

NARROWING THE BAND: REASONABLENESS REVIEW IN ADMINISTRATIVE JUSTICE AND SOCIO-ECONOMIC RIGHTS JURISPRUDENCE IN SOUTH AFRICA

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1 Introduction

The evolution of reasonableness as a standard of review has been one of the most significant developments in both socio-economic rights and administrative justice jurisprudence in South Africa under the Constitution of the Republic of South Africa, 1996 (“the Constitution”). However, the relationship between the development of reasonableness in these two areas of law has not received much attention and they remain seemingly distinct developments. At the same time, our courts’ reasonableness model of judicial review for socio-economic rights has been variously criticised and praised as one premised on an administrative-law conception of review.¹ That is meant to convey a model that is relatively process orientated and pays little regard to developing the substance of the normative content and obligations imposed by socio-economic rights. Critics thus argue that such an administrative-law reasonableness model of review is ill-suited for socio-economic rights adjudication.²

But reasonableness is also argued to hold distinct advantages as a standard of constitutional review over more “absolutist” methods of interpreting rights.

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¹ See, generally, CR Sunstein “Social and Economic Rights? Lessons from South Africa” (2000-2001) 11 *Constitutional Forum* 123; D Brand “The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights for?’” in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33; DM Davis “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’?” (2006) 23 *SAJHR* 301 See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 173

² See Brand “Proceduralisation” in *Rights and Democracy* 51-56; Liebenberg *Socio-Economic Rights* 173

Sadurski³ identifies two such advantages. First, reasonableness review promotes greater transparency in legal reasoning⁴ in that the competing value and policy considerations at stake, and the method and choices made in weighing them are openly acknowledged and set out in the reasoning. Second, reasonableness as a standard in judicial review is “consensus-orientated” in that it acknowledges that valid constitutional considerations and arguments are frequently made by both parties, and judicial review in the context of constitutional rights seeks to attain as far as possible to reconcile and accommodate competing values and interests.⁵ Della Cananea points out that a reasonableness standard differs from a more rigid rule-based standard “in the sense that it escapes any all-or-nothing logic”:

“It instead makes it necessary to carefully weigh and balance all the circumstances in a case and all matters of fact and law. Which means that the kind of judicial review the principle involves goes well beyond the traditional review by which to determine legality.”⁶

This conception of reasonableness review avoids normative closure and is capable of stimulating deliberative democracy both in court and in the broader public sphere.⁷ It supports a dynamic concept of law, where law is responsive to changing circumstances and socio-political contexts. Sadurski observes that reasonableness involves a continuum or band between weak reasonableness aimed at the exclusion of manifestly unfair or irrational consequences,⁸ and reasonableness in the strong sense of a proportionality analysis.⁹

³ W Sadurski “Reasonableness and Value Pluralism in Law and Politics” in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 129 145-146. He describes reasonableness review as follows: “By showing all the ‘ingredients’ of his/her reasoning, a judge conducting the proportionality analysis indicates that the final conclusion is not a result of a mechanical calculus: a syllogism in which the conclusion necessarily follows from the premises, but rather the outcome results from a complex, practical reasoning, in which significant but often mutually competing values have to be considered in their actual social context... [P]roportionality analysis is more conducive to critical analysis and dissection of its elements than the ‘absolutist’ analysis which focuses on one constitutional right and on a thorough examination of its meaning” (139)

⁴ On the significance of promoting transparency of legal processes and legal reasoning for the project of transformative constitutionalism and deepening democratic culture, see K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 170-171

⁵ This concept of reasonableness facilitates the relational, dialogic and fluid notion of constitutional rights and judicial review developed by scholars such as Jennifer Nedelsky “Reconceiving Rights as Relationship” (1993) 1 *Rev of Constitutional Studies* 1; and Henk Botha “Metaphoric Reasoning and Transformative Constitutionalism” (2003) *TSAR* 20

⁶ G della Cananea “Reasonableness in Administrative Law” in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 299 307

⁷ See Liebenberg *Socio-Economic Rights* 163-186

⁸ Sadurski describes this standard of review as “safety valve” reasonableness and points out its connection with the standard laid down for the review of administrative decisions in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. See Sadurski “Reasonableness” in *Reasonableness and Law* 131-132

⁹ Reasonableness in the strong sense involves two primary stages of inquiry:

Stage 1: The identification of the aim or purpose of a given measure, and an assessment of its nature and importance

Stage 2: A three-tiered proportionality test, posing the following questions:

- a) Are the means adopted “suitable” or “reasonably and demonstrably justified”?
- b) Do the means adopted limit the constitutional rights in the least restrictive way (the “least restrictive means test”)?
- c) Do the advantages of accomplishing the purpose outweigh the disadvantages and costs of restricting the specific constitutional right – “costs and benefits” analysis (proportionality *sensu stricto*)

Sadurski “Reasonableness” in *Reasonableness and Law* 133-134. See the similar, but not identical formulation under s 36 of the Constitution

In this paper we argue that an approach to reasonableness review that builds on the development of reasonableness as a standard in *both* administrative justice and socio-economic rights jurisprudence offers us a strong and coherent model of judicial review. In our view an analysis of these developments in the two areas shows how reasonableness can be understood as a single model of review that captures the structural advantages of this standard, but at the same time is capable of facilitating the development of the substantive content of socio-economic rights.

We begin our analysis by noting the significant development of reasonableness as a standard of review in administrative law and the consequent shift towards a more substantive conception of review. In the first part of the paper we thus consider the implications of that shift for cases involving review of administrative action impacting on socio-economic rights, what we call “overlap cases”. One important purpose of this discussion is to show the extent to which substantive considerations may enter administrative-law review under this ground. This analysis also illustrates the significant development of a truly post-constitutional conception of administrative-law review. This is a notion of review that breaks with the narrow confines of common-law review and embraces an understanding of administrative-law review as part of administrative justice within a justiciable bill of rights. We then proceed to consider the application of the new reasonableness review model in administrative law in overlap cases. These cases raise the issue of overlapping standards of review under the banner of reasonableness and consequently the relationship between the different provisions regarding this standard.

The second part of the paper examines reasonableness review in socio-economic rights cases where the cause of action is not formulated in terms of administrative law, what we call “non-overlap cases”. This typically concerns cases where it is alleged that the legislature or executive branches of government have failed to fulfil the obligations imposed by socio-economic rights. In this section we examine the problems as well as potential of reasonableness review to do justice to the substantive commitments of the socio-economic rights provisions in the Constitution.

We conclude by showing that there can be a single model of reasonableness review across socio-economic rights and administrative justice cases. While the reasonableness standards under the different sections overlap, we argue that they do not simply result in duplication, but fulfil different functions in the review. Taken together, we conclude that reasonableness offers a model of review of socio-economic rights that promotes a number of key constitutional objectives. These include transparency and justification of all forms of public action, proper consideration of the factual and normative context, and the development of the substantive dimensions of the socio-economic rights in the Constitution. These we take to be strategic imperatives in realising “transformative constitutionalism”¹⁰ and a “culture of justification”¹¹ in South Africa.

¹⁰ Klare (1998) *SAJHR* 146

¹¹ E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31

2 The reasonableness review standard in administrative law

2.1 Development of reasonableness as a standard in South African administrative law

Reasonableness enjoyed extremely limited status as a ground of review of administrative action in South African common law as was the case in most common law jurisdictions. As Stratford JA famously stated in *Union Government*:

“There is no authority that I know of ... for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness.”¹²

The court went on to endorse the standard of gross unreasonableness as the level at which a court may take notice of unreasonableness upon review. As the court subsequently confirmed, proving unreasonableness as a ground of review involved “a formidable onus” requiring proof that the “decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind”.¹³ Although common-law courts were prepared to adopt slightly higher standards of reasonableness review for the narrow categories of legislative administrative action (rule-making)¹⁴ and judicial administrative action (tribunal decisions),¹⁵ the vast bulk of administrative action remained subject only to the excessive standard of gross unreasonableness pointing to some other irregularity, aptly labelled “symptomatic unreasonableness”.¹⁶ This approach was closely aligned to the traditional approach to reasonableness in English administrative law that came to be known as *Wednesbury* unreasonableness.¹⁷

The Constitution of the Republic of South Africa Act 200 of 1993 (“the Interim Constitution”) brought a decisive break with the common-law position by introducing the right to administrative action that is justifiable in relation to the reasons given for it in section 24(d). Despite the (ostensibly deliberate) avoidance of the term reasonableness in section 24,¹⁸ early responses to this right raised the hope that reasonableness had at long last come to South African administrative law and with it a substantive dimension to review. A number of academic commentators labelled the standard to be adopted under section 24(d) as a reasonableness one.¹⁹ Early case law expressly recognised the substantive dimension of this standard. One of the most significant of these early judgments was that of Froneman DJP in *Carephone (Pty) Ltd v Marcus*

¹² *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 236-237

¹³ *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 3 SA 726 (A) 735G

¹⁴ *Kruse v Johnson* [1898] 2 QB 91; *R v Abdurahman* 1950 3 SA 136 (A)

¹⁵ *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 2 SA 1 (A)

¹⁶ J Taitz “But 'Twas a Famous Victory” (1978) *Acta Juridica* 109 111

¹⁷ HWR Wade & CF Forsyth *Administrative Law* 10 ed (2009) 293, 304; *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

¹⁸ Mureinik (1994) *SAJHR* 40 n 34

¹⁹ J Klaaren “Administrative Justice” in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (RS 5 1999) 25-20; J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 3 ed (2000) 473

*NO*²⁰ where he described section 24(d) as introducing “a requirement of rationality in the merit or outcome of the administrative decision” which “goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety”.²¹ Despite his reference to rationality, Froneman DJP had a substantive standard in mind. This is made clear by his important subsequent formulation of what the judicial enquiry under this standard entails:

“In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”²²

Froneman DJP concluded that the question to ask is whether there is “a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at”.²³

Two important points regarding the standard of justifiability flow from these remarks. Firstly, the standard applied is not simply a process-orientated one, but involves a consideration of the substance or merits of the case, what Froneman DJP referred to as “substantive rationality”.²⁴ Under this approach the review court does not only consider the way in which the decision was reached, that is the reasoning process leading to the decision, but indeed the decision itself. The substantive merits of the decision are measured against the material put forward, both facts and law, to justify the particular outcome.²⁵ Secondly, there are strong hints of the variability of the standard to be applied ranging from rationality to proportionality in particular cases.

The judgment in *Roman v Williams NO*²⁶ probably extended the section 24(d) standard most in this early jurisprudence by noting that it included the requirements of “suitability, necessity and proportionality” and that it therefore involved “the requirement of proportionality between the means and the end”.

The hopes of a truly substantive standard of review were, however, dashed by the majority judgment in *Bel Porto School Governing Body v Premier, Western Cape*.²⁷ In that case the majority held that section 24²⁸ had not changed the common-law position regarding substantive review and had not “introduced substantive fairness into our law as a criterion for judging whether

²⁰ 1999 3 SA 304 (LAC)

²¹ Para 31

²² Para 36

²³ Para 37

²⁴ Para 37

²⁵ As was stated in *Kotzé v Minister of Health* 1996 3 BCLR 417 (T) 425 the standard requires that “it must appear from the reasons that the action is based on accurate findings of fact and a correct application of the law”

²⁶ 1998 1 SA 270 (C) 284H-285A

²⁷ 2002 3 SA 265 (CC)

²⁸ The case was decided under the transitional reading of s 33 of the Constitution in terms of item 23(2)(b) of Sch 6 of the Constitution, which retained s 24 of the Interim Constitution pending the enactment of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)

administrative action is valid or not”.²⁹ The Court noted that such a standard would drag judges into policy matters that should, in terms of the separation of powers, be left to the political and administrative decision-makers.³⁰ The Court also held that *Carephone* should not be read as suggesting otherwise and that the appropriate standard was simply whether there was “a rational decision taken lawfully and directed to a proper purpose”.³¹ The minority in stark contrast adopted a highly substantive test, which provided the groundwork for the later development of a substantive contextual conception of reasonableness under the Constitution and PAJA in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.³²

In their minority judgment Mokgoro and Sachs JJ made a number of important remarks regarding the substantive test to be applied under section 24(d). They expressly endorsed proportionality as a dimension of the standard and noted that that includes “an element of substantive review”.³³ They held that the test to be applied in a given case involves a sliding scale between a standard of correctness (whether the *correct* decision was taken on the merits) and a “mere rational connection” standard. In locating the relevant action between these extremes the context needs to be taken into account, including factors such as “the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved ... [and] whether or not there are manifestly less restrictive means to achieve the purpose”.³⁴ In addition, the minority located their substantive review standard within the normative framework of the Constitution, which “prohibits administrative action which, however meritorious in its general thrust, is based on exclusionary processes, applies unacceptable criteria and results in sacrifice being borne in a disproportionate and unjustifiable manner, the more so if those who are most adversely affected are themselves from a disadvantaged sector of the community”.³⁵ However, the minority acknowledged the need to respect the constitutional mandate of executive government and the challenges and constraints under which it operates and, in particular, the need for courts not to usurp the policy functions of the political branches.³⁶ In this regard the minority stated that respect for policy-making functions of other state organs must be balanced against the need to protect persons seriously affected by administrative decisions.³⁷ In a

²⁹ *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 88

³⁰ Para 88

³¹ Para 89

³² 2004 4 SA 490 (CC)

³³ *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 162

³⁴ Para 165

³⁵ Para 155

³⁶ Paras 154-156

³⁷ Para 156

striking expression the minority stated that “[t]here are circumstances where fairness in implementation must outtop policy”.³⁸

The minority in the final analysis concluded that all these factors led to the question whether “the decision can be defended as falling within a wide permissible range of discretionary options”.³⁹ In the minority’s view the standard of justifiability therefore involved not only a process enquiry into the appropriate reasoning method followed to reach the conclusion, but also a substantive enquiry in which, taking the substantive context into account, the decision falls within the band of outcomes that would be considered reasonable by the court.

Against this difference of opinion on what exact standard of review justifiability in section 24(d) incorporates, section 33(1) of the Constitution adopted the term reasonableness as a standard of administrative justice. Noting the clear difference in terminology between the two sections, Chaskalson CJ stated in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd*⁴⁰ that the reasonableness standard under section 33(1) “is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution”.

In giving effect to section 33 of the Constitution, PAJA contains two clear reasonableness grounds of review, namely section 6(2)(f)(ii), the rationality standard, and section 6(2)(h), the wording of which is strongly reminiscent of the *Wednesbury* test.⁴¹ On its face, section 6(2)(h) involves a very narrow standard of reasonableness, something close to the gross unreasonableness test of the common law. However, building on the minority judgment in *Bel Porto*, the court in *Bato Star* rejected gross unreasonableness as an appropriate interpretation of section 6(2)(h) under section 33(1) of the Constitution and adopted a contextual reasonableness standard under PAJA. It is this standard that offers the most potential of a truly substantive test for reasonableness in South African administrative law.

2.2 Contextual reasonableness

In *Bato Star* O’Regan J held that section 6(2)(h) of PAJA should be understood as a simple reasonableness test, which asks whether the decision is one that a reasonable decision-maker could reach.⁴² This formulation endorses the notion of a band of options and the standard of reasonableness simply requiring the relevant decision to fall within that band. O’Regan J confirmed the variability of reasonableness, particularly in relation to the

³⁸ Para 156 with reference to Sedley J in *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB) 731

³⁹ *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 166

⁴⁰ 2006 2 SA 311 (CC) para 108

⁴¹ S 6(2)(h) of PAJA states that administrative action will be reviewable if “the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function”

⁴² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 44

context of the decision and that reasonableness now contains both procedural and substantive dimensions.⁴³ She most helpfully provided a list of factors that may be taken into account in applying this approach, which includes “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”.⁴⁴ Most of these factors can tell us very little about the actual reasonableness of a particular action. The factors rather serve to establish the level of scrutiny to be applied in a given case, which brings us back to the notion of a sliding scale or continuum of reasonableness advanced in the minority judgment in *Bel Porto*.

The *Bato Star* approach thus involves a two-stage enquiry, firstly establishing what the appropriate level of reasonableness scrutiny must be in a given case,⁴⁵ and secondly, assessing the decision at that level of scrutiny. Another way of looking at this approach is that the first step involves setting the markers of what would be the band of options available to the reasonable decision-maker under the particular circumstances. That involves developing some understanding as to what the minimum option would be, but also (at least notionally) what the maximum option would be in the given case, that is the maximum that a court can insist upon under a review. Once these markers have been set, the second step is to determine whether the administrator’s choice falls within that band. The key consideration in all of this is the context of the particular decision, which includes both the normative context and the factual context.

Some of the factors listed by O’Regan J, such as “the nature of the decision” (especially where policy is at stake) and “the identity and expertise of the decision-maker”, may point towards a lighter rationality type of reasonableness analysis. However, other factors such as “the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected” point to a standard beyond rationality and closer to proportionality, involving the consideration of the substantive impact of the decision. The very nature of this approach invites a proportionality analysis in which competing considerations are balanced.

This approach is a highly substantive one. O’Regan J pointed out that key questions are whether the decision taken “will reasonably result in the achievement of the goal”, whether the decision is “reasonably supported on the facts” and that it is “reasonable in the light of the reasons given for it”.⁴⁶

The upshot of the contextual reasonableness approach in its most substantive dimension (in looking at the merits of the decision) is to define the band of decisions that an administrator may take and to check that the decision

⁴³ Para 45

⁴⁴ Para 45

⁴⁵ This is not equivalent to the Canadian model of a certain and fixed number of predetermined levels of scrutiny, but a more fluid approach. See M Kidd *Following Bato Star: A Guide to Pinpointing Reasonableness* (2005) unpublished paper presented at the *Society of Law Teachers of South Africa* conference in Bloemfontein, 01-2005 (on file with authors)

⁴⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48

made is within those bounds. In “pure” administrative law cases (cases not involving other fundamental rights) that involves a fairly broad band of well-reasoned decisions. However, the variability of the standard allows for the band to be narrowed where the context demands. Thus, in a particular context, typically involving a decision with a high policy dimension and insignificant impact, the appropriate standard may be rationality, which denotes a very wide band of options only requiring some substantive basis supporting the outcome. In other cases, primarily where a decision has a severe impact and/or an impact on fundamental rights, a much stricter proportionality inquiry will be appropriate, which significantly narrows that band of options. The information must show that the decision arrived at was narrowly tailored to reach the desired outcome with minimal adverse impact and that there is evidence of a weighing of the negative and positive of the decision with an eventual balancing in the final outcome. In this approach the context will expand or narrow the band of options open to an administrator that will be considered reasonable.

2.3 Normative context

An important dimension of the context that informs the contextual reasonableness approach is the normative context. This refers to the relevance of the Constitution in general, in particular other fundamental rights, to the administrative decision at hand. The constitutional normative context plays a pivotal role in applying the contextual reasonableness approach in specific cases. In particular, it may result in a significant narrowing down of the band of options.

Bato Star itself provides one of the best examples of this role of the constitutional normative context. In the second majority judgment, Ngcobo J approached the review of the action at stake from a completely different angle than that of O’Regan J. His focus in determining whether the administrator’s decision was reviewable under the circumstances was to assess the substantive goals to be achieved by the decision, in this case transformation of the fishing industry, and the administrator’s substantive choice within the constitutional framework, particularly “the place of transformation in our constitutional democracy”.⁴⁷ This approach led Ngcobo J to conclude that where the empowering provision required the administrator to “have regard to” a number of policy objectives, one of which was transformation of the industry, the band of options open to the administrator was significantly narrowed by the constitutional imperative of transformation. Given the importance of transformation in the normative context, options which simply “bear in mind” or do not overlook transformation were not open to the administrator. Instead, the administrator had to pick an option that actively promoted transformation. While Ngcobo J based his reasoning on a basic lawfulness premise, focusing on compliance with the empowering provision, rather than a reasonable basis,

⁴⁷ Para 71

his approach is a good example of the role that the normative context can play in narrowing the band of substantive choices open to an administrator.

The role of the normative context will be particularly important where other fundamental rights are at stake, such as socio-economic rights. In such cases, the substantive dimension of those rights impact directly on adjudicating the substance of the administrative action in terms of the contextual reasonableness approach. It is to these cases that we now turn.

2 4 The reasonableness of administrative action impacting on socio-economic rights

Applying the contextual reasonableness approach outlined above to cases where administrative action impacts on socio-economic rights requires the relevant socio-economic right to inform the normative context of the analysis. Put differently, when taking administrative action that affects socio-economic rights the band of substantive choices open to the reasonable administrator is narrowed to those options that conform to the substantive commitments of the relevant right. The implication is that a court should determine the substantive content of the relevant socio-economic right when testing for reasonableness under section 33 of the Constitution.

Two distinctive features of review in overlap cases can accordingly be identified. Firstly, the purpose of the measures required in terms of sections 26(2) and 27(2) of the Constitution should be provided by the normative goals underpinning the rights enshrined in sections 26(1) and 27(1). The explicit formulation of these provisions is that everyone should have access to the “adequate”, “sufficient” or “appropriate” level of housing, health care, food, water and social security.⁴⁸ As human rights, socio-economic rights seek to promote and advance the fundamental values of this tradition, namely human dignity, equality and freedom.⁴⁹ They should also be interpreted according to the courts’ core interpretive mandate in section 39(1)(a) of the Constitution to interpret the Bill of Rights so as to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. This provision requires the Court to develop a substantive and transparent account of the normative purposes and goals which the relevant rights should seek to advance. Developing the substantive content of socio-economic rights will require close attention to the relevant historical, social, economic and cultural meanings and experiential dimensions of the rights in the South African context as well as dialogic engagement with relevant international and comparative law standards and jurisprudence. This openness to considering developments in international law and other jurisdictions is expressly mandated in section 39(1)(b) and (c) of the Constitution.

⁴⁸ It is noteworthy that there is no adjective qualifying health care or social security, but arguably a qualitative dimension is intrinsic to nature of rights. This would certainly accord with international law standards (see, for example, United Nations Committee on Economic, Social and Cultural Rights (the “UN CESCR”) *General Comment No 14: The Right to the Highest Attainable Standard of Health (art.12)* (2000) UN Doc E/C 12/2000/4 and UN CESCR *General Comment No 19: The Right to Social Security (art. 9)* (2007) UN Doc E/C 12/GC/19

⁴⁹ See Liebenberg *Socio-Economic Rights* 97-101

The substantive goals provided by the rights in sections 26(1) and 27(1) of the Constitution narrow the band of permissible policy choices. It is not enough that the objectives which the State sets itself fall within the broad range of what are regarded as “legitimate” State objectives. These objectives must be consistent with the normative purposes of the rights. This implies a rights-conscious social policy, planning and budgeting process. It is noteworthy in this context that one of the core obligations identified by the United Nations Committee on Economic, Social and Cultural Rights (the “CESCR”) in relation to the rights protected in the International Covenant on Economic, Social and Cultural Rights (1966) (the “ICESCR”)⁵⁰ is the adoption of national strategy and plan of action aimed at the realisation of the relevant rights. Such a national plan must be participatory and transparent and set clear goals as well as indicators and benchmarks by which progress can be monitored. Particular attention must be given in the plan to vulnerable or marginalised groups.⁵¹

The second feature which should distinguish overlap cases from non-overlap cases concerns the relationship between the measures adopted and the constitutionally mandated goal. The State is obliged to take positive measures towards the realisation and protection of the relevant rights.⁵² It may not remain purely passive when there are people within its jurisdiction lacking access to the relevant rights. In comparison, in non-overlap cases passivity would be an option as the State is not obliged to adopt positive measures. Passivity regarding a particular non-socio-economic rights substantive matter, say building roads, may pass the reasonableness test if the State can justify its choice to do nothing, for example with reference to competing substantive priorities, say improving rail connections. In the context of socio-economic rights, however, a positive duty to “realise” or “fulfil” the relevant rights implies scrutiny of whether the measures adopted are reasonably capable of fulfilling this objective. As O’Regan J pointed out in *Bato Star*, reasonableness means asking *inter alia* whether the decision taken “will reasonably result in the achievement of the goal”.⁵³ In the absence of this linkage, the measures adopted are abstracted from the normative goal set in terms of sections 26(1) and 27(1) of ensuring that everyone has access to the relevant rights to the requisite standard of sufficiency.⁵⁴ In many circumstances, the State will have a range of options to choose from, but subject always to the need to justify through the presentation of evidence and argument that the measures chosen are capable of advancing the constitutionally mandated goals. In other circumstances, the

⁵⁰ International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316

⁵¹ See, for example, UN CESCR *General Comment No 14* (2000) para 43 (f); UN CESCR *General Comment No 15: The Right to Water (arts. 11 & 12)* (2002) UN Doc E/C 12/2002/11 para 37(f) and paras 46-54

⁵² This is clear from the formulation of ss 26(2) and 27(2) of the Constitution, read with the overarching duty of the State to “respect, protect, promote and fulfil” the rights in the Bill of Rights in terms of s 7(2). For an application of the latter set of duties to the right to basic education, see *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761* (CC)

⁵³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48

⁵⁴ See, for example, M Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *SAJHR* 383 410-411; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 159-162

context may indicate that the “choice of means” available to the State to give effect to the relevant rights is much narrower.⁵⁵ The narrowing of the band, and in particular the extent of the narrowing, thus depends on the substantive implications of the relevant right. In terms of the *Bato Star* approach to reasonableness the determination of this narrowing, by understanding what the substantive implications of the relevant right are under the circumstances, is a first step to assess the reasonableness of the administrator’s substantive choice. In overlap cases the reasonableness analysis therefore requires more than simply indicating that the eventual choice was a properly reasoned one.

A rights-based analysis would furthermore imply a proportionality inquiry in assessing whether the means adopted are reasonably capable of advancing the normative goals and purposes of the relevant socio-economic rights. As noted above, this would entail inquiries into the extent of the impact on the relevant right, whether there are measures less restrictive or invasive of the rights which could be taken, and whether the State’s justifications for not providing the service in question outweigh the impact of the deprivation on the claimant. This approach largely resembles the inquiry followed in respect of the general limitations clause and incorporates many of the factors identified by O’Regan J in *Bato Star* as relevant in determining the reasonableness of administrative decisions.⁵⁶

How does this approach gel with the drafting of sections 26 and 27, specifically the qualifying phrases of “reasonableness”, “within available resources” and “progressive realisation” found in their second subsections? Sections 26(1) and 27(1) consists of an initial assertion of the rights to which everyone are entitled, followed by a second subsection which describes the nature of the duty resting on the State in relation to the realisation of the rights specified in the first subsection. The first two subsections are separated into two distinct, but interrelated provisions. This formulation clearly implies that the right cannot simply be reduced to an obligation of the State to behave reasonably in the broad sphere of social policy. Such a reading would amount, in Danie Brand’s words, to no more than an injunction for the State to observe “structural principles of good governance” in relation to socio-economic rights.⁵⁷ Rather, the obligation on the State to take reasonable measures refers to a very specific objective, namely, “the realisation” of the rights specified in sections 26(1) and 27(1). The reasonableness of the State’s acts and omissions must thus be assessed in relation to the achievement of this constitutionally-specified goal. In *Khosa v Minister of Social Development*,⁵⁸ the Court explicitly distinguished the “relatively low” test for rationality review from the standard of reasonableness review in the context of socio-economic rights.

⁵⁵ An example of such a situation would be the facts and circumstances of *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC). But even then, the Court explicitly granted government the latitude to adapt its policy “if equally better methods become available to it for the prevention of mother-to-child transmission of HIV” (para 135, Order para 4).

⁵⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 45.

⁵⁷ Brand “Proceduralisation” in *Rights and Democracy* 53.

⁵⁸ 2004 6 SA 505 (CC).

Certainly, the concept of reasonableness in itself implies a measure of the flexibility regarding the precise means to be adopted to achieve the goals, but this flexibility does not absolve a court from interrogating whether the means chosen are reasonably likely to advance the achievement of the goal, that is falls within the band of reasonable options.⁵⁹ Given the fact that the inquiry centres on the protection of rights in the Bill of Rights, “strong-form” reasonableness is appropriate which incorporates a proportionality inquiry. The narrowing of the band of options resulting from such “strong form” reasonableness review does not, however, exclude innovative approaches to the realisation of rights. By the narrowing of the band we do not propose that the court will exhaustively formulate the actual measures that a reasonable administrator may take. Within the defined markers that set the band in a given case there should be ample scope for experimentation with different measures to realise the right. The concepts of “available resources” and “progressive realisation” in sections 26(2) and 27(2) represent specific considerations within the overall reasonableness inquiry which a court must give weight to in assessing the State’s justificatory arguments in opting for a particular measure. However, while resource constraints and “progressive realisation” may constitute a basis for justifying the State’s lack of progress in advancing access to socio-economic rights, these factors also set standards of accountability within the reasonableness inquiry. Thus the CESCR has held that the concept of “progressive realisation” in article 2 of the Covenant is, on the one hand, a “necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights”. On the other hand, the UN CESCR states:

“[T]he phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”⁶⁰

Similarly, a failure to use available resources optimally (such as under-expenditure of allocated budgets) or efficiently (such as wasteful expenditure)

⁵⁹ The ICESCR uses the phrase “by all appropriate means, including particularly the adoption of legislative measures” in art 2. This is the equivalent of the concept of “reasonable legislative and other measures” used in ss 26(2) and 27(2) of the South African Constitution. In relation to the obligation “to adopt all appropriate means” in the Covenant, the CESCR has commented as follows in relation to the supervision of State’s obligations in the periodic reporting process:

“While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the ‘appropriateness’ of the means chosen will not always be self-evident. It is therefore desirable that State parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most ‘appropriate’ under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make” (UN CESCR *General Comment No 3: The Nature of States Parties Obligations (art 2(1))* (1990) UN Doc E/1991/23 para 4).

It is noteworthy that in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) UN Doc A/RES/63/117 establishing an individual communications procedure, the examination (or “review” standard set in art 8(4)) is “the reasonableness of the steps taken by the State Party”.

⁶⁰ UN CESCR *General Comment No 3* para 9 (cited with approval in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45).

should be strong indicators of unreasonableness in the context of socio-economic rights adjudication.

Reasonableness review described above is both a normative and context-sensitive standard. It is normative in the sense that the purposes and proportionality of the State's measures are assessed in relation to the overall objective to ensure the realisation of the relevant socio-economic rights. It is context-sensitive in the sense that this inquiry requires close attention to the factual context of relevant cases, how the deprivation in question impacts on the particular claimant group and the factual basis of the State's justifications for its conduct. Where the impact of the State's acts or omissions on socio-economic rights is severe, the review standard is correspondingly tightened (or narrowed). Much weightier justifications are required from the State to justify its actions or inaction, as the case may be. This was acknowledged by the Court in the context of reviewing the State's compliance with its positive duties to ensure the safety and security of persons using commuter trains. It held that the assessment of reasonableness should include, among other factors, "the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result".⁶¹ O'Regan J went on to hold, "[t]he more grave is the threat to fundamental rights, the greater is the responsibility on the duty bearer".⁶²

The potential of the contextual reasonableness approach of *Bato Star* has, however, not been fully exploited. The actual application of the approach in both judgments in *Bato Star* was fairly weak. Both applied little more than thin rationality, mostly by accepting the say-so of the administrator and being satisfied that attention had been given to the transformative objectives at issue in taking the decision.⁶³ There is very little interrogation of the actual substantive outcome of the decision, that is, to assess how the administrator's choice will in substance advance transformation. In this sense both judgments seem much closer to the test advocated in *Bel Porto* where any link between objective and decision will do, regardless of how tenuous that link may be in substance.

3 The reasonableness standard in socio-economic rights jurisprudence

In this part, we consider the model of review applied to socio-economic rights cases where the primary breach is identified as arising from executive or legislative acts or omissions. In other words, the impugned conduct does not constitute administrative action falling within the scope of section 33 of the Constitution and PAJA. Here we focus primarily on cases in which it is argued that the presence or absence of legislation, social programmes or policies infringe the obligations imposed by sections 26, 27, 28(1)(c) and 29 of the Constitution.

⁶¹ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 88

⁶² Para 88

⁶³ See Davis (2006) *Acta Juridica* 23

We commence by tracing the developments in the socio-economic rights jurisprudence concerning cases where it is alleged that the State has failed to comply with an aspect of the positive duties imposed by sections 26(1) and 27(1) read with their second subsections. To place the discussion of this category of cases in context we provide a brief overview of the structure of the review model applied respectively to the negative and positive duties imposed by the socio-economic rights, and thereafter to the rights formulated as qualified and unqualified entitlements. Our overall objectives in this part are twofold. First, we seek to examine to what extent the courts have developed a model of review in socio-economic rights jurisprudence which is distinct from a more formalistic model of administrative-law model of review. Second, we examine how the more substantive reasonableness review criteria formulated in the context of South African administrative law (discussed in the previous part) can contribute to the development of principled, transparent criteria for reviewing socio-economic rights claims.

3 1 The model of review applied to different types of socio-economic rights claims

Before proceeding to assess the model of review applied to positive socio-economic rights claims in the light of this understanding of the appropriate method of review, it is useful to situate this analysis within a broad overview of the structure of review applied to different types of socio-economic rights claims. The first noteworthy feature of the jurisprudence is that the Court has drawn a categorical distinction between the model of review applied to negative and positive duties, respectively. Thus where state action is held to deprive people of the existing access that they enjoy to socio-economic rights, this is held to constitute a *prima facie* breach of the negative duty “to respect” the relevant rights which the Court has located in sections 26(1) and 27(1).⁶⁴ The State’s justifications for the infringement are assessed according to the stringent purpose and proportionality requirements of the general limitations clause.⁶⁵ This is consonant with the traditional two-stage approach to constitutional review applied in respect of most other rights in the Bill of Rights.

In contrast, when the alleged infringement is classified as a breach of the positive duties in respect of socio-economic rights (which the court locates in sections 26(2) and 27(2)), a different model of review is applied. The Court has expressly held that the positive duties to achieve the realisation of socio-economic rights for those who lack access to socio-economic rights, or whose current access is inadequate, *is both defined and limited* by the criteria of

⁶⁴ See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 46, *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 33-34; *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC)

⁶⁵ S 36 of the Constitution

reasonableness, progressive realisation and the State's available resources.⁶⁶ In adopting the reasonableness standard of constitutional review, the Court has eschewed a relatively more absolutist model based on a minimum core approach.

3 2 The development of reasonableness review in the jurisprudence

In the first socio-economic rights case to come before the Constitutional Court, *Soobramoney v Minister of Health, KwaZulu-Natal*,⁶⁷ the Court focused its inquiry on whether the justifications provided by the State for rejecting the applicant for kidney dialysis treatment at a state hospital were fair and reasonable. Applying a costs-benefits analysis the Court held that the rationing criteria for kidney dialysis were designed to allow more people to benefit from scarce kidney dialysis facilities than would be the case in the absence of such criteria.⁶⁸ Devoting further resources to the kidney dialysis programme would prejudice both other health-related expenditure (including on primary health care), and the other legitimate needs which the State is required to meet.⁶⁹ In *Soobramoney* minimal attention was paid to the distinctive feature of the normative goals and purposes of the right of access to "health care services" in section 27(1)(a) read with 27(2). In contrast, greater attention was paid to the scope of section 27(3) (the right to emergency medical treatment), including at least some comparative references to Indian jurisprudence.⁷⁰ The justificatory analysis is thus conducted without reference to the critical first step of reasonableness review described by Sadurski – determining the nature of the decision to be taken, and assessing its normative importance.

*Government of the Republic of South Africa v Grootboom*⁷¹ signalled the evolution of a more clearly articulated model of review in respect of positive socio-economic rights claims. The Court indicated that it would adopt, as described by Danie Brand, the "means-end" justificatory model characteristic of reasonableness review.⁷² Thus it held in the context of the right of access to adequate housing that measures must be adopted that

"establish a coherent public housing programme *directed* towards the progressive realisation of the right of access to adequate housing within the State's available means. *The programme must be capable of facilitating the realisation of the right.* The precise contours and content of the measures

⁶⁶ See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 11; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 30-39. For a critique of the different models of review applied in respect of negative and positive duties, see S Liebenberg "Grootboom and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 38-59.

⁶⁷ 1998 1 SA 765 (CC)

⁶⁸ Paras 25-26

⁶⁹ Para 28

⁷⁰ Paras 12-21. For criticisms of the restrictive, and purely "negative duties" meaning given to s 27(3), see Liebenberg *Socio-Economic Rights* 137-139; C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise" (2000) 16 *SAJHR* 206 245-248.

⁷¹ 2001 1 SA 46 (CC)

⁷² Brand "Proceduralisation" in *Rights and Democracy* 40

to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.”⁷³

This is strongly suggestive of a proportionality approach. Government is allowed a margin of discretion relating to the specific policy choices – or band of options – it is free to choose from in giving effect to socio-economic rights.⁷⁴ However, the court is required to inquire whether such measures constitute a reasonable response to the socio-economic deprivation in question taking into account the constitutionally mandated goal in section 26(1) and 26(2) of ensuring that everyone has access to an adequate level of the relevant social services and resources.⁷⁵ Reasonableness must be assessed in the light of the normative goals that the relevant socio-economic rights seek to advance.⁷⁶

The Court devoted attention to developing some of the substantive features of housing as a human right and how it contributes to the promotion of foundational constitutional values as well as other rights in the Bill of Rights. Thus Yacoob J held that housing “entails more than bricks and mortar”.⁷⁷ He goes on to refer in this context to land, various services (such as water and sewage removal) as well as the physical structure. Moreover, the Court highlights some of the broader constitutional objectives that housing as human right is designed to foster such as enabling people to enjoy the other rights in the Bill of Rights, the advancement of racial and gender equality and “the evolution of a society in which men and women are equally able to achieve their full potential”.⁷⁸ Human dignity is the value-based underpinning of the Court’s key finding in *Grootboom* that reasonableness requires as a minimum or basic step short-term measures of relief for those whose needs are urgent and “who are living in intolerable conditions or crisis situations”.⁷⁹ Thus a statistical improvement in housing delivery will not pass the reasonableness test if it is not appropriately attuned and responsive to the circumstances of those in desperate need.⁸⁰

The Court also explicitly engages with international law in its judgment, specifically the ICESCR. While not endorsing the direct application of a minimum core approach⁸¹ (outside the framework of reasonableness

⁷³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 (emphasis added) The overarching requirement that a reasonable programme in the context of socio-economic rights must be geared towards the realisation of the relevant right is also implicit in the further criteria for assessing the reasonableness of the programme referred to in *Grootboom*: the programme must be comprehensive, coherent, co-ordinated (paras 39-40, 95); appropriate financial and human resources have must be allocated to it (paras 39, 68); and the programme must be balanced and flexible, making appropriate provision for short-, medium- and long-term needs (para 43)

⁷⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 87

⁷⁵ Frank Michelman describes the objectives of socio-economic rights to be the creation of “legal obligations on lawmakers to make their best effort to devise, adopt and execute policies and measures that will result in the desired social-outcome targets” F Michelman “Socioeconomic Rights in Constitutional Law: Explaining America Away” (2008) 6 *I CON* 663 667-668

⁷⁶ See in this regard, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44

⁷⁷ Para 35

⁷⁸ Para 23

⁷⁹ Paras 63-64, 99

⁸⁰ Para 44 (“[T]he Constitution requires that everyone must be treated with care and concern”)

⁸¹ Paras 26-33

review),⁸² it did, as noted above, endorse the CESCR's interpretation of the concept of "progressive realisation" in General Comment No 3.⁸³

Reasonableness will be assessed in the light of the relevant social, economic and historical context, the capacity of institutions responsible for implementing the programme,⁸⁴ and allowance must be for the availability of resources and the latitude of progressive realisation. Nevertheless, the overall inquiry remains whether the impugned measures are sufficiently effective and expeditious in achieving the goal of the full realisation of the relevant socio-economic rights. The more serious the socio-economic deprivation and its consequences, the proportionately greater the response expected from relevant organs of State.

In *Grootboom, Khosa, Minister of Health v Treatment Action Campaign (No 2)*⁸⁵ and the recent eviction-related jurisprudence,⁸⁶ a number of open-ended, non-exhaustive indicators⁸⁷ of the reasonableness of the measures adopted by the State have been developed. These include: reasonable formulation and implementation of programmes;⁸⁸ transparency;⁸⁹ non-discrimination against groups in their access to relevant programmes;⁹⁰ the impact of the deprivation on other rights such as life, dignity and equality⁹¹; and "meaningful engagement" with affected groups.⁹² Most of these indicators express aspects of the central constitutional values of human dignity, non-discrimination, transparency, and participatory democracy.⁹³

⁸² Note specifically the possibility left open by the Court that "[t]here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable" (*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33). See also *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 34.

⁸³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45. See also UN CESCR *General Comment No 3* (2000) para 9 on the CESCR's interpretation of the concept of progressive realisation.

⁸⁴ Para 43.

⁸⁵ 2002 5 SA 721 (CC).

⁸⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Abahlali BaseMondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA).

⁸⁷ The Court noted in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) that the factors identified in the assessment of reasonableness were not a closed list and that "all relevant factors have to be taken into account". The Court went on to observe that "[w]hat is relevant may vary from case to case depending on the particular facts and circumstances" (para 44).

⁸⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 40-43.

⁸⁹ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 123.

⁹⁰ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

⁹¹ Para 44.

⁹² See the eviction cases listed in n 83 above and *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC).

⁹³ Carol Steinberg argues that it is the heavier weighting of the values of human dignity and equality and the closer scrutiny of whether government programmes have been sufficiently attentive to these values that distinguishes reasonableness review in the context of socio-economic rights jurisprudence from an administrative law model of review where constitutional rights are not implicated. C Steinberg "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence" (2006) 123 *SALJ* 264 277, 281.

While in *Khosa* there is some attempt to articulate the goals and values of social security as a human right,⁹⁴ very little explicit attempt is made by the Court in *Minister of Health v Treatment Action Campaign* to articulate the normative content of the right of access to health care services in section 27(1). The case is resolved in favour of the claimants primarily on the basis of reviewing the rationality of the arguments put forward by Government in favour of its restrictive and inflexible approach to the provision of Nevirapine throughout the public health sector to reduce mother-to-child transmission of HIV in childbirth.⁹⁵ This is not far removed from the ground of review in administrative law that the decision is not rationally connected to the reasons given for it.⁹⁶

3 3 Reasonableness review in *Mazibuko*

The leading recent case on the review of positive duties in the context of socio-economic rights claims is *Mazibuko v City of Johannesburg*.⁹⁷ We focus here on the first leg of the claim which concerned the sufficiency of the City of Johannesburg's policy relating to the quantum of a free basic water supply, although both legs of the claim are closely related.⁹⁸ In particular, the Court was requested to consider whether the decision by the City to limit its supply of free basic water to six kilolitres of free water per month to every accountholder in the city was in conflict with the right of access to "sufficient" water in section 27(1)(b) of the Constitution read with subsection (2), or with section 11 of the Water Services Act 108 of 1997.

In its judgment, the Court gave a narrow construction of the "reasonableness review" standard for assessing the positive duties imposed by socio-economic rights as developed in the *Grootboom*, *TAC* and *Khosa* cases.⁹⁹ The Court justified its deferential stance by reference to institutional concerns regarding the "proper role" of courts *vis-à-vis* the other branches of government. Thus O'Regan J stated:

"[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available

⁹⁴ See, for example, *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) paras 74, 76-77, 79-81

⁹⁵ See also Brand "Proceduralisation" in *Rights and Democracy* 50-51; Bilchitz *Poverty and Fundamental Rights* 152-162

⁹⁶ See s 6(2)(f)(ii)(dd) of PAJA. In rebutting the rationality of the State's justifications, the Court accorded significant weight to the excellent medical evidence marshaled by the Treatment Action Campaign as well as the opinions of international and local expert bodies in the field such as the World Health Organisation and the Medicines Control Council. This arguably infuses a more substantive dimension in the degree of scrutiny applied in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) than a mere *Wednesbury* review standard.

⁹⁷ 2010 4 SA 1 (CC)

⁹⁸ For a critique of the reasoning adopted by the Court in relation to the second leg of the claim relating to the installation of pre-paid water meters, see G Quinot "Substantive Reasoning in Administrative-Law Adjudication" (2010) 3 *CCR* 111 124-136

⁹⁹ For criticisms of the narrow construction and application of the reasonableness review standard adopted in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC), see Liebenberg *Socio-Economic Rights* 468-472; L Williams "The Role of the Courts in the Quantitative Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 141

budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.”¹⁰⁰

She went on to hold that the Court’s role in enforcing the positive duties imposed by socio-economic rights is restricted to two primary scenarios. First, if government does not take steps to realise socio-economic rights, “the courts will require the government to take steps”.¹⁰¹ Second, the courts will intervene if the measures adopted by government “fail to meet the constitutional standard of reasonableness”.¹⁰² Three basic situations would be indicative of unreasonableness: a) where no provision is made for those most desperately in need,¹⁰³ b) socio-economic policies contain unjustifiable exclusions or restrictions,¹⁰⁴ and c) a failure by government “continually to review its policies to ensure that the achievement of the right is progressively realised”.¹⁰⁵

Applying these criteria the Court found that it had not been shown that the refusal of the City of Johannesburg to provide more than the basic minimum water supply of 25 litres per person per day (or six kilolitres per household per month) prescribed in Regulation 3(b) of the National Water Standards Regulations¹⁰⁶ to the Water Services Act to the households in Phiri was unreasonable. Persuasive facts for the Court appears to have been that at least some basic water was being provided, that there were others who were “worse off” than the Phiri community,¹⁰⁷ there was provision for flexibility in the programme through the additional water available through the City of Johannesburg’s indigency policy,¹⁰⁸ and it would be “administratively extremely burdensome and costly, if possible at all”¹⁰⁹ to provide water to households in Phiri on a per person universal basis instead of the set allowance of six kilolitres per month per household basis (based the assumption of 25 litres per person per day in a household of eight persons).¹¹⁰ It was argued that this resulted in an insufficient supply of water to larger households, particularly in the light of the fact that with the acute housing shortage in the townships stands were frequently occupied by more than one household resulting in some stands, such as Ms Mazibuko’s, accommodating as many as

¹⁰⁰ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61

¹⁰¹ Para 67

¹⁰² Para 67

¹⁰³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)

¹⁰⁴ The Court cites its judgment in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) as an example of a programme in which the Court simply ordered government to remove an “unreasonable limitation or exclusion” For criticism of this reading of the basis for the *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) decision, see Liebenberg *Socio-Economic Rights* 469

¹⁰⁵ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 67

¹⁰⁶ Regulations relating to compulsory national standards and measures to conserve water, GN R 509 in GG 22355 of 08-06-2001

¹⁰⁷ The Court referred to the fact that, according to Statistics South Africa *Census 2001* (2001), approximately a tenth of all households within the jurisdiction of the City of Johannesburg have no access to a tap providing clean water within 200 metres of their home *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 7

¹⁰⁸ Paras 90-102

¹⁰⁹ Para 89.

¹¹⁰ Paras 84, 86-89

three families (20 people). In the end the Court refrained from engaging with the arguments regarding the sufficiency of the 25 litres per person per day basic water supply despite acknowledging at the outset of its judgment that, “[w]ater is life” and that

“[h]uman beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.”¹¹¹

The considerations referred to above which carried weight in the Court’s judgment should undoubtedly form part of the proportionality analysis in a case such as *Mazibuko*. However, these justifications are weighed without a prior rigorous analysis of the nature of the right at issue and the impact of the basic water allowance on households in the circumstances of Ms Mazibuko.¹¹² The result is that there is no narrowing of the bands of purpose and proportionality which should occur in judicial review where fundamental rights are at stake. Judicial review in *Mazibuko* accordingly has more in common with “weak form” rationality review than “strong form” reasonableness review.

Paradoxically, if one were to assume that the action at stake in *Mazibuko* qualified as administrative action,¹¹³ the *Bato Star* test for reasonableness may have resulted in much closer scrutiny of the context than was actually done in that judgment solely in terms of section 27. Especially the last two factors listed by O’Regan J in *Bato Star*, namely “the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”,¹¹⁴ may have invited a closer look at both the decisions regarding the quantum of a free basic water supply and the installation of pre-payment meters against the substantive entitlements of section 27 and the real impact on the people of Phiri. Since the well-reasoned and rational decision-making dimension of the analysis would have been done in terms of section 33(1), the focus on section 27 could have remained entirely substantive. This indicates how the interaction of reasonableness under administrative justice and socio-economic rights in overlap cases can force a review court into truly substantive engagement with both socio-economic rights and administrative action. It also illustrates how the combination of the different provisions in a single model of reasonableness review can avoid a proceduralisation of socio-economic rights by locating that dimension of the review in section 33.

3 4 The relationship between the “internal” reasonableness test in sections 26 and 27 and the general limitations clause

The proportionality inquiry that we have put forward in reviewing socio-economic rights claims is identical to the justification inquiry normally taking place in terms of section 36. The potential overlap between the internal “reasonableness” inquiry in sections 26 (2) and 27(2) and the reasonableness

¹¹¹ Para 1

¹¹² See the more detailed engagement with these elements in the High Court and Supreme Court of Appeal judgments in *Mazibuko: Mazibuko v City of Johannesburg* 2008 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA)

¹¹³ This is not a particularly big assumption, see Quinot (2010) 3 CCR 135-136

¹¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 45

inquiry in the general limitations clause (section 36) was recognised by the Court in *Khosa*.¹¹⁵ However, Mokgoro J did not decide whether a different threshold of reasonableness should be applied in section 36. She held that even if a different test should be applied, she was satisfied that the exclusion of permanent residents from the relevant social assistance scheme would not meet the criteria for reasonableness and justifiability in terms of section 36.¹¹⁶

As argued above, sections 26(2) and 27(2) both define the nature of the State's obligations in relation to the rights in sections 26(1) and 27(1), and permit the State to raise specific justificatory factors such as resource constraints and the latitude of "progressive realisation". "Reasonableness" in the second subsection can in fact incorporate the proportionality inquiry of section 36, making section 36 largely redundant in this context except for the threshold requirement that a limitation of rights must be in terms of a law of general application. However, the strategic danger of subsuming the limitations inquiry into the rights definitional stage of the inquiry is that the traditional two stage-methodology of constitutional analysis is blurred. This can lead to a lack of principled, focused attention on the scope and purposes of the relevant socio-economic right, before turning to consider the State's justificatory arguments.¹¹⁷ As noted above, crucial to a proper application of the proportionality requirement is a clear understanding of the nature of the right affected,¹¹⁸ and the impact of the challenged conduct or omissions on the normative purposes and values which the relevant right seeks to promote.¹¹⁹

The two-stage approach and an explicit consideration of the factors to be considered under the general limitations clause promotes transparency in identifying and weighing the relevant considerations underpinning the ultimate decision of the Court. If the trend is to continue whereby the internal reasonableness standard in sections 26(2) and 27(2) is to do the heavy lifting of definition and limitation, then the Court should at least separate out the different strands of the reasoning process and commence with an initial principled consideration of the relevant right asserted in sections 26(1) and 27(1), and the impact of the impugned conduct on the values and purposes promoted by the relevant right. The focus at this stage is on the right and rights-holder. Proper attention to this inquiry provides the normative and contextual framework for proceeding to apply a proportionality analysis to the State's arguments that its conduct meets the constitutional standard of reasonableness. This is the same approach that we have put forward for the

¹¹⁵ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 83

¹¹⁶ Para 84 Compare the minority judgment of Ngcobo J (as he then was) See I Rautenbach "The Right to Access to Sufficient Water and the Two Stage Approach to the Application of the Bill of Rights" (2011) 74 *THRHR* 107 117-119 for an analysis of the different constructions of the relationship between ss 26 and 27 and the general limitations clause

¹¹⁷ See Liebenberg *Socio-Economic Rights* 201-202

¹¹⁸ This is the first factor to be considered in assessing the reasonableness and justifiability of limitations to rights in terms of s 36 (s 36(1)(a))

¹¹⁹ This corresponds with the third factor in the general limitation clause which requires consideration of the "nature and extent of the limitation" (s 36(1)(c))

interaction between section 33 and socio-economic rights in overlap cases above. This will not only foster transparency in the judicial reasoning process in socio-economic rights claims, but will also ensure that reasonableness in the context of socio-economic rights adjudication is appropriately attuned to the normative considerations of human rights claims.

4 Conclusion

Our analysis above indicates that there can be a unified model of reasonableness review across cases involving administrative and non-administrative measures impacting on socio-economic rights. The various reasonableness standards found in distinct provisions of the Bill of Rights are capable of being interpreted in a way that promotes a coherent model of review. In terms of this model, reasonableness under the various provisions overlap, but do not duplicate the same function. There is rather an interaction between these standards that promote the core advantages of reasonableness as a model of review.

In administrative law, the best model for reasonableness review flows from the judgments in *Bato Star*. In terms of this model, reasonableness review is a contextual inquiry with the level of scrutiny being determined by a number of factors focusing on the context of the relevant case. This context involves both the normative context and the factual context. The former refers to the other constitutional provisions implicated in the case. The model allows the court to engage with the substance of the administrative decision at stake, but not in order to assess whether the correct decision was taken on the merits, but whether the decision falls within a band of reasonable decisions on the merits. The normative context plays a critical role in defining that band of options. In cases where administrative action impacts on socio-economic rights (what we call overlap cases) the substantive entitlements found in the relevant socio-economic right determines to a large extent the scope of the band of options available to the administrator. In effect, in overlap cases, the band is narrowed with reference to the substance of the relevant socio-economic right.

In cases involving measures impacting on socio-economic rights that are not administrative action, mostly executive or legislative measures (what we call non-overlap cases), the model of review is necessarily different from the one in overlap cases. In these cases, the Constitutional Court applies a different model of review depending on whether the case is classified as a breach of a negative duty imposed by the relevant socio-economic right, or a breach of a positive duty. In the former type of case the court assesses the justificatory analysis of the infringing measures within the strict proportionality analysis of the limitations clause. However, in the latter type of case the court subsumes all aspects of the reasonableness analysis within the relevant right. The effect, particularly in the context of cases involving the review of positive duties, is that very little attention is given to the substantive content of the relevant socio-economic right. All the work is done in the justificatory analysis.

Under the model we advocate here, a distinct role is given to reasonableness analysis in terms of the relevant socio-economic right as a first step of the

model. This first step involves giving content to the relevant right in all types of cases before moving on to a justification analysis whether in terms of the internal reasonableness test of sections 26(2) or 27(2) or the general limitations clause analysis under section 36. Again, the band of options is narrowed down with reference to the substance of the right before the State's actions are analysed against those options.

This two-stage model of reasonableness analysis in both overlap and non-overlap cases facilitates many of the core advantages of reasonableness review. Firstly, it brings the context of the relevant case to the fore. Context, both normative and factual, plays a pivotal role in assessing the reasonableness of the measures at stake. Secondly, since the model is highly contextual, review can be appropriately individualised. There is thus less danger of setting substantive standards that may be inappropriate in another context or time. Thirdly, the model promotes greater transparency in legal reasoning in that the competing value and policy considerations at stake, and the method and choices made in weighing them are openly acknowledged and set out in the judgment, including judicial justification for the level of scrutiny applied. This promotes greater transparency in legal reasoning and enables a principled development of factors informing judicial intervention and non-intervention.¹²⁰ Since an assessment of the process and substance of the relevant measures are kept separate, there is less of a danger that these will be blurred with a resultant lack of transparency in the application of either one. Particular importance is accorded to the substantive dimensions of socio-economic rights in this model.

Despite the advantages noted above, our analysis indicates that the potential of a coherent reasonableness model of review has not been fully developed in the jurisprudence. The review standard in cases involving socio-economic rights has not been appropriately narrowed to reflect the particular purposes and values that these rights seek to advance. This leaves the judiciary ill equipped to play a significant role in catalysing the public and private measures required to give effect to the substantive commitments of our transformative Constitution.¹²¹

SUMMARY

This contribution explores the standard of reasonableness review applied in both administrative justice and socio-economic rights jurisprudence in South Africa. The first part traces the development of reasonableness as a standard of review in administrative law, and the significant shift towards a more substantive conception of review. The implications of this shift for cases involving review of administrative action impacting on socio-economic rights (what we term, "overlap cases") are examined. The second part of the contribution examines reasonableness review in socio-economic rights cases where the cause of action is not formulated in terms of administrative law (what we term, "non-overlap cases"). This typically concerns cases where it is alleged that the legislature or executive branches of government have failed to fulfil the obligations imposed by socio-economic rights. In this section we highlight the failure of existing constitutional jurisprudence on socio-economic rights

¹²⁰ See A Pillay "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?" (2005) 122 *SALJ* 419-420; Davis (2006) *Acta Juridica* 33

¹²¹ On the catalytic function of judicial review see K Young "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review" (2010) 8 *ICON* 385

to develop a substantive account of the normative purposes and values promoted by these rights. We argue that it remains possible for such an account to be developed within the existing framework of reasonableness review applied to positive socio-economic rights claims. The paper concludes with an argument in favour of the development of a single model of reasonableness review across socio-economic rights and administrative justice cases. While the reasonableness standards under the different sections overlap, they should not result in duplication, but fulfil different functions in the review. Taken together, reasonableness offers a model of review of socio-economic rights that promotes a number of key constitutional objectives. These include transparency, the justification of all forms of public action, proper consideration of the factual and normative context, and the development of the substantive dimensions of the socio-economic rights in the Constitution.