chaskalson P in *Soobramoney*, stating that the obligation in section 26(2) 'does not require the state to do more than its available resources permit'.[750] Again, the *Grootboom* language is ambiguous and does not clarify the conceptual distinction between the nature of the duty and its relationship to the scope of the right. The same point was raised again in *Khosa* in relation to section 27. In summarising the Court's previous jurisprudence, Mokgoro J states:

> This Court has dealt with socio-economic rights on four previous occasions. What is clear from these cases is that section 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to

747 Budlender (n 744 above) 208.
748 *Soobramoney* (n 726 above) para 42.
749 As above, para 54.
750 *Grootboom* (n 725 above) para 46.

> fulfil the obligation towards those entitled to the right in section 27(1).[751]

Thus, while the content of the section 27(1) right is '*determined with reference*' to the duty placed on the state in section 27(2), the fact that some of the same factors may be used to determine the right and the duty does not mean that the right and the duty map onto each other in a strict one-to-one relationship. Subsequent paragraphs in the judgment indicate that the Court may still accept a conceptual distinction between the right and the duty and that the scope of the right may be more extensive than the duty:

> [E]ven where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.[752]

This passage implies that it is possible to have entitlements under section 27 (presumably section 27(1)) while the state can justify not extending those benefits to everyone on the basis of budgetary limitations (presumably under section 27(2)). Thus, even though the same factors are taken into consideration in determining the right and the duty, these determinations remain discrete inquiries. While it is accepted that the text does not clearly or explicitly favour this interpretation, the text is at least ambiguous, and that this interpretation is one which could (and should) reasonably be adopted from a reading of these passages.[753]

The question that then arises is why is it important to make this conceptual distinction when, practically, a claimant would be entitled only to claim the extent of the duty imposed on the state by section 26(2) or section 27(2). There are four reasons for preferring this interpretation. First, it is more jurisprudentially convincing to have a stable core interpretation of the right which is not contingent on available resources.[754] The justification for any limitation of the right then takes place in terms of either the internal limitations in subsections 26(2) or 27(2) or through the general limitations clause in

751 *Khosa* (n 722 above) para 43. The four judgments referred to are *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); *Soobramoney* (n 726 above); *Grootboom* (n 725 above); and *TAC* (n 727 above).

752 *Khosa* (n 722 above) para 45.

753 See, eg, 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 5-9, who adopts a similar interpretation in a discussion of the same passages in *Grootboom* and *TAC*.

754 For an argument of the jurisprudential possibilities of separating rights and duties, see N MacCormick *Legal right and social democracy: Essays in legal and political philosophy* (1982) 161-66.

section 36. This approach would allow the courts to align interpretations of the scope of the right with international and comparative norms, rather than make the scope of the right entirely contingent on immediate exigencies. It also forces the state to justify any 'failure' to realise fully the right.[755] In this sense, then, sections 26 and 27 are different to other 'internally-limited' rights in the Constitution, such as the right to freedom of expression, where the text of the right in section 16 indicates clearly that it is the scope of the right which is curtailed by the internal limitation.[756] It is also more consistent with the interpretation impliedly required of section 25(5) which collapses the two-part structure into a single provision: 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' This provision clearly implies that the duty and consequent right is that the state must take 'reasonable legislative and other measures' to enable citizens to gain access to land. The different formulation of the text in sections 26 and 27 suggests that the same interpretation should not be adopted, and the interpretation argued for here is apposite.

A second reason for preferring this interpretation is that this approach is consistent with the general approach to rights interpretation in the South African Bill of Rights where, if a right, such as the right to dignity, is limited by other rights, such as another's rights to free speech, it does not follow that the right to dignity is diminished or extinguished. Rather, a claimant may not be entitled to enforce her right to dignity because, on the merits of the case before the court, another right (such as free speech) takes precedence.

Third, this approach is to be preferred because it draws a distinction between the negative and positive obligations which arise from sections 26 and 27.[757] In *TAC*, the Constitutional Court approached the interpretation of the negative duties in that case by using the reasonableness test.[758] As Liebenberg points out:

> This reading runs counter to the widely accepted interpretation amongst commentators that negative violations of the duty to respect socio-

[755] See E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

[756] Sec 16 states: '(1) Everyone has the right to freedom of expression ... (2) The right in subsection (1) does not extend to - (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' See S Woolman & H Botha 'Limitations' in Woolman *et al* (n 729 above) 34-31 to 34-33.

[757] See Klaaren (n 742 above) 114.

[758] See ch four, sec 3.1.3.

> economic rights are immediate and not subject to resource-based limitations (at least at the first stage of constitutional analysis).[759]

It would therefore be far preferable for the Court to maintain a distinction between the right and the negative duties imposed by that right in subsection (1) and the positive obligations imposed by subsection (2).[760] Moreover, separating the right and the duty opens up the possibility of a reading of multiple duties.

Fourth, and perhaps most fundamentally, this distinction touches on what one understands rights to be. If one views rights as simply the corresponding correlation of what a person can claim as a legal duty or obligation against the state, then there is no practical point in distinguishing between rights and duties. If, however, one adopts a wider socio-political understanding of rights, then rights may be understood as political or ethical claims against the state which stand, even where the state is not able to realise these rights fully.[761] For all these reasons, therefore, a preferable interpretation is that parts (1) and (2) of sections 26 and 27 of the Constitution remain conceptually distinct. This would mean that the reasonableness test should not only be confined to an assessment of whether the state has met its constitutional obligations to take 'reasonable legislative and other measures' to realise the right, but should also include an assessment of what the right itself is.

3 The content of socio-economic rights

3.1 Minimum core interpretation

One of the most widely debated issues in the secondary literature on South African socio-economic rights is the issue of a minimum core in those rights.[762] The Constitutional Court first considered the question in *Grootboom*, when the *amici curiae* asked the Court to adopt an

759 S Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (n 729 above) 33-18. See also P de Vos 'Pious wishes or directly enforceable human rights: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67 94.

760 This was the approach adopted in the High Court decision of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W).

761 For a more detailed account of this proposition, see Bilchitz (n 753 above) 20-23; and Bilchitz (n 729 above) 56A-40 to 56A-42.

762 A number of writers argued for a minimum core interpretation prior to the *Grootboom* (n 725 above) and *TAC* (n 727 above) judgments. See C Scott & P MacKlem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1 77; S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999) 41-43 to 41-42; De Vos (n 759 above) 97-98; G van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* 52 57-59; C Scott & P Alston 'Adjudicating

interpretation of section 26 which included a duty to provide the 'minimum core' of the right to housing to everyone. This argument was based largely on the interpretation of ICESCR,[763] adopted by the ESCR Committee. The ESCR Committee has made it clear that, at the very minimum, states are to provide for the basic needs of their citizens through a provision of the 'minimum core' of each of the rights in ICESCR. The notion of a minimum core is not stated expressly in ICESCR, but was introduced by the ESCR Committee in its General Comment No 3, where it found that to exclude a minimum core interpretation would deprive ICESCR of its *raison d'être*.[764] The Court found that in the circumstances of *Grootboom* it was not necessary to decide the issue, but expressed strong reservation as to the appropriateness of a minimum core approach in the absence of extensive evidence which would enable the Court to determine the minimum core.[765] Rather, a minimum core could only be relevant as a factor in determining whether the measures undertaken by the state are reasonable.[766] Nevertheless, Yacoob J did find that, where socio-economic rights were deprived, the foundational values of dignity, equality and freedom were also undermined[767] — leaving open the possibility for an argument that something akin to the minimum core of every right should be provided to ensure that people's socio-economic needs are met so they can live consistently with the values of dignity, equality and freedom.

Bilchitz argues that the reasoning of the Court is based on an acceptance of the notion of a minimum core: 'Yacoob J succeeds in reaching the conclusion he does by implicitly building the notion of minimum core into the notion of reasonableness.'[768] This is because the outcome of the decision is that the Court declares that state policy must cater for short-term, immediate needs, that is, it must

constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206 249-54. For a more nuanced, post-*TAC* analysis, see M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to healthcare services' (2006) 22 *South African Journal on Human Rights* 473.

763 Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

764 General Comment No 3 'The nature of states parties' obligations' (1990) para 10.

765 *Grootboom* (n 725 above) paras 26-33. See the discussion in ch four, sec 3.2.2. In the recent decision in *Mazibuko & Others v The City of Johannesburg & Others* 2009 ZACC 28 paras 52-68, however, the Constitutional Court was explicit about its rejection of the minimum core jurisprudence in South Africa. The reasons given by the Court for this rejection are, first, the 'proper' reading of the Constitutional text (reading sec 27(1) and (2) together) and, second, an 'understanding of the proper role of courts in our constitutional democracy': para 57. It would appear that there is now very little scope for a minimum core jurisprudence.

766 *Grootboom* (n 725 above) para 33. This position was affirmed in *TAC* (n 727 above) para 34.

767 *Grootboom* (n 725 above) para 23.

768 D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* 484 498.

cater for those in desperate need who do not have access to their minimum core housing needs. He argues that, to ensure transparency and theoretical coherence, the Court should openly adopt a minimum core approach.[769] As Liebenberg points out, however, there is a critical distinction between the minimum core approach and reasonableness review adopted by the Court: in the minimum core approach, individuals are entitled to claim the minimum core of the right directly from the state and, subject to the general limitations clause, the state is obliged to provide that core. On the basis of the Court's reasonableness test, on the other hand, the only claim of individuals which the Court would uphold is that the state must have in place a reasonable policy.[770] Whether or not the state's policy fulfils individual's minimum core needs may be relevant to the question of whether the policy is 'reasonable', but is not determinative.[771]

In *TAC*, the Constitutional Court again dealt with the minimum core argument. Here the *amici curiae* took a slightly different approach and, taking their cue from *Grootboom*, argued that the right to access to healthcare services should be interpreted to mean that the state should provide a minimum level of services consistent with a 'dignified human existence'.[772] According to this argument, the minimum core approach would mean that two positive obligations are imposed on the state in sections 26 and 27 respectively. First, sections 26(1) and 27(1) impose a self-standing right, to which everyone is entitled immediately, to a 'minimum core' of the right. Second, sections 26(2) and 27(2) impose a different obligation on the state to realise the right progressively.[773] The Court rejected this argument on the grounds that it failed to appreciate the interrelationship between subsections (1) and (2) of the respective rights, as well as the way these rights had been interpreted in the Court's previous jurisprudence.[774] As Bilchitz points out, the reasoning of the Court (and the *amici curiae*) conflates the creation of a separate right in part (1) of the right with the notion of minimum core. Rather, Bilchitz argues, the minimum core approach should be grounded in part (2) in the notion of 'progressive realisation' of the right. It was therefore not appropriate of the Court to reject the minimum core approach on the basis that it created two separate rights.[775] With regard to the latter objection Bilchitz argues that it amounts to 'simply an assertion of the Court's authority' since the argument of the *amici curiae* was

769 As above, 499.
770 Liebenberg (n 759 above) 33-30.
771 *Grootboom* (n 725 above) para 33.
772 *TAC* (n 727 above) para 28. The *amici* submissions are available at http://www.communitylawcentre.org.za/ser/docs (accessed 2 August 2006).
773 As above, paras 28-29.
774 As above, paras 29-30.
775 Bilchitz (n 753 above) 13.

that the Court should overrule its previous jurisprudence.[776]

The Court went on, however, to point out that it had already found that sections 26 and 27 should not be interpreted so as to confer a minimum core of the right on everyone:

> [T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them ... A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.[777]

What is striking from this passage is the extent to which the Court goes to 'naturalise' its interpretation — again refusing to accept the interpretive choices inherent in its position. It is not true that a purposive interpretation necessarily results in the rejection of the minimum core approach. Indeed, it could be more forcefully argued that a purposive interpretation of the Constitution, giving effect to the foundational values of equality, dignity and freedom, would result in a minimum core interpretation.[778] Furthermore, there was no evidence put before the Court, nor was it argued, that it was 'impossible' to provide the minimum core at that time or in the foreseeable future. And even if the state was unable to meet the minimum core needs of everyone, the state would be able to justify, through the general limitations clause, its inability to fulfil the right. Thus it could not be said that an adoption of the minimum core approach would impose 'unrealistic demands' on the state.[779]

This aspect was considered before the discussion by the Court of the institutional limitations on courts in adjudicating socio-economic rights, which has already been discussed in chapter four.[780] The Court stated that 'courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards ... should be' and that courts 'are ill-suited to adjudicate upon issues where court orders could have

776 As above, 6. Bilchitz, perhaps the leading South African commentator on minimum core, has subsequently refined his approach to minimum core, arguing that it is necessary to distinguish between the 'principled minimum core' (ie, the 'minimum basic resources that are necessary to allow individuals to survive and achieve a minimal level of well-being') and a 'pragmatic minimum threshold' (ie, the minimal standards to which the state can be held accountable in realising): Bilchitz (n 729 above) 56A-31 to 56A-35. The pragmatic minimum core is determined with reference to, among other factors, budgetary considerations.

777 *TAC* (n 727 above) paras 34-35.

778 See, eg, Bilchitz (n 753 above) 15-18.

779 Liebenberg (n 759 above) 33-31.

780 See ch four, sec 3.1.3.

multiple social and economic consequences for the community'.[781] Again, rather than engaging in a dialogue over the appropriate role of the courts in adjudication through a discussion of the principles underpinning constitutional deference, the Court closed down any debate.

It is also not clear what the implications of this reasoning are for non-qualified rights, such as children's rights to basic nutrition, shelter, basic healthcare services and social services, and prisoners' rights to adequate accommodation, nutrition, reading material and medical treatment. While it is not necessary to adopt a minimum core approach to these rights, they do, on the face of it, require substantive interpretation, and this interpretation will raise largely the same issues as those involved in a determination of the minimum core content of sections 26 and 27. Early indications are that the Court will simply adopt the same approach to these unqualified rights as it does to sections 26 and 27.[782]

A more convincing approach by the Constitutional Court would have been to examine the role of the ESCR Committee in contradistinction to the role of the Constitutional Court. Both ICESCR and the South African Constitution were born out of a realisation that social justice is indispensable to a sustainable democracy. Nevertheless, despite this similarity, their interpretation and enforcement operates in a different context and fulfils a different political function. It is therefore instructive to contrast them. States voluntarily submit reports to the ESCR Committee, which then engages in a 'constructive dialogue' with state parties to ICESCR regarding the extent to which state policies are aimed at meeting their obligations under ICESCR. The ESCR Committee is thus able to engage in a more far-reaching discussion over fundamental questions of policy, such as privatisation and the impact of free-market economics on the vulnerable and disadvantaged within a community.[783] The South African Constitutional Court, on the other hand, engages in a confrontational dialogue, in which the Court assesses whether, and to what extent, the state has complied with its constitutional obligations. The Court then makes a judgment that is binding on the state and which can compel the state to change its policy or its allocation of resources.

The ESCR Committee and the Constitutional Court thus differ in their adjudicative processes in four respects. First, the nature of the adjudication is different: state parties to ICESCR submit periodic

781 *TAC* (n 727 above) paras 37-38.
782 See ch four, sec 3.2.1.
783 MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 122.

reports to the ESCR Committee in order to engage in a dialogue about their progress in realising the rights in the Covenant; while the South African state is brought, generally unwillingly, before the Constitutional Court to have its policies assessed in an adversarial forum. Second, the extent to which the ESCR Committee and the Constitutional Court can examine fundamental choices of policy differs: the ESCR Committee is able to engage in a far-reaching discussion over fundamental questions of policy, while the Court, out of considerations of constitutional deference, cannot adjudicate on the wisdom of fundamental policy choices and is left with the more modest task of assessing the reasonableness of state action. Third, the South African Constitutional Court is able to grant remedies which may have far-reaching policy and budgetary implications. It must thus be very careful about how it crafts its remedies; while the ESCR Committee, on the other hand, is free to make broad, sweeping findings about state compliance with the provisions of ICESCR. Lastly, the level of detail of scrutiny will usually differ. The Court, by its nature, engages in a particular dispute, with a particular set of facts in the context of a particular government policy. Unlike the ESCR Committee, it does not engage in a broad review of the state's entire socio-economic policy, and its findings may be distorted for this reason.

Hence, if the Constitutional Court, for reasons of constitutional deference, did not want to adopt a minimum core approach, it should have pointed to the different social and political functions which socio-economic rights play at the international level and in the South African context. It could have argued that, in the international arena, they serve to establish a higher ideal to which state parties subscribe and desire to commit themselves for future achievement. The South African Constitution, on the other hand, establishes a standard to which the South African government must be held immediately accountable, or be found in breach of its constitutional obligations. It is therefore appropriate, the Court could find, that the South African Constitution should establish a standard that the government can, in good faith, achieve, and that more aspirational goals such as the minimum core obligation are not necessarily appropriate as a constitutional standard in the context of South Africa.

The interpretation and enforcement of socio-economic rights in South Africa must be informed by its historical, political and social context. While international norms are relevant to informing the approach adopted, they should not be determinative. South Africa needs to develop its own approach to the adjudication of these rights — an approach grounded in its context. While it is not suggested that such an argument is a necessary interpretation of sections 26 and 27 of the Constitution, this approach would be preferable to that adopted for its transparency. In this way, it would be consistent with

the principle of constitutional deference advocated in this book, as it would require the Court to articulate clearly its role in South Africa's constitutional democracy.

3.2 Engaging the content of the right

This book has made several allusions to the argument that the South African courts ought to engage the interpretation of the normative content of socio-economic rights.[784] It bears repeating that this is not an argument that the courts should fully define the scope of all of the socio-economic rights. Indeed, such an approach by the courts would display an inappropriate lack of deference to the policy-making role of the executive and parliament. Rather, what is argued is that the courts should engage in a dialogue with the other branches of government regarding the content and scope of socio-economic rights. In this way, the courts could establish guidelines or benchmarks in defining the rights.

This argument should also not be taken to suggest that the courts have not already begun to engage is such a dialogue — only that the dialogue should be louder and clearer from the courts. A scrutiny of the reasoning in *Grootboom* provides a good example of what is being argued for. In *Grootboom*, the Court examined the housing legislation and policy of the state and found that the state policy was unreasonable to the extent that it did not cater for those in desperate need.[785] The Court also held that a reasonable policy must be reasonably implemented, flexible, cater for vulnerable groups and provide for a clear and efficient assignment of functions to the three spheres of government. Clearly, this is an example of the Court's engagement with the content of the right to housing in the Constitution. The Court, however, could and should have gone further in establishing guidelines for the state to follow in implementing its order. For example, the Court could have prescribed that, in order for the state to cater for these vulnerable groups, it should undertake a number of steps. First, the state should begin by defining the threshold levels for vulnerable groups in a manner consistent with the constitutional values to equality and dignity. Second, the state should establish a programme to provide shelter and rudimentary services for those who fall within this category. The Court could have provided guidance as to what this would entail, such as access to a basic water supply, sanitation, and secure tenure. Third, the Court should have prescribed time frames by which the state must create this new policy. By setting out a more specific order in this manner, the Court

[784] For similar arguments, see Brand (n 728 above) 45-51; Bilchitz (n 729 above) 56A-20 to 56A-23; Klaaren (n 742 above) 112.

[785] *Grootboom* (n 725 above) para 66.

could have avoided the continuing lack of an adequate response to the order made by it.[786] At the same time, the Court would have given the appropriate space to the executive to respond to the order with a suitable policy, without creating individually enforceable rights in its construction of section 26 of the Constitution.

In a similar vein, Brand describes the approach of the Constitutional Court as one which prioritises the procedural aspects of the reasonableness review, in particular, a narrow, procedural notion of 'good governance'.[787] In discussing the Court's approach to *Grootboom*, for instance, he writes:

> [T]he Court's concern in *Grootboom* was quite narrow: it seems to have been concerned in some sense only with the logical consistency of the state's housing policy, the fact that it make no reference to those who had nowhere to live. This is a structural concern only. It did not seem to be concerned with posing a substantive standard, that effort and expenditure should be prioritised in time according to differing degrees of need.[788]

He speculates that this approach of the Court is based on 'concerns about its institutional relationship with the political branches of government bolstered by a formalist understanding of law'.[789] One of the most important consequences of this strategy is that it undermines the role that socio-economic rights could play in formulating social policy and social activism to motivate for policy change.[790] In Brand's words:

> The socio-economic rights in the Constitution have thus far mostly played a role reactively, used as standards to test policy against once a dispute has arisen. But a potentially much more important role for these rights is that they should guide and shape policy formulation from the outset.[791]

This statement is perhaps unfair, as government has certainly made some attempt to give effect to socio-economic rights and to respond positively to the guidelines established by the Court. The state, for instance, in response to the *Grootboom* decision, amended the National Housing Code to include chapter 12, 'Housing Assistance in Emergency Housing Situations'.[792] Nevertheless, Brand's argument,

786 See K McLean 'Housing' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 55-20 to 55-24 for a discussion of the state's inadequate response to the *Grootboom* order.
787 Brand (n 728 above) 49.
788 As above, 50.
789 As above (footnote omitted).
790 As above, 53.
791 As above, 53-54.
792 See n 786 for a fuller discussion of the state's response, and the weaknesses in its amended policy and implementation.

that the Court has failed to establish adequate guidance with regard to policy formulation, is one which is consistent with the argument made in this section.

In addition to this criticism, Brand also argues that the Court's reasoning is based on a false conflation of form and substance, thereby 'enabl[ing] the Court to divorce itself from the inevitably contested nature of the meaning and role of socio-economic rights'.[793] Again, this observation is consonant with the critique in this chapter. The Constitutional Court, in adopting and shaping the reasonableness test in the way in which it has done so, has failed to give adequate substance to the scope of the textual socio-economic rights. This approach is derived from all three aspects of constitutional deference outlined in chapter two. The Court is acutely aware of the delicacy of its constitutional role in South Africa's new democracy and is at pains to create a modest role for itself in the constitutional dialogue with the executive and the legislature over the country's socio-economic upliftment of the poor.

This highly deferent approach is not, however, one which is applied consistently to civil and political rights. The 2005 decision of the Constitution Court in relation to 'gay marriage', for instance, has sparked considerably more political and social controversy, and involved a much greater 'intrusion' by the courts into the policy-making arena of parliament than any of the socio-economic rights decisions have done.[794] Again, this illustrates the Court's highly deferential approach to socio-economic rights where, despite assertions of equality between civil and political rights on the one hand, and socio-economic rights on the other, the Court engages with these rights differently.

793 Brand (n 728 above) 55.

794 *Minister of Home Affairs v Fourie (Doctors for Life International & Others,* Amici Curiae*); Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC). In this decision, the majority of the Constitutional Court declared that the common law definition of marriage (which allowed for heterosexual marriage only) was unconstitutional, as were the corresponding provisions of the Marriage Act 25 of 1961. The Court gave parliament 12 months to provide for an institution allowing for same-sex marriages that accorded the same legal benefits and status to homosexual partners. Parliament responded by enacting the Civil Union Act 17 of 2006. The Court's decision and subsequent legislation has generated extensive controversy throughout the country, with the predictable countermajoritarian objections to the judgment, and calls to amend the Constitution. See ch four, n 719 for a further discussion of this case.

4 The role of budgetary limitations in interpretation

The budgetary implications of socio-economic rights is one of the primary reasons given for distinguishing between socio-economic rights and civil and political rights in international law. While the difference between the two sets of rights is overstated, socio-economic rights do raise significant budgetary concerns, making it difficult for most state parties to ICESCR to commit to immediate, full realisation of the rights in the Covenant. For this reason, article 2(1) obliges state parties to take measures 'to the maximum of its available resources' so that the obligation to realise the rights progressively is dependent on individual member states' financial position.

While it is clear from the text of ICESCR that budgetary constraints are the most important limitation on the provision of socio-economic rights, the *travaux préparatoires* also indicate that that this limitation is only meant to operate for countries which do not have sufficient resources, in particular, developing countries. For countries which do have sufficient resources, the obligation is to provide the rights in the Covenant immediately. This interpretation has not, however, been followed by the ESCR Committee, which has interpreted the obligation of developed countries to be the same as that of developing countries — progressive implementation subject to budgetary restrictions.[795]

Earlier in this chapter, in section 2, it was argued in relation to the internally-limited rights in the South African Constitution that a conceptual distinction should be drawn between the content or scope of the right in sub-section (1) and the duty imposed on the state in sub-section (2) of sections 26 and 27 respectively. If this is accepted, then there are two ways in which budgetary limitations are relevant: first, they may be relevant in determining the scope of the right in sub-section (1), and second, they are relevant in determining whether the state has met its obligations to take reasonable measures to realise the relevant socio-economic right, 'within available resources'.[796] In *Grootboom*, the Court appears to acknowledge that resources are relevant to determining the scope of the right, although it does so within an analysis of section 26(2):

> [T]he obligation does not require the state to do more than its available resources permit. This means that both the *content of the obligation* in

[795] Craven (n 783 above) 132-33.
[796] Clearly, if this conceptual distinction is not accepted, then it is only in the second instance that budgetary limitations are relevant.

> relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.[797]

Thus, the Court appears to acknowledge that budgetary restrictions are relevant in determining the scope of the right as well as the reasonableness of state action in relation to the duty. These two aspects are now discussed in turn.

4.1 The scope of the right

4.1.1 Internally-limited rights

It has already been argued that a preferable interpretive approach to internally-limited socio-economic rights is that a court should first engage with the content of a right before considering whether the state has met its obligations to take reasonable measures to provide for the right progressively and within its available resources. The state's obligation could, therefore, be qualified, and consequently be narrower than the scope of the right.

When interpreting a primary right, such as the right to access to 'adequate housing' in section 26(1), the court is faced with a range of possible interpretations derived from the text. 'Adequate housing' could mean an independent house or a 'site-and-services scheme' with building materials. It could not, however, mean the absence of any shelter; neither could it have an unreasonable meaning, such as shelter under a tree. Within this range of permissible readings, the courts may be deferential to the legislature or executive in giving meaning to 'adequate housing', allowing budgetary considerations to play a role in determining what meaning is given to the right. Nevertheless, budgetary limitations could not be used to negate the meaning of the right — it can only be relevant in deciding on the meaning within a range of reasonable interpretations of the right. Moreover, it is for the state to demonstrate how its limited resources are relevant to circumscribing the ambit of the right. In this sense, budgetary limitations act as one of the contextual factors to be considered by the courts in interpreting the content of a right, in the same way as this consideration would be relevant to civil and political rights, such as the right to legal representation[798] or the right to 'be

[797] *Grootboom* (n 725 above) para 46 (my emphasis).
[798] Constitution (n 739 above) sec 35(2)(c).

free from all forms of violence from either public or private sources'.[799]

4.1.2 Unqualified rights

Unqualified rights are simpler. In the case of such rights, budgetary considerations are relevant only at the first stage of interpreting the right. For example, section 28(1)(c) provides that every child has the right to shelter. In interpreting the term 'shelter', the court can again take budgetary considerations into account in deciding on an appropriate meaning for the term shelter within the range of reasonable interpretations of the right. The decision in *Van Biljon*[800] provides an excellent example of the reasoning process proposed here for unqualified rights. The decision concerned an application based on section 35(2)(e) for adequate medical treatment, at state expense, for prisoners. In particular, the dispute in this case was about whether the applicants, who were HIV positive (and similarly situated prisoners) 'who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml,[801] [were entitled] to have prescribed and to receive at state expense appropriate anti-viral medication'. In deciding this matter, Brand J considered carefully what constituted 'adequate medical treatment' in section 35(2)(e) of the Constitution.[802] The respondents contended that the right in section 35(2)(e) meant that detained persons are entitled only to the medical treatment they would have received at provincial hospitals, had they not been incarcerated.[803] It was common cause that patients in provincial hospitals in the same position as the applicants would not be entitled to anti-retroviral drugs at state expense.[804] The respondents argued further that the Court should not scrutinise provincial health policy regarding HIV-positive patients as this policy was 'dictated by budgetary considerations which is a matter of polycentric nature and, therefore, non-justiciable by [the] Court'.[805]

799 As above, sec 12(1)(c). See also S Fredman 'Social, economic and cultural rights' in D Feldman (ed) *English public law* (2004) 529 para 10.145 who argues: 'The Constitutional Court has insisted that the availability of resources is not a separate issue, but is integral to defining the reach of the right itself.' For a contrary view, see Bilchitz (n 753 above) 19-20 who argues that the approach of the courts is ambiguous, and that the court should interpret the content of the right independently of resources.

800 *Van Biljon & Others v Minister of Correctional Services & Others* 1997 4 SA 441 (C).

801 CD4 is a type of white blood cell or lymphocyte involved in fighting infection. The Centre for Disease Control measures the progression of the Human Immunodeficiency Viral (HIV) infection using a CD4 count since, the further the disease has progressed, the lower the CD4 count and the less likely the patient is to be able to fight off infection.

802 *Van Biljon* (n 800 above) para 41.

803 As above, para 43.

804 As above, para 44.

805 As above, para 45.

The applicants countered this argument by contending that the state could not rely on budgetary constraints as a legitimate reason for refusing adequate medical treatment since this right was entrenched in the Constitution.[806] The Court accepted this argument, but then went on to find that budgetary considerations were nevertheless relevant in determining what constitutes 'adequate medical treatment'. The following passage demonstrates the Court's reasoning.

> In principle, I agree ... that lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment ... I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is 'adequate medical treatment' cannot be determined *in vacuo*. In determining what is 'adequate', regard must be had to, *inter alia*, what the state can afford.[807]

The Court then found that the 'respondents did not make out a proper case that the medical treatment claimed by applicants is unaffordable',[808] since the respondents only referred to the level of care available in provincial hospitals. This was not, however, the test to be applied since it was the Department of Correctional Services and not the provincial hospitals via the Department of Health which was responsible for providing health services to detained persons. Furthermore, the Court found that the respondents' case was flawed because it was based on a premise that the state did not owe a higher duty of care to those in detention. Moreover, prisoners are kept in conditions that make them more vulnerable to opportunistic infections. For all these reasons, the Court reached the following conclusion and ordered the respondents to supply the applicants with the anti-retroviral medication that had been prescribed for them:

> Applicants have, therefore, established, in my view, that anti-viral therapy is at present the only prophylactic ... [The] respondents have failed to make out a case that the Department of Correctional Services cannot afford to provide HIV-infected prisoners in the stated category with the combination anti-viral therapy claimed by applicants. In these circumstances, I believe that the medical treatment claimed by applicants must be regarded as no more than the 'adequate medical treatment' to which they are entitled in terms of section 35(2)(e) of the Constitution.[809]

In essence, then, the Court's reasoning is that, since the state failed properly to make out a case that it could not afford the medical treatment claimed by the applicants, budgetary considerations could

806 As above, para 48.
807 As above, para 49.
808 As above, para 50.
809 As above, para 60.

not be taken into account in determining what constitutes *adequate* medical treatment.[810] If the state had made out such a case, the implication is that what constitutes adequate medical treatment may have been different.

The reasoning in this judgment has been set out at length as, it is suggested, this is the correct approach for courts to adopt in determining the scope of non-internally-qualified socio-economic rights. Consequently, budgetary considerations are relevant to determining the scope of the right, although they should not be used to undermine the existence of the right fundamentally. For instance, budgetary considerations are relevant to the type and quality of accommodation which is provided for prisoners, and lack of funding could not be used to justify the failure to provide any accommodation for prisoners or permit the provision of accommodation which is inconsistent with their rights, to dignity.

4.2 Reasonableness of the state's measures

Budgetary limitations are also relevant in determining the reasonableness of the state's measures in relation to internally-limited rights. In this sense, they both impose a 'duty on the state', as well as a 'defence to a claim alleging that its progress in realising the rights is unreasonable'.[811]

4.2.1 The duty to take reasonable measures

Once the Court has given an interpretation to the right in section 26(1), it needs to consider whether the state has met its obligations under section 26(2) to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Thus, the state must demonstrate to the Court that it has taken reasonable measures — both legislative and non-legislative — to realise the right progressively. And in deciding whether these measures are reasonable, the Court may take into account the available resources of the state. It is at this stage that budgetary limitations can play a mitigating role on the state's duty. There are two ways in which this could be interpreted. First, that the

[810] In *E N & Others v Government of RSA & Others* 2007 1 BCLR 84 (D), the Court considered a similar challege to the failure of the state to provide anti-retroviral treatment to HIV-positive prisoners whose CD4 count was below 200, and who otherwise qualified for this treatment. In that case, however, the state specifically did not put a lack of resources in issue and contended, instead, that it had complied with its constitutional obligations and taken reasonable measures to ensure that the applicants' rights to adequate medical treatment had been fulfilled. The Court did not, therefore, consider the role of budgetary restrictions in deciding on the obligations of the state. See, in particular, para 25.

[811] Liebenberg (n 759 above) 33-34.

duty to take 'reasonable legislative and other measures' (that is, to establish a legislative and policy framework) is subject to available resources. This interpretation should be rejected outright, as an interpretation should always be adopted which puts the state under a duty to create a policy framework through which to realise the right progressively.[812] Limited resources should not, therefore, be available as a justification to ignore the realisation of any right. The second, and preferred, interpretation is that the obligation to take 'reasonable legislative and other measures' progressively to realise the right, is subject to budgetary restrictions. This obligation relates to both the means of realising the rights, as well as the rate of realisation, and budgetary restrictions are relevant to both of these evaluations.[813]

4.2.2 Within available resources

In addition to assessing whether the state has taken reasonable measures in relation to its available resources, it must determine what the 'available resources' are. This could be interpreted either as the resources which the state has made available, or it could mean all resources which are potentially available to meet the state's obligations — or a range of possible options in-between.[814] The second interpretation would involve an assessment, by the courts, as to whether the state has made a suitable budgetary allocation to realise the right in question.

In international law, in deciding what resources to allocate in fulfilling its socio-economic rights obligations, a state party to ICESCR has a wide measure of discretion. This does not, however, mean that its discretion is completely unfettered, or this would undermine the rationale behind the obligation itself.[815] Moreover, the discretion in deciding what constitutes the maximum available resources for social, economic and cultural rights, must be open to scrutiny. Alston and Quinn sum up the position as follows:

> A plea of resource scarcity *simpliciter*, if substantiated, is entitled to deference especially where a state shows adherence to a regular and principled decision-making process. In the final resort, however, such a plea remains open to some sort of objective scrutiny by the body

[812] See n 739 for a brief discussion on the right to food which, until recently, has not been the subject of legislative and executive attention.

[813] *Grootboom* (n 725 above) para 46.

[814] D Moellendorf 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) 14 *South African Journal on Human Rights* 327 330.

[815] P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 177-80; Craven (n 783 above) 137.

> entrusted with responsibility for supervising states' compliance with their obligations under the Covenant.[816]

The wording in the South African Constitution is notably different, and the state is only obliged to take reasonable measures 'within its available resources'. For this reason, the Constitutional Court has found that, on this point, international law is not relevant to how the South African courts assess the constitutionality of state action.[817] Nevertheless, South Africa has signed (although not ratified) ICESCR, and therefore incurs obligations under the Vienna Convention to start bringing its law in line with ICESCR.[818] The second interpretation regarding the meaning of 'available resources' is therefore preferable as it is more consistent with ICESCR, and it would allow South African courts to enquire into the appropriateness (and notably not reasonableness) of the budgetary allocation to fulfil socio-economic rights. This approach, however, is one which raises a number of difficulties for the courts. It could potentially involve incursions into budgetary policy, a task for which the courts are ill-equipped both institutionally and democratically to undertake. For this reason, it could be argued that a high level of constitutional deference is warranted. On the other hand, a high level of deference on this issue undermines the effectiveness and potency of socio-economic rights, in contrast to civil and political rights where courts are traditionally far less reticent about making orders which potentially involve budgetary reallocation.

The Constitutional Court has been particularly deferential on this issue. In *Soobramoney*, the Court considered only the reasonableness of the hospital policy in relation to the existing health budget and the allocation of that budget within the provincial health system.[819] At one point the Court did discuss the implications of positive orders to provide expensive medical treatment on the state budget, but this was never considered as a possible alternative and was cited merely as a justification for not making such an order.[820] In adopting a narrow interpretation of 'available resources', the Court appeared to be influenced by the particular difficulties raised by decisions relating to healthcare.[821] In this regard, the Court's approach is in line with that of other democratic states, which are generally extremely

816 Alston & Quinn (n 815 above) 181.
817 *Grootboom* (n 725 above) paras 27-33 46.
818 See Introduction, sec 3, and ch four, sec 3.2.2. See also *S v Makwanyane & Another* 1995 3 SA 391 (CC) para 35.
819 *Soobramoney* (n 726 above) paras 24-25.
820 As above, para 28.
821 Bilchitz (n 729 above) 56A-32.

reluctant to make decisions on how scarce medical resources should be allocated.[822] As Moellendorf points out, this approach to available resources is not consistent with the *Certification* judgment, where the Constitutional Court accepted that the enforcement of socio-economic rights may have budgetary implications, in the same way that civil and political rights may have such implications.[823] The approach of the Court in *Soobramoney* therefore undermines further the equality between the two sets of rights.

The question of available resources was dealt with only briefly in *Grootboom*, and was not central to the reasoning in that judgment.[824] The Court held that the state policy, to the extent that it failed to cater for those in desperate need, was not reasonable. In order to remedy this, the Court held that national government must devote a 'reasonable part of the national housing budget' to provide relief for those in desperate need.[825] It therefore did not require additional funds to be allocated to the housing budget; only that funds should be reallocated within it. Neither were the budgetary implications of its order considered in any depth by the Constitutional Court in *Olivia Road* and *Joe Slovo*, as both were essentially concerned with whether it would be just and equitable to grant an eviction order in the circumstances of those two cases.

The *TAC* and *Khosa* judgments, however, did consider the issue in more depth. On the first issue before the Court in *TAC*[826] — of whether it was reasonable for the state to limit the provision of Nevirapine to pilot sites — the Court found that budgetary limitations were not in issue, because the state had admitted that the drug could be made available within its existing resources.[827] The Court, however, failed to note that the issue of available resources is, in principle, irrelevant where a violation of a negative right is concerned. In relation to the second issue before the Court, of whether the state had in place a reasonable policy, the Court did not consider budgetary limitations in finding that the state had acted unreasonably in not having such a policy in place. This is in line with the earlier assertion made that budgetary restrictions should not be

[822] See, eg, *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898, 2 All ER 129 (CA) 137; and *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990) 303. For a contrasting approach, see *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426. See K McLean 'Deconstructing deference: A comparative analysis of judicial approaches to healthcare in South Africa and Canada' in PE Andrews & S Bazilli *Law and rights: Global perspectives on constitutionalism and governance* (2008) 115 for a comparative discussion on the nature of the courts' approach to deference in the adjudication of healthcare decisions in South Africa and Canada.

[823] *Certification Judgment* (n 751 above) para 77. Moellendorf (n 814 above) 331.

[824] *Grootboom* (n 725 above) para 46.

[825] As above, para 66.

[826] See ch four, sec 3.1.3.

[827] *TAC* (n 727 above) para 71.

considered at all in assessing whether the state has in place a reasonable policy and legislative framework to realise the right.

The final, and perhaps most interesting, decision of the Constitutional Court in relation to state budgeting, is *Khosa*.[828] In *Khosa*, the Court conspicuously adopted a low level of deference in its remedy to order the state to provide welfare benefits to elderly permanent residents.[829] The majority found that an increase of 'less than 2%' of the current budget would 'only be a small proportion of the total cost'[830] and was therefore not seen to be relevant to the Court's decision to legislate to include a previously excluded group.[831] The approach of the Court in making this finding is more consistent with its approach to civil and political rights. In *August*, for instance, the Court made an order that the state must provide for the registration of prisoners as voters for the then forthcoming elections. In making this order, the Court rejected outright an objection by the state that the cost of doing so would strain the resources of the Independent Electoral Commission.[832] Perhaps then the explanation for the robust approach adopted in *Khosa* is that the reasoning is indeed based on equality jurisprudence, and it is therefore not clear that the judgment signals a new approach to the consideration of budgetary limitations in socio-economic rights decisions which do not involve unfair discrimination.[833]

The Constitutional Court has therefore largely adopted a restrictive reading of available resources, with *Khosa* possibly pointing to a more robust approach. In *TAC*, the Court stated that while decisions on socio-economic rights 'may in fact have budgetary implications ... [they] are not in themselves directed at rearranging budgets'.[834] The decision in *Khosa*, however, was directed at rearranging the budget as it required the state to give additional

828 *Khosa* (n 722 above).
829 See ch four, sec 3.3.2.
830 *Khosa* (n 722 above) para 62.
831 See *Eldridge v British Columbia (AG)* [1997] 3 SCR 624 (1997) para 92 for a similar approach taken by the Canadian Supreme Court in deciding that a legislative provision that hospitals in British Columbia had an obligation to provide free medical interpreters to the deaf was consistent with the Charter: see ch three, sec 3.3.1.
832 *August & Another v Electoral Commission & Others* 1999 3 SA 1 (CC) para 30. See also, eg, *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 44, where the Court found that the state must take positive steps to protect people in certain circumstances; and *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 2 SA 359 (CC) paras 83 111, where the Court made an order that the respondent had a legal duty to provide rail commuting services in a manner consistent with the constitutional rights of commuters, and made a declaration that the respondents were obliged to take positive measures to ensure that these rights are reasonably respected.
833 See ch four, sec 3.3.3.
834 *TAC* (n 727 above) para 38.

resources to those already allocated to social welfare benefits in order to comply with the order. This approach is not inconsistent with a balanced approach to constitutional deference. There are many other situations where it is arguably appropriate for courts to scrutinise budgetary allocation, for example, if the state were to diminish its budgetary allocation to, for instance, social welfare grants, resulting in a lessening of the amounts awarded, or where the state decided it wanted to spend all its money on one socio-economic right, to the exclusion of another. The development in *Khosa* is therefore to be welcomed as a correction to an overly-narrow and overly-deferent interpretation of 'available resources'.

5 Remedies

The South African Constitution sets out broad remedial powers for the courts to enforce socio-economic rights. Section 172(1)(b) provides that when deciding a 'constitutional matter', which includes 'any issue involving the interpretation, protection or enforcement of the Constitution' (section 167(7)), courts 'may make any order that is just and equitable'. Moreover, section 38 states that whenever a court finds that a right in the Bill of Rights has been infringed, it may grant 'appropriate relief'. The Constitutional Court has interpreted 'appropriate relief' as meaning 'relief that is required to protect and enforce the Constitution'.[835] Thus, when enforcing socio-economic rights, courts are permitted to provide remedies that are 'appropriate', 'just and equitable'. Despite this broad remit, the Constitutional Court is mindful of the separation of powers doctrine in granting remedies, holding that courts, out of the 'deference it owes to the legislature', are required to exercise 'restraint' in 'not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature'.[836]

The first Constitutional Court decision to provide a remedy for a breach of a socio-economic right is that in *Grootboom*. The Court made a declaratory order that the state was required by section 26 of the Constitution 'to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing'.[837] The Court gave, as an example of what would constitute such a programme, the Accelerated Managed Land Settlement Programme, in order to make provision for those 'with no access to land, no roof

[835] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.
[836] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 2 SA 1 (CC) para 66.
[837] *Grootboom* (n 725 above) para 99.

over their heads, and who were living in intolerable conditions or crisis situations'.[838] In chapter four it was noted that one of the possible reasons for this 'weak' remedy and high level of constitutional deference was that the Court was under the impression that the Accelerated Managed Land Settlement Programme had already been implemented and that the applicant group had therefore already received substantive relief.[839]

It is the remedy in that judgment that has received the most adverse criticism in the secondary literature.[840] Roux, for instance, criticises the order for failing to prioritise the needs of those most in need and for failing to provide an effective remedy, arguing that the minimum the Court should have done is to order the state back to the Court to report on how it intended to fulfil the order.[841] The *Rudolph* decision provides a good example of how this could have been achieved, through the use of a structural interdict.[842] In that decision, based on facts remarkably similar to those in *Grootboom*, the High Court ordered the state to report back to the Court on how it was implementing the order so as to meet its constitutional obligations. The City of Cape Town was ordered to deliver a report within four months of the order being handed down to outline the 'steps it ha[d] taken to comply with its constitutional and statutory obligations'.[843]

A number of other High Court decisions have similarly handed down effective orders using a structural interdict. The High Court in *Grootboom*, for instance, required the state to present, within three months of the order, a report detailing the manner in which they had given effect to the order to provide the applicant children (and their parents) with shelter in terms of section 28(1)(c) of the Constitution.[844] In *E N v Government of RSA*,[845] the Court required the state to report to it on how it intended to implement the applicants' rights (and those of similarly situated prisoners within the same prison) to adequate healthcare. Although expressing some

838 As above, para 99.
839 See ch four, sec 3.2.3.
840 See, eg, T Roux 'Understanding *Grootboom* — A response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41; R Dixon 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391 415-18; Bilchitz (n 753 above) 24-26; and C Mbazira 'From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 1.
841 Roux (n 840 above) 51.
842 *City of Cape Town v Rudolph & Others* 2004 5 SA 39 (C).
843 As above, 90.
844 *Grootboom v Oostenberg Municipality & Others* 2000 3 BCLR 277 (C) 293-294. See also the discussion of the interim order of the Constitutional Court in ch four, sec 3.2.3.
845 n 810 above.

reservation to the use of structural interdicts, the Court found that 'structured relief is justified based on the facts before [the Court] and the circumstances of the case'.[846] In particular, the Court found that 'there [had] been and [continued] to be a violation of the applicants' constitutional rights' and the respondents continued to fail to acknowledge their constitutional obligations.[847]

Interestingly, the *travaux préparatoires* for the Constitution indicate that a proposal was made to provide for a reporting procedure by the various state departments, to the South African Human Rights Commission — along the lines of the reporting mechanism established in ICESCR obliging state parties to submit periodic reports to the ESCR Committee.[848] This recommendation was not followed.

Although there is some argument that structural interdicts amount to 'policy making',[849] in the South African context, given the constitutional mandate of courts to ensure that the state puts in place and implements 'reasonable' socio-economic policy, this argument cannot counter the use of a structural interdict as an appropriate remedy. Indeed, the Constitutional Court has recognised that court orders (including structural interdicts) may be used and may be tailored to be sufficiently 'flexible' so as to allow the executive to make 'legitimate [policy] choices'.[850] Structural interdicts, therefore, where they are used to force the state to account to the Court as to how it intends to remedy a constitutional defect, are appropriate, and serve as a useful tool in the constitutional dialogue between the courts and the executive or legislature as to how best to realise socio-economic rights. They are also, given the unacceptable response by the state to certain socio-economic rights decisions, the best means to ensure that the rights in the Constitution are adequately protected and enforced.

The Constitutional Court has, however, until the *Joe Slovo* decision, failed to use this remedy in the context of socio-economic rights. In the High Court decision in *TAC*, for example, the Court

846 As above, para 32.

847 As above. See also *Centre for Child Law & Others v MEC for Education, Gauteng, & Others* 2008 1 SA 223 (T) discussed in ch four, sec 3.2.1, above.

848 *Travaux Préparatoire* Panel of Constitutional Experts: Memorandum (18 January 1996) 1-3.

849 See, eg, DL Horowitz 'Decreeing organisational change: Judicial supervision of public institutions' (1983) *Duke Law Journal* 1265 1267; and M Schlanger 'Beyond the hero judge: Institutional reform litigation as litigation' (1999) 97 *Michigan Law Review* 1994 2005-9.

850 *August* (n 832 above) paras 39 42; *Sibiya & Others v Director of Public Prosecutions, Johannesburg, & Others* 2005 5 SA 315 (CC) para 64. See also *TAC* (n 727 above) paras 107-13, which discusses the use of the structural interdict in socio-economic rights judgments.

ordered the state to provide a report on how it had implemented the order of the Court — an order which, apart from the structural interdict, was substantially the same as the Constitutional Court order.[851] The Constitutional Court, by contrast, merely made a declaratory order, with regard to the state's obligations to develop and implement a reasonable policy for the prevention of mother-to-child transmission of HIV. Notably, it did make a positive order that the state was required to '[r]emove restrictions that prevent Nevirapine from being made available …', '[p]ermit and facilitate the use of Nevirapine' where the medical superintendent considered it necessary, and train counsellors outside of the pilot sites, but did not establish a time-frame in which this should be done.[852]

This order should have been bolstered with the use of a structural interdict to ensure state compliance and adequate protection of the right to healthcare. The Court stated that the reason a structural interdict was not necessary is that 'government has always respected and executed the orders of [the] Court' and that '[t]here is no reason to believe that it will not do so in the present case'.[853] The state action, or inaction, after the order in *Grootboom* was handed down, however, undermined this justification.[854] In addition, as noted in the previous chapter, another reason for the Court's decision not to issue a structural interdict was that state policy had already been partly amended in line with the order in some of the provinces (but not all), so it was not seen as necessary at that point.[855] The Court recognised the importance for the other provinces to amend their policy and found that the order of the Court would 'facilitate this'.[856] This is precisely the problem with the order: the order should not have 'facilitated' the amendment of policy in the remaining provinces — it should have *required* it, through the use of a structural interdict. Indeed, as Budlender and Roach point out, even after the judgment was handed down, some of the provinces did not comply with the order and had to be taken to Court to force compliance.[857] Once again, the overly-deferential remedy of the Constitutional Court undermined the effectiveness of socio-economic rights enforcement.

It is only in the recent decision of *Joe Slovo*[858] that the Court handed down a structural interdict in a socio-economic rights

851 *Treatment Action Campaign & Others v Minister of Health & Others* 2002 4 BCLR 356 (T) 387.
852 *TAC* (n 727 above) para 135.
853 As above, para 129.
854 See n 786 above.
855 n 727 above, paras 117-22. See ch four, sec 3.2.3.
856 As above, para 132.
857 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325 334. See also Bilchitz (n 753 above) 23-26 for criticisms of the court's order.
858 *Joe Slovo* (n 731 above).

decision. In that case, the Court ordered the parties to engage meaningfully with one another on the details of the relocation of the occupiers of Joe Slovo and to report back to it, on oath, as to how the order would be implemented.[859] It is unfortunately too early to tell whether this remedy will prove to be effective or not. The handing down of a structural interdict in *Joe Slovo* must, however, be understood in the overall context of the remedy given by the Court, that is, to grant the eviction order, but require the parties to engage meaningfully on how to carry that order out. In this light, the issuing of a structural interdict was a rather weak remedy as it related only to the details on how the eviction order was to be executed, and not to a change in state policy to comply with its socio-economic rights obligations.

In the light of the Constitutional Court's cautious and overly deferential approach to remedies, the *Khosa* decision is somewhat surprising or, at least, atypical. In that judgment, the Court found that the state social welfare policy was unconstitutional in that it excluded elderly permanent residents from receiving social assistance, while only affording these benefits to elderly citizens. The remedy formulated by the Court in this instance was to 'read in' words to ensure the benefits were extended to the excluded group; in other words, the Court legislated to cure the defective legislation. This legislative action does not, however, undermine the principles of separation of powers for two reasons. First, the Court was not deciding what social welfare benefits should be given to the elderly — only that where benefits are provided, it is unreasonable to exclude certain categories of persons, in this case 'permanent residents'. Second, the Court action did not preclude other 'reasonable' responses by the state, since there was only one appropriate response to the unfair discrimination displayed in state policy. Moreover, the state may amend its legislation, provided it does so without excluding permanent residents. This order therefore provides a good example of effective enforcement of socio-economic rights within the traditional boundaries of acceptable constitutional deference.

6 Conclusion

This chapter extends the discussion in chapter four through a consideration of four specific issues relevant to the interpretation and enforcement of socio-economic rights. The chapter begins with a consideration of the nature of the reasonableness test adopted. It is argued that the reasonableness test was adopted precisely because it establishes a lower level of scrutiny for the adjudication of socio-

[859] As above, para 7, order 16.

economic rights than that adopted in the review of civil and political rights. The reasonableness test, however, threatens the conceptual distinction between the two parts of the right, effectively reducing the rights in sections 26 and 27 to a right to a reasonable policy. This move should consequently be avoided and the courts should distinguish between the normative content of the right and the duty imposed on the state to achieve that right.

The Constitutional Court's approach to sections 26 and 27, in collapsing the two parts of the rights, has been one of the reasons for its rejecting a minimum core approach, consistent with that advocated by the ESCR Committee in the interpretation of ICESCR. A minimum core approach would require the courts to define the substantive minimum content of the right. While there may be good reasons for the courts to reject a minimum core approach in a domestic context, this does not mean that they should refuse to engage at all with the normative content of socio-economic rights. What is argued for in this book is that the South African courts should engage in a dialogue with the executive and legislature over the content of socio-economic rights, and in this way create clear benchmarks against which lower courts and the other branches of government can assess their interpretation.

The third issue considered in this chapter is that of the budgetary implications of socio-economic rights. While it is conceded that socio-economic rights do raise a number of concerns regarding judicial control over state spending, this is not a problem particular to socio-economic rights, nor a problem which is insurmountable. Budgetary implications may be taken into account in interpreting the right so that they do not place impossible demands on the state. This can be done at both stages of the interpretive process for sections 26 and 27, through taking budgetary restrictions into account in defining the content of the right and, second, in determining the scope of the duty imposed on the state. For non-internally qualified socio-economic rights, budgetary restrictions would only be taken into account at this first stage.

Finally, the chapter considers the courts' approach to remedies in socio-economic rights adjudication. It argues that it is in the arena of remedies that the court has, arguably, been most deferent. This has resulted in the state often failing to implement an order effectively, or timeously. Instead, it is argued in this chapter that it would be more appropriate for the courts to use structural interdicts as part of a dialogue with the state over the development of socio-economic policy.

CONCLUSION

This book surveys over 12 years of socio-economic rights jurisprudence — from the introduction of the final Constitution on 4 February 1997 until June 2009. In those 12 years, there has been surprisingly little litigation, with only six significant socio-economic rights judgments emanating from the Constitutional Court. This illustrates a reticence on the part of the public in instituting litigation to help secure socio-economic rights, which in turn demonstrates the dampening effect which the Constitutional Court's overly-deferential approach has had (as well as undermining the 'flood-gates' objections to entrenching these rights). The judicial review of socio-economic rights has generated immense academic interest — both within South Africa and internationally. Much of this work has focused on the reasonableness test adopted by the Constitutional Court, and is largely critical of the Court's failure to engage with the substantive content of these rights, and the restrictive remedies adopted by the Court. Despite this, there is little work on the reasons for the Court's restrictive approach — a gap which this book has attempted to fill. In examining the reasons for the Court's reticence, it has developed a notion of constitutional deference to explain the underlying principles motivating the Court's deferential approach.

The book concludes with some general observations on the approach of the South African courts to interpreting and enforcing socio-economic rights. It does so by starting with a more general discussion of the context in which the South African courts engage with socio-economic rights. In particular, it discusses the transitional context of constitutional interpretation in a country which has only recently embraced democracy and a rights culture; shifts in macro-economic policy within the country; and some of the dynamics in the balance of powers in the three branches of government. Within this context, some observations are then set out on the role of the courts and some speculation on future developments.

1 Political and economic context

1.1 Transitional democracy

It is worth emphasising that the jurisprudence surveyed in this book is located within a transitional period in South African society — a transition from the old legal order of racial oppression to democracy. Teitel marks this period of political change in the life of countries moving from 'illiberal' to 'liberal' regimes as one of 'transitional justice'.[860] For Teitel, constitutionalism and the rule of law during such periods of transformation 'bridge[s] the discontinuity from illiberal to liberal rule', mediating the construction of the new legal and political order.[861] Teitel thus advocates a 'constructivist' account of constitutionalism:

> The construction of new constitutional arrangements in periods of radical political change is informed by a transitional conception of constitutional justice. Constitutional law is commonly conceptualised as the most forward-looking form of law. Yet transitional constitutionalism is ambivalent in its directionality; for the revolutionary generation, the content of principles of constitutional justice relates back to past injustice. From a transitional perspective, what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of past injustice.[862]

A notable feature of this transition is the role of law, which both constitutes and is constituted by the new political order. The judiciary, and in particular, the Constitutional Court are important institutions for structuring and legitimating the law during this period. Yet, at the same time, the courts must tread a careful path, as a perceived 'overstepping of the mark' of the courts by the executive and parliament may precipitate a confrontation, or even a constitutional crisis, if the other branches of government were to ignore the rulings of the courts.

The South Africa Constitution has been described as a 'transformative constitution'[863] — one which points to a transformation which is yet to be created.[864] Socio-economic rights, interpreted within this context, constitute a commitment to transform our society so that increasing numbers of people have

860 RG Teitel *Transitional justice* (2000) 1.
861 As above, 19.
862 As above, 196.
863 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150. See also *S v Makwanyane & Another* 1995 3 SA 391 (CC) para 262.
864 G Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 *South African Law Journal* 715 715.

access to better social services. This point was expressly recognised by the Constitutional Court in its first decision on socio-economic rights: in *Soobramoney*, the Court recognised the 'deplorable conditions' in which many people live and noted that the Constitution constitutes a commitment to address these conditions and 'to transform our society into one in which there will be human dignity, freedom and equality'.[865]

1.2 Shifts in macro-economic policy

In 1994, the ANC announced its macro-economic policy for the 'new South Africa': the Reconstruction and Development Programme (RDP), which also formed the basis of their election manifesto.[866] The RDP provided a broad commitment to addressing past inequality through the provision of basic social goods.[867] The final Constitution, which included socio-economic rights provisions, was adopted within the RDP framework, reflecting a social-democratic outlook. A mere two years later, in 1996, a new policy direction was announced and the Growth, Employment and Redistribution Strategy (GEAR) was adopted. GEAR is characterised by tighter fiscal control on government spending and a leaning towards 'neo-liberal' macro-economic policy, with its attendant emphasis on privatisation, open markets, and drive to attract foreign investment. The new Zuma presidency is ambiguous on whether the country's macro-economic policy will stick to GEAR or return to a more 'RDP-style' strategy. The current global financial crisis and looming deficit make this return less likely.

Davis cites this shift in macro-economic policy in South Africa as one of the reasons that the Constitutional Court adopts a deferent approach to socio-economic rights, in failing to consider the minimum core approach or to issue structural interdicts.[868] This shift from the RDP to GEAR is, according to Davis, not consistent with the vision set out in the Constitution. If the Court were to be more 'activist' in enforcing the socio-economic vision contained in the Constitution, this would place it in conflict with current government planning.[869] While it is not clear whether one can say with certainty whether this reasoning explicitly motivates the courts, it does point to a broader principle relevant to constitutional deference, namely, that courts, as

865 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8.
866 African National Congress 'The Reconstruction and Development Programme: A policy framework' (1994).
867 See Introduction, sec 3, for a discussion of the RDP.
868 DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "Deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 315.
869 As above, 316.

a matter of proper constitutional deference, should not interpret the constitution to bind the government to one particular economic vision of society. To do so, would be to fall into the trap of *Lochner*.[870]

2 The role of the courts in South Africa's democracy

2.1 The balance of powers between the three branches of state

South Africa's separation of powers is characterised by an increasingly dominant executive, and a dominant political party — the ANC. The dominance of the executive is particularly clear in relation to parliament which, in many instances, merely 'rubber stamps' executive policy through enacting legislation. This dominance also permeates through all three levels of government, resulting in a highly centralised state from a policy-formation perspective. The strength of the ANC, it is suggested, influences the state's attitude to the judiciary. For instance, the state occasionally displays an unwillingness to engage with the courts through judicial proceedings, either through simply ignoring the process,[871] or through questioning the final judgment.[872] Given the political weight of the ANC, however, the government has generally been 'remarkably restrained' when courts have handed down orders overturning their policy.[873] Where government has failed adequately to respond to judgments, this is due mainly to a lack of capacity and incompetence, rather than a deliberate decision to oppose a judgment.[874] The *Rudolph*[875] decision is illustrative of this point, where the High Court repeatedly required the local authority to report on how it had implemented the *Grootboom* order. The initial reports continued to deny that the state had any obligation to provide shelter for those in desperate need, and it was only by the fourth report that the municipality acknowledged its responsibility. In these initial reports, it is unlikely that the state was deliberately disobeying the Constitutional Court; rather it adopted a different vision of how it ought to give effect to section 26 of the Constitution, and simply did not understand, for reasons of

870 *Lochner v New York* 1981 US 45 (1905).
871 See the discussion on *Khosa & Others v Minister of Social Development & Others*; *Mahlaule & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC) and the state's initial failure to respond to court directions: ch four, sec 3.3.
872 The Minister of Health initially stated that she would ignore the court order handed down in *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC); this was later denied: Budlender (n 864 above) 722.
873 Budlender (n 864 above) 722.
874 As above.
875 *City of Cape Town v Rudolph & Others* 2004 5 SA 39 (C). See ch five, sec 5.

incompetence and poor legal advice, that the order of the Court did not permit this.

In practice this means that the courts should not be too deferent to the executive and legislature in allowing them to reformulate policy in light of a finding that the existing policy conflicts with the Constitution. Courts should be more ready, in formulating their orders, to adopt an oversight role, or at least allow the litigants to return to the courts easily if orders are not adequately implemented. Such a strategy would fit in well with the notion of a dialogue between the executive and legislature, and the courts, over the development of our constitutional democracy.

2.2 Separation of powers in South Africa

A second consequence arising from the dominance of the ANC at all three levels of government is that there is little effective 'checks and balances' happening at the other levels of government. This means that the traditional separation of powers between the three branches of state are effectively found only between the courts on the one hand and the executive and legislature on the other (at all three levels of government). In the absence of robust checks and balances elsewhere, courts should respond, not by adopting a deferential position, but by ensuring that the other branches of government are held accountable to it.

Dicta in the case law provide some indication of how the Constitutional Court currently views its role. In *Ferreira v Levin,*[876] for instance, Chaskalson P adopts a fairly formalist view of separation of powers. In a discussion of the role of the court and the dangers of *Lochner*, he writes:

> It is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.[877]

Other judgments, however, reveal a more flexible approach. In *Executive Council, Western Cape Legislature*, for instance, Chaskalson P contrasts South Africa's approach to other jurisdictions,

[876] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 1 SA 984 (CC).
[877] As above, para 183.

concluding that South Africa does not have a strict separation of powers doctrine.[878]

The approach of the Constitutional Court in relation to socio-economic rights is similarly ambivalent. On the one hand, it accepts that there is a flexible approach to separation of powers, and that courts have enormous powers in giving effect to these rights. On the other hand, the Court has been deferential to the legislature and executive in practice in its interpretation and enforcement of socio-economic rights. The following sections discuss the Courts' approach in more detail.

3 The South African courts' approach to socio-economic rights

The South African courts, when interpreting and enforcing socio-economic rights, have been deferential to the executive and legislature in their approach, and have not treated these rights in the same way as they do civil and political rights. This difference in treatment is demonstrated primarily in the choice of a lower standard of review and the use of weak remedies. It is important to bear in mind that this differential treatment is carried out despite the fact that the Constitutional Court has accepted that socio-economic rights are justiciable, that the constitutional drafters made a conscious effort to align the constitutional text with the text of ICESCR,[879] and that there is a constitutional mandate on the courts to consider international law when interpreting the Bill of Rights.[880]

There are two main reasons for this approach. The first is that the Court, despite expressing views to the contrary, appears to have absorbed many of the standard objections to the judicial review of socio-economic rights. The discussion in chapter three illustrates that most of these objections do not withstand scrutiny and, even where they do raise difficulties for courts, many are not peculiar to socio-economic rights, and courts are able to deal with them using traditional rights jurisprudence. The second reason for the approach of the Court is that it is mindful of its role in a transitional democracy, and extremely cautious about overstepping the mark in any way. In

878 *Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others* 1995 4 SA 877 (CC) paras 52-62. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 109-13; *De Lange v Smuts NO & Others* 1998 3 SA 785 (CC) para 60; *South African Association of Personal Injury Layers v Heath* 2001 1 SA 883 (CC) paras 24-26.

879 Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3. See Introduction, sec 3.

880 Constitution of the Republic of South Africa Act 108 of 1996 sec 39(1)(b).

this sense, it has generally adopted a pro-executive mindset in the adjudication of contentious issues, which would include socio-economic rights decisions.

As is now clear, the Constitutional Court has adopted a reasonableness test for the review of qualified socio-economic rights — a test with a lower standard of review than the proportionality test adopted for the review of civil and political rights. This test has permitted the courts largely to avoid substantive engagement with the content of the rights, and to focus on the reasonableness of state action in fulfilling the right. The dominance of this test is demonstrated in the way in which the courts have attempted to adjudicate all socio-economic rights issues in the same manner. Hence, the reasonableness test has been used in adjudicating both negative and positive aspects of the qualified right, despite the fact that international and comparative jurisprudence favours a more robust approach to the protection of the negative aspects of a right. Similarly, and despite the fact that unqualified socio-economic rights are not subject to the same internal limitations as qualified rights, the Constitutional Court appears to have adopted the same approach to interpreting these rights — as well as negative aspects of the qualified rights. Hence, in *Grootboom*,[881] and to a lesser extent in *TAC*,[882] the Court adopted a highly restrictive approach to interpreting the scope of children's socio-economic rights.

There are two primary observations which arise from this evaluation of the jurisprudence. First, there is no need for the South African courts to adopt a deferential approach to the interpretation and enforcement of socio-economic rights, as a matter of principle. Deference may be warranted in a particular matter (whether that involves socio-economic, civil or political rights), but this must be decided on a case-by-case basis. Wholesale deference is neither warranted, nor desirable, in the review of this category of rights. The second observation is that where a court does choose to adopt a more deferential approach, it must be transparent about the reasons for this approach. Transparency in judicial choices will force the courts to engage directly with the reasoning underpinning their choices, and to contribute to a culture of justification throughout all the branches of government. The courts' current approach is unhelpful and has resulted in the courts side-lining themselves in the dialogue with the executive and legislature over the constitutional vision of a better life for all. The courts have effectively diminished their own role, to the detriment of all branches of government and the poor in South Africa.

881 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC).

882 *TAC* (n 872 above).

4 Future developments

Finally, it is fitting to conclude with some thoughts on how the next decade of South African socio-economic rights jurisprudence may look. Sadly, at this point, there is little to indicate that the courts, particularly the Constitutional Court, will be any less deferent in their approach. This is lamentable in a country where, despite the advent of democracy, real poverty has in fact deepened since 1994. There are a number of reasons for this, including a shift in macro-economic policy from a pro-poor stance to a self-imposed structural adjustment programme. In addition, despite the fact that government has made significant achievements in delivering social services, such as housing, water and sanitation, healthcare and education to the poor, many of the beneficiaries are no longer benefiting from this delivery of social goods, as they, for instance, have their water disconnected as a result of non-payment, or are forced to sell or abandon their 'RDP' house as a result of unaffordable services, high transportation costs, and a lack of access to employment and other livelihood strategies. Rather than simply 'throwing money' at the problem, the state urgently needs to revise its policies to ensure that the most vulnerable benefit materially and people are not forced to live lives inconsistent with the values of equality and dignity. And it is in this respect that the Constitutional Court can play the most meaningful role: through discussing the content of the rights protected in the Constitution, through setting clear benchmarks against which the executive and legislature, as well as lower courts can assess the reasonableness of existing policy, and through granting remedies which require the state properly to address and implement the order.

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