A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights

By

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Shanelle van der Berg
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Summary

The realisation of socio-economic rights – often through the medium of administrative law – is a critical prerequisite for the transformation of South African society. Resources are integral to the fulfilment of socio-economic rights. However, resources are finite. Difficult allocative choices must thus be made since the fulfilment of different rights, and short-term and long-term poverty alleviation programmes, all compete for resources. The primary research problem that this dissertation addresses is how Amartya Sen and Martha Nussbaum's capabilities approach can contribute to the development of a theoretical paradigm for the judicial review of State resource allocation decisions that impact on socio-economic rights. This dissertation identifies key linkages that exist between the capabilities theory and the characteristics of South Africa's project of transformative constitutionalism. Once these central tenets are identified, they should be observed throughout the adjudicatory process.

In this dissertation the need for the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions is assessed. Thereafter, a capabilities-based standard of review is designed. The weighting exercise required for the ranking of capabilities is carefully developed to cater for instances where diverse rights compete for prominence and resource allocation, or where long-term and short-term capability realisation vies for resources. However, it is cautioned that a capabilities-centred weighting exercise is only feasible where courts are willing to substantively interpret socio-economic rights. The interpretation of the content of the relevant right with reference to the capabilities it represents in a particular historical, social and factual context constitutes the first stage of the two-stage analysis. At the second stage of the rights-analysis, a capabilities-centred proportionality analysis can be applied to the impugned allocative decision. Finally, the contours of a capabilities approach to remedies are explored, whereby the efficacy of a remedy is measured by its potential to effect capability realisation.

Thus, courts can extract accountability, responsiveness and openness from the State by requiring it to justify its allocative choices in the light of the normative content and purposes of socio-economic rights. Where reasonable resource allocation decisions are required, courts can help ensure that the State directs its resources to socio-economic capability realisation at a systemic level. Where resources are allocated to realise capability needs, it becomes possible for the socio-economically disadvantaged members of our society to unlock their potential and choose to live meaningful lives. In this way, a society characterised by freedom, dignity and equality for all becomes a realistic prospect.

Opsomming

Die verwesenliking van sosio-ekonomiese regte, dikwels deur middel van administratiefreg, is 'n voorvereiste van kritieke belang vir die transformasie van die Suid Afrikaanse samelewing. Hulpbronne is integraal tot die verwesenliking van sosio-ekonomiese regte. Hulpbronne is egter beperk. Moeilike toedelingsbesluite moet dus gemaak word aangesien die vervulling van verskillende regte, en die kort- en langtermyn programme vir verligting van armoede, almal meeding om hulpbronne. Die primêre navorsingsvraagstuk wat hierdie proefskrif aanspreek is hoe Amartya Sen en Martha Nussbaum se vermoënsbenadering kan bydra tot die ontwikkeling van 'n teoretiese paradigma vir die regterlike hersiening van die Staat se toewysingsbesluite wat 'n impak op sosio-ekonomiese regte het. Hierdie proefskrif identifiseer sleutel raakpunte wat bestaan tussen die vermoënsteorie en die eienskappe van Suid Afrika se projek van transformerende konstitusionalisme. Sodra hierdie kernbeginsels geïdentifiseer is, moet dit deurgaans in die beoordelingsproses nagekom word.

In hierdie proefskrif word die noodsaak vir die ontwikkeling van 'n vermoënsgebaseerde hersieningstandaard vir besluite oor die toewysing van Staatshulpbronne bepaal. Dienooreenkomstig word 'n vermoënsgebaseerde standaard vir hersiening ontwerp. Die gewigstoekenningsoefening wat die gradering van vermoëns vereis, is deeglik ontwikkel om voorsiening te maak vir gevalle waar uiteenlopende regte meeding om voorrang en hulpbrontoewysing, of waar lang- en korttermyn vermoënsverwesenliking meeding om hulpbronne. Daar word nietemin gewaarsku dat 'n vermoëns-gesentreerde gewigstoekenningsoefening slegs haalbaar is indien die howe bereid is om sosio-ekonomiese regte substantief te vertolk. Die vertolking van die inhoud van die ter sake reg met verwysing na die vermoëns wat dit verteenwoordig in 'n bepaalde historiese, sosiale en feitelike konteks maak die eerste fase van die twee-stap analise uit. By die tweede fase van die regte-ontleding kan 'n vermoëns-gesentreerde proporsionaliteitsontleding toegepas word op die bevraagtekende toewysingsbesluit. Laastens word die kontoere van 'n vermoënsbenadering tot remedies ondersoek, waarvolgens die doelmatigheid van 'n remedie gemeet word aan die potensiaal om vermoënsrealisering te bewerkstellig.

Aldus kan die howe die Staat dwing tot verantwoordingspligtigheid, 'n responsiewe ingesteldheid en openheid deur te vereis dat die Staat sy toewysingsbesluite verantwoord in die lig van die normatiewe konteks en doelwitte van sosio-ekonomiese regte. Indien redelike hulpbrontoewysingsbesluite vereis word, kan die howe help om te verseker dat die Staat sy hulpbronne aanwend vir sosio-ekonomiese vermoënsbewerkstelling op 'n sistematiese vlak. Wanneer hulpbronne toegewys word om vermoënsbehoeftes te realiseer, word dit vir die sosio-ekonomies-benadeelde lede van ons samelewing moontlik om hul potensiaal te ontsluit en te kies om 'n betekenisvolle lewe te leef. Sodoende word 'n samelewing gekenmerk deur vryheid, menswaardigheid en gelykheid vir almal 'n realistiese vooruitsig.

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Chapter 1: Introduction

1 1 Background

1 1 1 A transformative constitution

The Constitution of the Republic of South Africa, 1996 (the "Constitution") evinces a commitment to "[i]mprove the quality of life of all citizens and free the potential of each person".[1] For this vision to become a reality, South African political, legal, social and economic institutions must be transformed to create a society in which the freedom, dignity and equal worth of all who live here are recognised and supported.[2] Large-scale reform is necessary to address the structural patterns of disadvantage caused by discriminatory laws and policies enacted under the apartheid regime.[3] In addition to redressing the wrongs of the past, the positive construction of "a society based on democratic values, social justice and fundamental human rights"[4] is required. Our Constitution sets out the fundamental values that should guide the process of transformation.[5] It also provides a constitutional framework in which this ambitious project can unfold.

The law can be a powerful tool with which to effect social change.[6] The law was used as a tool to oppress the majority of the South African population,[7] and it can be used as a tool to attain social justice. Karl Klare's well-known conceptualisation of "transformative constitutionalism" highlights the important role that law and legal

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[1] Preamble to the Constitution.

[2] South Africa is founded on, *inter alia*, "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms". S 1(a) of the Constitution.

[3] Preamble.

[4] Preamble.

[5] Besides the fundamental values of freedom, dignity and equality enumerated in s 1(a) of the Constitution, the other fundamental values on which our society is based are set out in s (1)(b)-(d) of the Constitution.

[6] SA Scheingold *The Politics of Rights: Lawyers, Public Policy, and Political Change* 2 ed (2004) 131.

[7] Legislation used to further racial oppression includes, but is not limited to, the Group Areas Act 41 of 1950; the Black Education Act 47 of 1953; the Reservation of Separate Amenities Act 49 of 1953 and the Group Areas Act 36 of 1966.

processes can play in the transformation of society through constitutional interpretation and enactment.[8]

The shift from a system of parliamentary sovereignty to one of constitutional supremacy has fundamentally altered the foundations on which our legal system is based. The Constitutional Court is the ultimate guardian of the rights entrenched in the Bill of Rights. The judiciary in its entirety is subject only to the Constitution and the law.[9] Courts fulfil a significant function in a concerted effort to effect societal transformation by interpreting and enforcing constitutional rights. Of course, courts can by no means achieve this project in isolation. It is primarily the task of government to implement laws and policies aimed at far-reaching transformation.

However, transformation must occur through on-going participatory processes that enable the public and civil society organisations to contribute to the formulation of government's transformative agenda.[10] Courts constitute one (amongst many) platforms where deliberation and participation can occur. Furthermore, courts can ensure that laws, policies and administrative action are constitutionally compliant. By engaging in substantive reasoning and requiring government to justify its actions, courts can support the transition from a culture of authority to a culture of justification, in terms of which all exercises of public power must be justified.[11] In this way, the judiciary constitutes an institution that can promote the foundational values of accountability, responsiveness and openness.[12]

1 1 2 Socio-economic and administrative justice

1 1 2 1 Socio-economic rights

The inclusion of justiciable socio-economic rights in the Constitution is significant for the achievement of societal transformation. Previously, apartheid policy systematically denied adequate access to socio-economic services to the majority of our country

[8] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150, quoted in chapter two part 2 4 below.

[9] S 165 of the Constitution.

[10] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354.

[11] E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

[12] S 1(d) of the Constitution.

based on race.[13] The realisation of, *inter alia*, the rights to education;[14] access to adequate housing;[15] health care, sufficient food and water, and to social security,[16] is necessary to address the structural socio-economic disadvantage caused by apartheid era laws and policies. In addition, it is necessary to realise socio-economic rights in order to facilitate the enjoyment of all other constitutional rights.[17] Without the basic socio-economic means to live an autonomous and dignified life, meaningful participation in social, economic and political life is not possible. Nelson Mandela has made this point compellingly:

> "We must address the issues of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society."[18]

Furthermore, the realisation of socio-economic rights is crucial for the achievement of the constitutional objective to free the potential of each person. Without the enjoyment of basic socio-economic resources, the values of freedom, dignity and equality, on which our democracy is based, will never find meaningful expression in the lives of the socio-economically vulnerable members of our society.[19]

1 1 2 2 Administrative justice

In an effort to realise socio-economic rights and so attain social justice, the tenets of administrative justice must also be adhered to. Prior to the advent of constitutional democracy in South Africa, the State often denied socio-economic justice to the majority of its citizens through the mechanisms of administrative law. For example,

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[13] K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 9; CR Sunstein "Social and Economic Rights? Lessons from South Africa" (2001) 11 *Constitutional Forum* 123 125.

[14] S 29 of the Constitution.

[15] S 26.

[16] S 27.

[17] Including "first generation" civil and political rights.

[18] N Mandela "Address of Nelson Mandela at his Investiture as Doctor of Laws" *ANC* <http://www.anc.org.za/show.php?id=4094> (accessed 25-09-2014).

[19] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 2.

access to housing and education was regulated through administrative law.[20] In our current constitutional dispensation, administrative power continues to be vast. However, administrative action should now be directed at furthering the project of transformative constitutionalism, as opposed to denying social justice to the South African people.

Socio-economic rights are often realised through the medium of administrative action. The realisation of socio-economic rights therefore forms part of administrative law's potential to contribute to transformative constitutionalism. The fulfilment of socio-economic rights is not enough – the means through which these rights are realised should reinforce the achievement of administrative justice.[21] When implementing socio-economic policy and legislation, administrative action must thus be lawful, reasonable and procedurally fair.[22] A constitutionally compliant allocation of resources towards, for example, social security will not lead to social justice if the grant system is unjustly administered. Social justice is therefore predicated on the realisation of socio-economic rights in an administratively just manner.

Furthermore, the manner in which legal claims are framed should not be allowed to prejudice the attainment of socio-economic justice. Thus, for example, a claim for the provision of social security might be framed as a socio-economic rights case or an administrative justice case, or both. It is imperative that administrative law be substantively developed to ensure that the interests sought to be asserted through such claims are sufficiently protected, regardless of how a claim is formulated. The substantive development of administrative law is thus necessary to ensure socio-economic and administrative justice.

1 1 3 A capabilities perspective

The capabilities theory, as developed by Amartya Sen and Martha Nussbaum,[23] resonates strongly with a project of transformative constitutionalism. Whereas one of

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[20] C Hoexter *Administrative Law in South Africa* 2 ed (2012) 11.

[21] The right to administrative justice is enshrined in s 33 of the Constitution. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") aims to give legislative expression to the constitutional right.

[22] S 33(1) of the Constitution.

[23] A Sen *Development as Freedom* (1999); A Sen *The Idea of Justice* (2009); MC Nussbaum *Women and Human Development: The Capabilities Approach* (2000); MC Nussbaum *Creating Capabilities* (2011).

our Constitution's objectives is to realise the potential of each person, the capabilities theory asks to what extent we have the potential (or substantive freedom) to choose the lives we have reason to value.[24] A capabilities perspective can therefore be adopted to evaluate the progress of the project of transformative constitutionalism and to assess the degree to which we have established a socially just democracy. Legislation, policy and administrative action can thus be judged by determining to what extent government measures expand the capabilities of all South Africans to choose the lives they have reason to value.

Public reasoning is an essential component of Sen's capabilities theory.[25] Similarly, public reasoning conceptualised as participation constitutes a central tenet of transformative constitutionalism. The importance of public reasoning and participation holds several implications for the adjudication of socio-economic rights in general. First, it implies that in seeking to foster substantive capabilities, the State must simultaneously pay attention to procedural processes that allow for meaningful participation by a broad range of stakeholders. It further implies that government decisions and trade-offs between diverse priorities should be explicitly expounded to enable meaningful public scrutiny.[26] Third, the requirement for public reasoning entails that opportunities should be created by the State and courts for the public to participate in evaluative exercises. In this way, all stakeholders can participate in value formation and policy design by identifying the objectives that government should pursue.[27] However, participation through public reasoning is not only instrumentally important, but is also of constitutive importance since the opportunity to participate in all spheres of life forms part of the lives we have reason to value.

Certain fundamental tenets can be distilled from the central importance of public reasoning and agency within the capabilities theory. First, the entire capabilities approach depends on the informational base available to make evaluative judgments regarding the state of social justice in a particular context. This principle of informational broadening is congruent with the significance of participation under a transformative constitution.[28] Second, it is imperative that decision-makers explicitly justify the socio-economic policy choices made. The principle of explicitness finds its

[24] A Sen *Development as Freedom* (1999) 74.
[25] A Sen *The Idea of Justice* (2009) 44.
[26] A Sen *Development as Freedom* (1999) 75.
[27] 110, 274, 287.
[28] See further chapter two part 2 4 3 below.

corollary in the requirement for substantive reasoning under a transformative constitution and in a culture of justification.[29] These tenets must be observed by all stakeholders in order to ensure effective capability realisation in an effort to transform society.

It is against this legal, political, social and theoretical background that this dissertation is situated.

1 2 Rationale and motivation

1 2 1 Using law to help combat poverty and socio-economic disadvantage

Twenty one years after the advent of democracy in South Africa, it is estimated that nearly half of the South African population lives below the poverty line.[30] Sen conceptualises poverty as the deprivation of "basic capabilities", such as the capabilities to be adequately nourished or even minimally educated.[31] Where people lack these elementary opportunities, the transformative objectives of the Constitution cannot be realised.[32] The harsh reality acknowledged by our Constitutional Court over a decade ago accordingly persists, in that "the Constitution's promise of dignity and equality for all remains for many a distant dream".[33] The underlying rationale for this dissertation is to contribute to a more comprehensive understanding of how the law can be utilised to combat poverty, homelessness and socio-economic disadvantage.

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[29] See further chapter two part 2 4 4 below.

[30] Stats SA *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 12. For earlier data, see *inter alia* The Presidency *Towards a Fifteen Year Review* (2008) 18 <www.info.gov.za/view/DownloadFileAction?id=89475> (accessed 02-06-2011) (estimates that 47.99% of South Africa's population lived below a poverty line of R322 per month in 2005); see also JP Landman, H Bhorat, C van Aardt & S van der Berg *Breaking the Grip of Poverty and Inequality in South Africa 2004 – 2014* (2003) 1 <http://www.sarpn.org.za/documents/d0000649/index.php> (accessed 20-04-2011); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 26.

[31] A Sen *Development as Freedom* (1999) 20.

[32] For example, the potential of those who lack basic capabilities is severely stunted, and the constitutional objective to "free the potential of each person" is hampered. Preamble to the Constitution.

[33] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 2.

1 2 2 Recognising the transformative potential of socio-economic rights and the right to administrative justice

Poverty eradication requires a holistic and integrated strategy that includes the input of civil society organisations, grass roots activism, engagement among government and all stakeholders, and intergovernmental co-operation and planning. It also includes judicial enforcement of constitutional rights where laws and government conduct do not comply with the State's constitutional obligations.[34] The inclusion of justiciable socio-economic rights in the Constitution signals our society's dedication to ensuring that government policy meets the basic needs of every person.[35] The realisation of socio-economic rights can thus remedy basic capability deprivation, and in so doing alleviate poverty. Furthermore, the inclusion of the right to administrative justice acknowledges the importance of reaching constitutional goals through administrative action that is lawful, reasonable and procedurally fair.

The litigation and judicial enforcement of socio-economic rights can accordingly play a valuable role in an integrated strategy to combat poverty. If it were not for the litigation and adjudication of the right of access to housing[36] in *Government of the Republic of South Africa v Grootboom*,[37] government policy would not provide for those in urgent need who lacked the resources necessary to access housing in exigent circumstances.[38] If it were not for the litigation and adjudication of the right of access

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[34] G van Bueren "Alleviating Poverty through the Constitutional Court" (1999) 15 *SAJHR* 52 53-54; see also J Seekings "Poverty and Inequality after Apartheid" (2007) *Centre for Social Science Research, University of Cape Town* <http://www.sarpn.org.za/documents/d0003024/index.php> (accessed 26-04-2011) 27-28, where it is stated that meaningful poverty reduction likely requires further redistribution through the budget. Furthermore, Seekings opines that the government's *constitutional* commitment to the provision of social security serves as a primary factor to motivate further expansion of a social welfare programme. The government has confirmed that its social security assistance programme constitutes its most important driver of the decline of poverty in South Africa. The Presidency *Towards a Fifteen Year Review* (2008) 19 <www.info.gov.za/view/DownloadFileAction?id=89475> (accessed 02-06-2011).

[35] D Bilchitz "Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence" (2003) 4 *ESR Review* 2.

[36] S 26 of the Constitution.

[37] 2001 1 SA 46 (CC).

[38] Alternatively, it may have taken some time for government to identify the *lacuna* in its housing policy had the Court not alerted it to this fact.

to health care services[39] in *Minister of Health v Treatment Action Campaign (No 2)*,[40] government would not have expeditiously provided lifesaving treatment to indigent mothers who could not afford the medication necessary to prevent their infants from contracting HIV.

Government may not always effectively respond to socio-economic rights litigation and the judicial enforcement of these rights. Nevertheless, socio-economic rights litigation may foster accountability and lead to social mobilisation and rights activism. The Constitutional Court recognised the potential of socio-economic rights litigation to promote accountability in *Mazibuko v City of Johannesburg*:[41]

> "A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy… [T]he disclosure of such information points to the substantial importance of litigation concerning social and economic rights… In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation."[42]

Even where government fails to fully comply with court orders,[43] or to implement remedial plans without delay, socio-economic rights litigation can bring important basic capability needs into focus. For example, protracted litigation regarding the right to basic education has brought serious deficiencies in educational policies – and the government's recalcitrance in realising this right – squarely into the public domain.[44] A further rationale for this dissertation is thus the recognition of the transformative potential of socio-economic rights litigation and adjudication to help combat poverty and socio-economic vulnerability.

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[39] S 27(1)(a) of the Constitution.

[40] 2002 5 SA 721 (CC).

[41] 2010 4 SA 1 (CC).

[42] Para 71.

[43] See, for example, F Veriava (Commissioned by Section 27) *The 2012 Limpopo Textbook Crisis: A Study in Rights-bases Advocacy, the Raising of Rights Consciousness and Governance* (2013) regarding government non-compliance with court orders related to the delivery of textbooks in the context of the right to basic education enshrined in s 29(1)(a) of the Constitution.

[44] F Veriava (Commissioned by Section 27) *The 2012 Limpopo Textbook Crisis: A Study in Rights-bases Advocacy, the Raising of Rights Consciousness and Governance* (2013) 37-39.

Administrative law serves as a critical conduit for the realisation of socio-economic rights. The implementation of socio-economic legislation and policy (as opposed to legislative or policy formulation)[45] thus occurs through administrative processes and accordingly entails administrative action. The right to just administrative action implies that socio-economic goods should not merely be delivered to passive beneficiaries, but should occur through administrative processes that are lawful, reasonable and procedurally fair.[46] These requirements thus constitute a *segue* through which Sen's emphasis on agency and participation can find expression in the realisation of socio-economic rights.[47] Administrative justice serves the dual purpose of eliciting responsiveness, openness and accountability from the powerful administration, while fostering the dignity and agency of those affected by administrative action. As with socio-economic rights litigation, administrative justice litigation can also bring important basic capability needs into focus. For example, litigation about administrative processes regarding social grant payment systems has highlighted questionable practices of deductions from social grants and their impact on social welfare.[48] An additional rationale for this dissertation is therefore the recognition of the important synergy that exists between socio-economic rights and the right to administrative justice, which can be developed as part of a comprehensive strategy to alleviate socio-economic disadvantage.

1 2 3 Recognising the persistent relevance of resources

Resource allocation lies at the heart of the realisation of socio-economic rights. The judicial enforcement of socio-economic rights will accordingly often demand the evaluation of government expenditure decisions. Such expenditure decisions require

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[45] Cf *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province v Ed-U-College (PE) (Section21) Inc* 2001 2 SA 1 (CC) para 17 where the Constitutional Court held that the political nature of a decision does not automatically result in action not constituting administrative action. Moreover, the political nature of an administrative decision does not affect the *justiciability* of such decision.

[46] S 33(1) of the Constitution.

[47] A Sen *Development as Freedom* (1999) 19, 53.

[48] See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 6 BCLR 653 (CC) para 9.

priorities to be set.[49] Courts should therefore be capable of assessing government priorities in the light of the socio-economic rights enshrined in the Constitution. Evaluative criteria can aid courts in doing so, and thereby fortify the ability of adjudication to contribute to the realisation of socio-economic rights by guiding government policy and facilitating democratic dialogue.[50] The dissertation is thus further motivated by the recognition of the need for the formulation of concrete and justifiable criteria for the allocation of resources and for the subsequent judicial evaluation of such prioritising decisions.

1 2 4 Recognising the importance of a capabilities perspective

The capabilities theory, which places the substantive freedom to choose the lives we have reason to value at the centre of the evaluation of government laws, policies and conduct, resonates strongly with the objectives of a transformative constitution. The capabilities approach thus holds the potential to make a rich contribution to policy formation by the State, social evaluation of policy by the public and adjudication by the courts. This dissertation is motivated by the desire to identify further linkages that exist between a capabilities approach and our transformative Constitution, and to develop this theory specifically for the adjudication of State resource allocation decisions that impact on socio-economic rights.

1 3 Scope of dissertation

This dissertation investigates the suitability of adopting a capabilities approach for the adjudication of State resource allocation decisions impacting on socio-economic rights. Although a capabilities approach to adjudication may constitute a sound theoretical paradigm for constitutional review in general, that is not where the focus of this dissertation lies. Certain elements of the capabilities theory are evidently harmonious with our constitutional ethos, and alternative theories are thus not considered. In particular, capabilities theory resonates strongly with the rationale for including justiciable socio-economic rights in our Constitution. Without the fulfilment of

[49] G van Bueren “Alleviating Poverty through the Constitutional Court” (1999) 15 *SAJHR* 52 61; 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.

[50] M Pieterse “Health Care Rights, Resources and Rationing” (2007) 127 *SALJ* 514 514.

basic socio-economic needs, real opportunities to live meaningful lives that give effect to the values of freedom, dignity and equality, do not exist. The realisation of socio-economic rights thus creates the capabilities to choose the lives we have reason to value. Moreover, Sen's theory aptly places the need for public expenditure aimed at capability realisation into perspective, and thus justifies the judicial review of State resource allocation decisions that impact on the crucial capabilities represented by socio-economic rights. In addition, Sen's emphasis on observing the tenets of explicitness, informational broadening and agency through a process of public reasoning is wholly congruent with certain central features of adjudication under a transformative constitution.

Furthermore, attention is primarily paid to adjudication in the context of sections 26, 27 and 33 of the Constitution. The second subsection of sections 26 and 27 directs the State to "take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation" of the relevant rights.[51] The availability of resources is thus always relevant in terms of these provisions, and arguments of resource constraints may often be proffered by the State to justify its failure to progressively realise these rights. The formulation of these rights has led the Constitutional Court to develop a model of reasonableness review. In terms of this model of review, a court does not ask whether the State has adopted the "best" or "correct" measures to realise the right in question, but merely whether the measures are reasonable.[52]

Given the instrumental importance[53] of administrative law for realising socio-economic rights, administrative law review also falls within the scope of this dissertation. In particular, the Constitutional Court's development of reasonableness review across the spheres of socio-economic rights and administrative justice jurisprudence is relevant for an analysis of the Court's approach to the judicial review of resource allocation decisions that impact on socio-economic rights. Whereas the

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[51] Ss 26(2) and 27(2) of the Constitution (emphasis added).

[52] This standard was developed especially in the early judgments of *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC). Given that the right to just administrative action requires "reasonable" administrative action, a test for substantive reasonableness has also developed in administrative law. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

[53] The right to administrative justice is also inherently important, but this falls outside the scope of this dissertation.

Court's methodology is equally important in respect of other elements of administrative justice such as procedural fairness, these questions fall outside the scope of this dissertation.

This dissertation focuses primarily on problems associated with adjudicating *budgetary* allocations. Although the allocation of, for example, human and technical resources will not be dealt with as distinct issues, it should be borne in mind that the allocation of any type of resources will ultimately result in a corresponding budgetary allocation.[54]

1 4 Research problem

1 4 1 The primary research question

The primary research problem that this dissertation aims to solve is how the capabilities approach can contribute to the development of a theoretical paradigm for the judicial review of State resource allocation decisions that impact on socio-economic rights. In order to address this fundamental question, many ancillary questions are also investigated.

1 4 2 Supplementary research questions

1 4 2 1 A capabilities approach to adjudication

The first ancillary question that must be answered is to what extent the capabilities approach can be developed for adjudication of complex, polycentric resource allocation decisions. This dissertation therefore identifies linkages that exist between the capabilities theory and the characteristics of transformative constitutionalism. Once such links are identified, a theoretical paradigm for adjudication that furthers the project of transformative constitutionalism can be designed.

[54] RE Robertson "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights" (1994) 15 *HRQ* 693.

1 4 2 2 The role of the judiciary

However, the question arises as to whether the capabilities theory sufficiently recognises the role that courts can and should play in enforcing socio-economic rights. To the extent that Sen's theory fails to accommodate the role of the judiciary,[55] can it be developed to accommodate the significance of adjudication under a transformative constitution? Sen emphasises the role of public reasoning to make comparative judgments regarding the state of social justice, and to evaluate and rank capabilities. These two evaluative endeavours are related, in that the measure of justice or injustice prevalent in a society can be gauged by determining to what extent capabilities are allowed to flourish. For courts to function as one platform where evaluative public reasoning can meaningfully occur, what features of the capabilities theory and transformative constitutionalism should be assimilated by the judiciary? The research problem of how to adapt Sen's theory for judicial utilisation, with reference to Nussbaum's scholarship and the central tenets of transformative constitutionalism,[56] is therefore explored.

1 4 2 3 Defining "available resources"

Another question that must be answered is how courts should conceptualise "available resources".[57] Where the State seeks to justify its non-realisation of a socio-economic right on the basis of resource constraints, should a court merely examine the resources that have already been allocated to a particular socio-economic programme? Or should a court consider a wider pool of resources, for example, the relevant department's overall allocation or even the national budget? Does a capabilities approach to evaluation support an even wider definition of "available resources" that involves the macro-economic choices available to the State? By answering these questions, the problem as to whether wide definitions of "available resources" should be recognised in order to prevent the State from limiting its socio-

[55] Sen only gives fleeting recognition to the role that the judiciary can play in A Sen *Development as Freedom* (1999) 297.

[56] MC Nussbaum *Creating Capabilities* (2011) 170.

[57] In terms of ss 26(2) and 27(2) of the Constitution.

economic obligations – by allocating minimal funds to relevant governmental departments or to particular socio-economic programmes – can be addressed.[58]

1 4 2 4 Weighting rights and resource-based justifications

A further research question relates to how courts can use the capabilities approach to assign weights to different rights, or short-term *versus* long-term socio-economic needs, that all vie for resource allocation. Once a valuational ordering of rights, values and other interests is established, resource-based justificatory arguments can then be assessed against the weight assigned to the importance of the rights and needs at issue. A critical question that will thus be addressed is how the capabilities approach can be utilised to design a capabilities-based standard of review for the adjudication of State resource allocation decisions.

1 4 2 5 Using capabilities to imbue socio-economic rights with substantive content

However, in seeking to address the question expounded immediately above, yet another important question arises: How can courts assign weight to oft-competing socio-economic rights without determining their content? Moreover, if socio-economic rights lack content, against what measure can courts assess the proportionality of the relevant resource allocation decisions? Many stakeholders develop the content of rights, including socio-economic rights. Thus government, the judiciary, civil society organisations and ordinary citizens all contribute to the meaning or content of rights. The capabilities approach constitutes a promising avenue for imbuing socio-economic rights with content. A crucial question that will be addressed is how the capabilities approach can be used to concretise the normative purposes and content of these rights. In this dissertation, focus is placed on the role of the courts, in particular, in elaborating the content of socio-economic rights in order to effectively adjudicate State resource allocation decisions.

[58] For the importance of interpreting "available resources" generously, see D Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327.

1 4 2 6 The need for effective remedies

Finally, the question must be addressed as to what a capabilities approach to remedies requires. Where socio-economic rights are infringed on a systemic level through unreasonable resource allocation, can a capabilities approach to remedies ensure effective relief? Which central features of a capabilities approach to adjudication under a transformative constitution should be observed to promote an effective remedy? The effectiveness of a remedy can be assessed by its ability to realise the capabilities that form the content of the infringed socio-economic right. Certain features of a capabilities approach to the design of a structural interdict will be scrutinised to determine its efficacy as measured against its potential to effect capability realisation. In order to answer these questions, Constitutional Court and High Court jurisprudence will be critically evaluated against the requirements of a capabilities approach to remedies. Furthermore, in answering the question of what a capabilities approach to remedies requires, yet another research question can be addressed: Can concerns that the judiciary lacks the constitutional and institutional competence[59] necessary to adjudicate complex, polycentric State resource allocation decisions be accommodated at the remedial phase of adjudication?

1 5 Research aims and hypotheses

The primary research aim of this dissertation is to develop a theoretical paradigm for the judicial review of State resource allocation decisions that impact on socio-economic rights. The central hypothesis of this dissertation is that a capabilities approach to adjudication under a transformative constitution can be developed to create a capabilities-based standard of review for the adjudication of State resource allocation decisions. Furthermore, a capabilities approach to adjudication can help ensure effective remedies where socio-economic rights have been infringed through unreasonable resource allocation decisions.

In order to achieve the primary research aim, five subsidiary research aims are pursued in this dissertation. First, this dissertation aims to develop Sen's and Nussbaum's capabilities theory through a lens of transformative constitutionalism in

[59] Constitutional competence refers to the legitimacy of the judiciary as an unelected branch of government to review certain matters. Institutional competence refers to the capacity of the judiciary to review certain matters.

order to justify the role of the judiciary in adjudicating State resource allocation decisions. In order to achieve this aim, the role of public discussion and reasoning – and their relationship to the justiciability of resource allocation decisions – is evaluated. The hypothesis in this regard is that the capabilities theory, which places substantive freedoms and capabilities at the centre of evaluative judgments, can justify the prioritisation of expenditure on the realisation of socio-economic rights. Moreover, Sen's and Nussbaum's capabilities theory can be developed to validate judicial involvement in questions of resource allocation and practically aid the adjudication of allocative decisions. The critical role of public dialogue and transparent reasoning within Sen's theory of justice can further support the justiciability of resource allocation decisions.

Second, the need for the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions is assessed. The hypothesis in respect hereof is that the Constitutional Court's insufficient focus on the content of socio-economic rights, narrow definition of "available resources", undue resort to deference and rigid distinction between positive and negative duties illustrate the need for development of a capabilities-based standard of review. Furthermore, it is hypothesised that the courts do in fact possess the competence to adjudicate resource allocation decisions, as is evident from certain jurisprudence.

Third, the aim is to develop a capabilities-based standard of review. The corresponding hypothesis posits that proportionality review closely resembles the weighting exercise required by a capabilities approach to adjudication. The weighting exercise required for the ranking of capabilities thus calls for careful development to cater for instances where diverse rights compete for prominence and resource allocation, or where long-term and short-term capability realisation vies for resources.

Fourth, the extent to which a capabilities approach to remedies can be used to ensure systemic reasonable resource allocation is assessed. Simultaneously, a capabilities approach to remedies should be able to alleviate concerns that courts cannot legitimately or competently adjudicate polycentric resource allocation decisions. It is hypothesised that a structural interdict can be designed to incorporate certain capabilities tenets, so as to ensure systemic reasonable resource allocation while mitigating problems of legitimacy, institutional competence and polycentricity.

Finally, a comparative perspective is provided by evaluating the strengths and weaknesses of the approach to the adjudication of resource allocation decisions followed in the United Kingdom and India, respectively. The corresponding hypothesis

is that comparative law can provide valuable insights regarding problems associated with adjudicating resource allocation decisions. A comparative perspective can also provide guidance as to how such problems may be addressed or avoided by domestic courts.

1 6 Methodology

1 6 1 Critically analysing the justiciability of State resource allocation decisions

This dissertation will rely in the first instance on South African jurisprudence and academic literature to address the research questions formulated above. The Constitutional Court has articulated its stance on socio-economic rights in several cases to date, although a methodological approach to the review of resource allocation decisions has not been elucidated. Secondary literary sources provide valuable insights as to the degree of justiciability of resource allocation decisions and will be used to highlight key issues in the debate regarding the appropriateness of judicial intervention in this area. However, to date not much attention has been exclusively devoted to a comprehensive study of the issues raised. In addition, secondary literature with regard to the capabilities theory, proportionality and the Constitutional Court's approach to the adjudication of socio-economic rights will be utilised.

1 6 2 Developing capabilities theory to design a review paradigm

In this dissertation, the capabilities theory as espoused by Sen and Nussbaum is developed for the adjudication of State resource allocation decisions. Reliance is primarily placed on the scholarship of Sen and, to a lesser degree, Nussbaum.[60]

The capabilities theory resonates strongly with the ethos of our transformative Constitution, which serves as a legal-political framework for the achievement of equality, dignity and freedom for all. Given the close relationship between capabilities and the realisation of the socio-economic rights enshrined in our Constitution,[61] the

[60] The main scholarship relied on is A Sen *Development as Freedom* (1999); A Sen *The Idea of Justice* (2009); and MC Nussbaum *Creating Capabilities* (2011).

[61] Capability theory evaluates laws, policies and conduct by asking to what extent such measures are aimed at enabling people to live the lives they have reason to value. Without the realisation of socio-economic rights, people will not possess the substantive freedom necessary to choose to lead meaningful lives. The rationale for the development of the

capabilities approach has been utilised by several legal scholars studying socio-economic rights in the South African context.

Sandra Fredman has utilised the capabilities approach to justify the imposition of positive duties by justiciable socio-economic rights. Her primary work in this regard is *Human Rights Transformed: Positive Rights and Positive Duties*.[62] Several authors have subsequently used and elaborated upon Fredman's capabilities-based paradigm for understanding the right to equality and socio-economic rights.[63] David Bilchitz has also discussed and criticised the capabilities approach in the context of socio-economic rights in *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*.[64] Sandra Liebenberg has drawn from the capabilities approach to illustrate how the fundamental values of freedom and dignity can aid the interpretation of socio-economic rights.[65] Marius Pieterse has demonstrated the links between autonomy, the realisation of socio-economic rights and the right to health, which he regards as a critical (and fertile) capability.[66] Erika George has argued for a closer interrelationship amongst development, human rights and capabilities, and has furthermore pointed out that capabilities can lend normative substance and content to abstract socio-economic rights.[67]

South African post-graduate studies in law that have focused on socio-economic rights and have simultaneously explored the use of the capabilities approach are

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capabilities theory and for the constitutional enshrinement of justiciable socio-economic rights is to better the quality of life, agency and over-all well-being of all people suffering from the "unfreedoms" associated with poverty.

[62] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008).

[63] See, *inter alia*, B Goldblatt "The Right to Social Security – Addressing Women's Poverty and Disadvantage" (2009) 25 *SAJHR* 442; L Chenwi & K McLean "'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa" (2009) 25 *SAJHR* 517.

[64] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

[65] S Liebenberg "The Value of Freedom in Interpreting Socio-economic Rights" (2008) *Acta Juridica* 149; S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1.

[66] M Pieterse "The Interdependence of rights to Health and Autonomy" (2008) 123 *SALJ* 553. See also in this regard JP Ruger "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements" (2006) 18 *Yale J of Law & the Humanities* 273.

[67] E George "Instructions in Inequality: Development, Human Rights, Capabilities, and Gender Violence in Schools" (2005) 26 *Michigan J of Int L* 1139 1179.

limited.[68] One LLM dissertation that assesses the role that the right of access to health care services plays in reducing poverty, discusses the capabilities approach.[69] Rebecca Amollo's LLD thesis, entitled *Women's Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence*, uses the lenses of the capabilities approach and feminism to argue that gender-inequalities must be rectified in an effort to combat HIV/AIDS.[70]

However, based on a literature survey and doctoral research, there appears to be no other project grounded in South African law that has focused on the ways in which the capabilities approach can be developed to design a review paradigm for the adjudication of State resource allocation decisions.[71] The scholarship of Sen and Nussbaum is accordingly relied on, critically analysed and developed for the particular focus area of this dissertation, *viz* the judicial review of resource allocation decisions impacting on socio-economic rights.

1 6 3 Constitutional Court jurisprudence

As the highest court in South Africa, pronouncements by the Constitutional Court bind all other courts.[72] Focus is therefore placed on Constitutional Court jurisprudence, since these judgments authoritatively establish constitutional principles that should be adhered to by lower courts. Selected judgments of the South African Constitutional Court are critically analysed in an attempt to illustrate the need for development of a capabilities-based standard of review for the adjudication of State resource allocation decisions. The focus is on judgments where qualified socio-economic rights or the right to just administrative action were at issue, and where a standard of reasonableness review was applied to impugned State laws, policy or conduct. High Court

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[68] Post-graduate research in the field of economics and commerce has dealt more widely with the capabilities approach, but such studies are not strictly relevant to this dissertation.

[69] Z Strauss *Die Rol wat die Reg op Toegang tot Gesondheidsorgdienste speel in Armoedevermindering in Suid-Afrika* LLM dissertation North West (2010).

[70] R Amollo *Women's Socio-Economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence* LLD thesis Western Cape (2011).

[71] Writing from the perspective of political studies, S Hassim "Social Justice, Care and Developmental Welfare in South Africa: A Capabilities Perspective" (2008) 34 *Social Dynamics* 104 uses the capabilities approach to argue that expenditure (or State spending), in itself, is not sufficient to achieve equality and social justice.

[72] Constitution of the Republic of South Africa Seventeenth Amendment Act, 2012.

jurisprudence is critically evaluated where *lacunae* in the existing body of Constitutional Court jurisprudence exists, especially in the context of adopting a capabilities approach to remedies.

1 6 4 A comparative perspective

The Constitution expressly permits courts to consider foreign law when interpreting the Bill of Rights.[73] This dissertation provides a comparative perspective by critically evaluating relevant jurisprudence and legal developments in the United Kingdom (excluding Scots law, and with an emphasis on English law) and India.

It is trite that one's choice of comparative jurisdictions is often limited by practical obstacles (such as the language in which the jurisdiction operates) as well as the need to understand a chosen jurisdiction in adequate depth to make its ultimate analysis meaningful.[74] The selection of comparative jurisdictions in this dissertation is therefore limited by practical considerations of language and accessibility, as well as an awareness of the limited scope of this study. Although a comparative analysis of the legal approach in, for example, Columbia or Canada may have yielded relevant insights,[75] this study focuses on two jurisdictions that illustrate the divergent forms that judicial review of resource allocation decisions in common-law jurisdictions, sharing a common legal heritage, can adopt. While being careful to avoid "shallow comparativism" and other risks inherent in comparative scholarship, the following exposition of the value of comparative analysis by O'Regan J is apt:

> "It would seem unduly parochial to consider that no guidance, whether *positive or negative*, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided.

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[73] S 39(1)(c) of the Constitution.

[74] C Saunders "The Use and Misuse of Comparative Constitutional Law" (2006) 13 *Indiana J of Global Legal Studies* 37 67; VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 64, 70.

[75] For a discussion of the relevance of these jurisdictions for future research, see chapter seven part 7 9 2 below.

> To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions…"[76]

1 6 4 1 The United Kingdom

In *Soobramoney v Minister of Health (KwaZulu-Natal)*,[77] the only Constitutional Court judgment to date which has focused explicitly on scarce resources in the context of socio-economic rights, the Court relied on English jurisprudence to substantiate its unwillingness to scrutinise allocative decisions pertaining to medical resources and health budgets.[78] Similarly, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[79] the Court relied on English authorities for guidance in interpreting certain provisions of PAJA that were drawn from English jurisprudence. Both these judgments are pivotal to this dissertation given their pertinence to two central themes addressed herein, namely (i) the judicial review of resource allocation decisions; and (ii) proportionality as potentially constituting a review paradigm that closely resembles the weighting exercise demanded by a capabilities approach to adjudication. The influence of English law on South African constitutional jurisprudence as it pertains to these two central themes therefore falls to be investigated.

The judicial tendency to consider English law for guidance regarding the nature and scope of judicial review is understandable. England exerted colonial control over South Africa for over a century, and the influence of English law on South African constitutional and administrative law has been vast.[80] Furthermore, in vesting colonial rule, Britain established an English system of public administration in South Africa.[81] Perhaps the greatest legacy of English influence on South African law was South Africa's adherence to a Westminster system of parliament until the advent of a system

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[76] *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 35 (emphasis added).

[77] 1998 1 SA 765 (CC).

[78] Para 30.

[79] 2004 4 SA 490 (CC) para 44, interpreting s 6(2)(h) of PAJA, which was drawn from the English judgment *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

[80] On the significant historical and continuing influence of English law on South African constitutional, administrative and international law, see generally G Barrie "Decisions of the extinct Appellate Committee of the House of Lords will continue to resonate in South African Administrative, Constitutional and International Law" (2013) 28 *SAPL* 249.

[81] DW Freedman "Constitutional Law: Structures of Government" in WA Joubert & JA Faris *LAWSA 5* 2 ed (RS 2012) para 281.

of constitutional supremacy in 1994. Whereas the English judiciary still operates within a system of parliamentary sovereignty in terms of which judicial review of primary legislation is severely limited, South Africa's transition to a system of constitutional supremacy theoretically vests our courts with far greater power to judicially review Acts of parliament. Ordinary courts in both jurisdictions continue to enjoy the power to review administrative action.

The question arises whether the continued application of English doctrines and conventions remains appropriate for the adjudication of constitutionally enshrined rights in South Africa. Within the United Kingdom, debates regarding the nature of judicial review as a mere representation of the will of Parliament *versus* the merits of a rights-based approach, have gained impetus following the adoption of the Human Rights Act, 1998.[82] An analysis of this debate is informative for illustrating the deficiencies in the current normative assumptions that underlie the justification for judicial review in the United Kingdom. These debates furthermore demonstrate the links between a rights-based approach to judicial review and the adoption of a substantive standard of review. South African courts should therefore feel fortified in adopting a substantive test for reasonableness across the fields of administrative law and socio-economic rights, since a contextual, rights-based approach is mandated by the Constitution itself.

Furthermore, disagreement regarding the nature, importance and applicability of judicial deference persists in the United Kingdom after decades of academic and judicial debate on the subject.[83] The issues of non-justiciability and deference become amplified where the judicial review of government resource allocation decisions is called for.[84] The key difference that should inform debates regarding the applicability of these doctrines in South Africa again emerges as the difference between a system of parliamentary sovereignty and one of constitutional supremacy. In the former, the judiciary traditionally adopts a formalistic approach to reasoning and easily defers to the will of the legislature. In contrast, the interpretation and enforcement of constitutionally guaranteed rights must be determinative of the judicial approach in the latter.

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[82] A Pillay "Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights" (2007) 6 *EHRLR* 616 626.

[83] Lord Steyn "Deference: A Tangled Story" (2005) *PL* 346.

[84] E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 162.

The seemingly irresolvable nature of these debates in the United Kingdom calls into question the appropriateness of a continued reliance on these aspects of English law by the South African judiciary. South African courts may benefit from taking cognisance of the pitfalls experienced by the English legal system in these respects, and may heed calls by English academics for judicial reform. The deficiencies identified in the English approach can therefore be instructive to South African courts in that our judiciary can avoid the same obstacles while incorporating academic proposals that will contribute to the realisation of our own constitutional project. In contrast to those aspects of English law that beg reform, a move in the United Kingdom towards recognising proportionality as a uniform head of review appears more promising for rights protection and enforcement.[85] The advantages of adopting proportionality as a standard of review for the judicial review of State resource allocation decisions should therefore be acknowledged by South African scholars and the judiciary.

1 6 4 2 India

Like South Africa, India is a common-law jurisdiction that shares a history of colonisation by Britain. India gained independence from Britain in 1947, and adopted the Constitution of India, 1949 ("Indian Constitution") shortly thereafter. India therefore underwent a transition from a system of parliamentary sovereignty to one of constitutional supremacy similar to that of South Africa in 1994. The Indian Supreme Court eventually adopted an unmistakably activist approach that is far removed from the restrained approach of judiciaries operating in Westminster systems.

The Indian example is instructive for demonstrating how courts, although sharing an English legal heritage, can nevertheless adopt an approach distinct from one characterised by formal judicial review and deference in an effort to interpret, protect and enforce constitutional rights. The innovative approach of the Indian Supreme Court with regard to the creation and development of Public Interest Litigation[86] will be scrutinised and Indian case law that impacted on resource allocation will be

[85] P Craig *Administrative Law* 7 ed (2012) 657.

[86] S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102 109.

discussed.[87] It is not contended that the approach of any foreign jurisdiction should be uncritically adopted by the South African judiciary. Nevertheless, the strengths of the Indian Supreme Court's approach in interpreting and enforcing constitutional rights in a manner that is congruent with certain central tenets of the capabilities approach should be recognised.

Simultaneously, deficiencies in the Indian Supreme Court's approach merit attention in order to ensure that South African courts can draw from the Indian Supreme Court's strengths while avoiding similar difficulties in our own domestic jurisprudence.

1 6 4 3 Methodological approach

Comparative constitutional law methodologies can be categorised in various ways.[88] Relying on the categorisation espoused by Vicki Jackson[89] and Sujit Choudhry,[90] respectively, the comparative methodology adopted in this dissertation can be described as an amalgamation of normative-dialogical and functional and, to a lesser extent, historical and classificatory.

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[87] J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 122-123. Compare S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102 112, 113, 118-119 discussing the deferential stance of the Supreme Court towards the executive branch of government in *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 and S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 125 who notes that observers are witnessing a trend moving away from such activism.

[88] Compare the categorisation of M Tushnet "The Possibilities of Comparative Constitutional Law" (1999) 108 *Yale LJ* 1225 ("functionalism"; "expressivism" and "bricolage") with that of S Choudhry "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana LJ* 819 ("universalist"; "dialogical" and "genealogical") and VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 ("classificatory", "historical", "normative", "functional" and "contextual").

[89] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54.

[90] S Choudhry "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana LJ* 819.

1 6 4 3 1 Normative-dialogical

A normative approach (also termed a universalist approach) seeks to discover transcendental principles of justice through comparative analysis.[91] This methodology can be applied at a very general level, or it can occur through comparative doctrinal analyses of, for example, divergent approaches to the interpretation and enforcement of socio-economic rights.[92] Jackson describes normative doctrinal analyses as follows:

> "Scholars' exploration of the varying assumptions, and interpretative approaches, of comparator countries may serve self-reflective normative purpose – at once trying to understand other systems and identify improvements of one's own."[93]

Importantly, normative comparative scholarship can include the analysis of "aversive" examples found in foreign jurisdictions, ie the comparative study of negative models.[94] Scheppele discusses the comparative analysis of negative models in the context of constitutional drafting, and seemingly limits this concept to morally repugnant societies, including totalitarian regimes and pre-democratic South Africa.[95] However, aversive precedent in more modest incarnations can also prove to be useful. Problematic aspects identified in the approach of the judiciary in the United Kingdom and India can therefore highlight issues that should be avoided by the South African judiciary.

Choudhry distinguishes dialogical interpretation from normative interpretation on the basis that the former makes no normative assumptions.[96] Normative disagreement is thus not an obstacle to dialogical comparative work, but instead compels the identification and justification of points of divergence.[97] According to Choudhry, this

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[91] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 60.

[92] 61.

[93] 61.

[94] KL Scheppele "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models" (2003) 1 *I Con* 296; VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 61-62.

[95] KL Scheppele "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models" (2003) 1 *I Con* 296 305, 313.

[96] S Choudhry "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana LJ* 819 892.

[97] 888.

self-reflective methodology encompasses the identification of factual and normative assumptions that underlie the approach of the comparative jurisdiction as well as the domestic jurisdiction under scrutiny.[98] Once these normative assumptions are identified, it is necessary to question whether they are and should be shared by the relevant domestic jurisdiction. Writing in the context of comparative constitutional analyses executed by courts, the author elaborates:

> "Although the *starting point of dialogical interpretation is constitutional difference*, a court must also be open to the possibility that it will instead discover constitutional similarity. But nevertheless, even if the assumptions are similar, one can still ask why - that is, *whether those assumptions ought to be shared*. A similarity in constitutional assumptions should not be considered fixed and immutable…
>
> [T]he process of dialogic interpretation can lead the court to fundamentally re-assess its previous judgments, and to use comparative jurisprudence as a means to initiate radical legal change."[99]

In this dissertation, a normative methodology is thus followed by evaluating the judicial approach to the review of resource allocation decisions in the United Kingdom and India against the normative baseline posited by a capabilities approach to adjudication. Furthermore, a dialogical approach is adopted by explicitly acknowledging the inevitable differences amongst the judicial approach in each respective jurisdiction – and critically analysing the justifiability of the normative assumptions that underlie these differences as well as any similarities that may become apparent.

1 6 4 3 2 Functional

Functionalism constitutes the principal approach to comparative legal analysis.[100] According to this approach, similar institutions or doctrines across different jurisdictions are identified and their functions are compared, or similar functions performed by

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[98] 857.

[99] 857-858 (emphasis added).

[100] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 62; O Brand "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" (2007) 32 *Brook J Int'l L* 405 409.

institutions across foreign jurisdictions are evaluated.[101] Brand explains that functionalism entails identifying a similar legal problem which occurs across the comparator jurisdictions, analysing how each comparative jurisdiction resolves the problem, and finally evaluating the similarities and differences between the comparative approaches under scrutiny.[102]

In this dissertation, the common problem identified is the judicial review of State resource allocation decisions that impact on socio-economic rights. The approach of the judiciary in the United Kingdom and India is then evaluated against the tenets posited by a capabilities approach to adjudication. This is done by comparing, *inter alia*, the common institution of judicial review, and the common doctrines of proportionality and deference, as they manifest in the selected jurisdictions. Whereas the United Kingdom may be regarded as constitutionally "most different" and India as "most similar" to South Africa,[103] all three jurisdictions encounter the common problem identified. Furthermore, all three jurisdictions incorporate certain institutions and doctrines that may be utilised in divergent ways to respond to the shared problem. This forms the focus of the functionalist approach adopted in this dissertation.

Functionalism has been subjected to criticism to the effect that, *inter alia*, it tends to be a reductionist approach that fails to adequately account for socio-economic and cultural heterogeneity.[104] In this dissertation, these problems are sought to be mitigated by acknowledging the differences in constitutional design amongst the chosen comparator jurisdictions and South Africa from the outset. The differences between a system of parliamentary sovereignty as prevalent in the United Kingdom, and that of constitutional supremacy as is the norm in India and South Africa, should therefore lead to circumspection before unquestioningly accepting United Kingdom institutions and doctrines in the latter two jurisdictions. Only where these institutions or doctrines are capable of performing the function of promoting socio-economic capabilities through the adjudication of resource allocation decisions should their incorporation in jurisdictions committed to social transformation be considered. Conversely, the

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[101] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 62.

[102] O Brand "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" (2007) 32 *Brook J Int'l L* 405 409.

[103] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 64.

[104] O Brand "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies" (2007) 32 *Brook J Int'l L* 405 418.

similarity of the transformative vision encompassed by the Indian and South African Constitutions indicates that institutions that serve the function of transformation may be appropriately shared between these jurisdictions.

The functional approach adopted in this dissertation is thus normative in the sense that the institution of judicial review, and the doctrines of proportionality and deference, are evaluated to determine whether they are capable of leading to consequences that are congruent with a capabilities approach to the adjudication of State resource allocation decisions.[105]

1 6 4 3 3 Historical and classificatory

The comparative methodological approach adopted in the dissertation can also be described as historical and classificatory. This is true, in the first place, because all three jurisdictions analysed in this dissertation are common-law jurisdictions that share a "genealogical connection" in that both South Africa and India were previously colonised by England.[106] Moreover, the approach is classificatory in that "emerging trends in doctrine and interpretative methodology"[107] are considered across the three jurisdictions under scrutiny. These doctrines include those of proportionality and deference, while the formalistic interpretative methodology preferred by United Kingdom courts stands in stark contrast to the broad interpretative approach favoured by the Indian Supreme Court. The role of public reasoning and participation among all stakeholders in the application of the institution of judicial review also constitutes an important common trend that merits further critical analysis.

1 7 Overview of chapters

In chapter two the capabilities approach to development and justice, as propounded by Sen and Nussbaum, is examined. This chapter seeks to justify the capabilities approach as an appropriate starting point for the development of a theoretical paradigm in which the judicial review of State resource allocation decisions can occur.

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[105] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 62. The central tenets of a capabilities approach to adjudication under a transformative constitution are explored in chapter two part 2 4 below.

[106] VC Jackson "Comparative Constitutional Law: Methodologies" in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 55, 58.

[107] 57.

Furthermore, the linkages that exist between the capabilities theory and resource allocation are conceptualised. The question as to whether the capabilities theory supports a wide definition of "available resources" is discussed. Moreover, the role of the courts in the valuation and weighting of diverse capabilities and other factors is critically scrutinised. In particular, certain *lacuna*e in Sen's theory are highlighted and addressed in order to justify the role of the courts in adjudicating State resource allocation decisions. In this regard, the need to ascribe substantive content to socio-economic rights with reference to the capabilities they seek to give rise to is emphasised. Finally, the implications of transformative constitutionalism for a capabilities approach to adjudication are highlighted.

In chapter three the strengths and weaknesses of the judicial approach to the review of State resource allocation decisions in the United Kingdom and India, respectively, are analysed. First, the approach of the courts in the United Kingdom within a system of parliamentary sovereignty is evaluated. The efforts of certain leading academics to develop a rights-based justification for judicial review are elucidated. Thereafter, the need for adjudicative reform is espoused. Finally, a recent move towards a more capabilities-congruent approach is discussed. In particular, calls to adopt proportionality as a uniform head of review are evaluated.

Thereafter, the focus of chapter three turns to the approach of the Indian Supreme Court. The Court has interpreted the justiciable rights contained in the Constitution of India, 1949, as including socio-economic capabilities, despite the fact that socio-economic rights are not entrenched as directly justiciable fundamental rights. Furthermore, the innovation of Public Interest Litigation is analysed as a mechanism through which the Supreme Court has sought to generate increased information through facilitating broad government and stakeholder participation. However, weaknesses in the Supreme Court's approach are also highlighted.

Chapter four assesses the need for the development of a capabilities-based standard of review that can be applied where complex, polycentric State resource allocation decisions fall to be adjudicated. The need for such a standard of review is determined in the light of the judicial tendencies to collapse the interpretative and justificatory stages of adjudication; define "available resources" narrowly; unduly resort to deference and reinforce a rigid distinction between positive and negative duties imposed upon the State by qualified socio-economic rights. Thereafter, evidence of the judicial competence to review allocative decisions, as gleaned from existing Constitutional Court jurisprudence, is elucidated.

Chapter five investigates whether proportionality review, as a robust manifestation of reasonableness review, can be developed to constitute a capabilities-based standard of review for the adjudication of State resource allocation decisions. Elements of proportionality review apparent from Constitutional Court jurisprudence are expounded. Thereafter, the intricacies of adapting proportionality specifically for the review of allocative decisions are explored. Chapter five furthermore elucidates the overarching features of a capabilities-based standard of review. In addition, specific review criteria are identified.

In chapter six a capabilities approach to remedies is expounded. Where a violation of a socio-economic right is found, the infringement of the right in question must be remedied. The need therefore arises to direct the State to re-allocate resources or procure additional resources. Chapter six explores the potential of the structural interdict to conform to a capabilities approach to remedies and to simultaneously accommodate the judiciary's constitutional and institutional limitations. Where concerns regarding the constitutional and institutional competence of courts are simply ignored, ineffective remedies may be granted. Chapter six thus investigates whether the incorporation of certain central tenets of the capabilities approach into the design of structural interdicts can substantially address these important concerns while effectively vindicating vital capabilities and the socio-economic rights that protect them.

Chapter seven concludes this dissertation. Recommendations are made for the future adjudication of State resource allocation decisions impacting on socio-economic rights. Related research areas that merit further analyses are highlighted.

Chapter 2: Adjudicating State resource allocation decisions: The capabilities approach

2 1 Introduction

The adjudication of State resource allocation decisions raises many concerns regarding the role and aptitude of the judiciary to make sound judgments in this complex context. The judiciary is often viewed as an illegitimate forum for adjudicating in an area that affects everyone.[1] Moreover, attention must be paid to claims that courts are incompetent *fora* for the adjudication of polycentric issues that can result in a myriad unintended consequences.[2] State resource allocation decisions are polycentric par excellence, and can impact on the national budget and even affect macro-economic policy.[3] A theoretical approach is accordingly needed that both justifies the role of the courts as a legitimate forum and practically aids the judiciary in competently adjudicating State resource allocation decisions in socio-economic rights cases.

In this chapter it will be argued that the capabilities approach to development and justice, as developed by Amartya Sen and Martha Nussbaum, provides a theoretical approach that can meet these demands.[4] This chapter lays the theoretical foundation for the evaluation of the approach of the judiciaries in the United Kingdom and India to the review of allocative decisions,[5] the argument that aspects of the Constitutional Court's application of a model of reasonableness review require reform,[6] the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions,[7] and the design of a capabilities approach to remedies.[8]

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[1] C Steinberg "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence" (2006) 123 *SALJ* 264 272.

[2] L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harv LR* 353 394 coined the term "polycentricity" to describe complex disputes in which a decision on one issue could potentially result in unknown ramifications for a myriad interrelated issues.

[3] JA King *Judging Social Rights* (2012) 38.

[4] This dissertation primarily focuses on two of Sen's seminal works, A Sen *Development as Freedom* (1999) and more recently A Sen *The Idea of Justice* (2009). Furthermore, it is necessary to supplement Sen's work at certain points and to this end reliance is placed on MC Nussbaum *Creating Capabilities* (2011).

[5] Chapter three.

[6] Chapter four.

[7] Chapter five.

[8] Chapter six.

The chapter commences by conceptualising the broad linkages that exist between the capabilities approach and resource allocation in the socio-economic sphere. Importantly, the implication of the capabilities approach for defining "available resources" widely or narrowly will be elucidated. Thereafter, Sen's framework for the valuation of capabilities will be scrutinised, and the points of commonality between this valuational framework and the model of review adopt by the Constitutional Court in socio-economic rights and administrative justice cases will be highlighted. Significantly, the crucial importance of adopting a two-stage rights analysis for the review of allocative decisions will be emphasised. Similarly, the critical role that public reasoning and participation play in a process of valuation will be expounded. Furthermore, certain *lacunae* in Sen's theory will be pointed out and supplemented with reference to Nussbaum's scholarship.

Finally, the congruence between a capabilities approach to adjudication and adjudication under a transformative constitution will be underscored with reference to certain tenets that are central to both the capabilities approach and a project of transformative constitutionalism.

2 2 The capabilities approach

2 2 1 Why capabilities?

The capabilities approach constitutes a paradigm in terms of which a wide range of issues such as poverty, inequality, well-being, justice or government policies can be evaluated. This inter-disciplinary approach has been used as an evaluative tool in a variety of fields such as those related to development, welfare economics, political philosophy, and social policy.[9] The capabilities approach stands apart from other evaluative approaches in that it does not focus exclusively on monetary income, resources, basic goods or utility.[10]

Sen rejects utilitarian, welfarist approaches that focus on measuring the "utility" (defined as happiness, pleasure or preference) of alternative states of affairs. One reason for Sen's rejection of these approaches is that non-utility related information such as conversion factors are excluded from an evaluative exercise. Thus, a welfarist

[9] I Robeyns "The Capability Approach: A Theoretical Survey" (2005) *Journal of Human Development* 93 94.

[10] 96-97.

approach would not take into account the additional needs of a disabled person, or the fact that a woman is satisfied with lower wages than her male counterparts due to a history of oppression and marginalisation.[11] Instead, Sen places the substantive freedoms or capabilities to "choose a life one has reason to value"[12] at the centre of his evaluative endeavours. This perspective recognises the importance of freedom to lead dignified lives. It is thus much more in tune with a constitutional democracy based on "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms"[13] than an approach whereby government policy is judged based on the real income per capita or Gross Domestic Product that it produces.

Capabilities also resonate particularly strongly with the socio-economic rights enshrined in the Constitution of the Republic of South Africa, 1996 (the "Constitution"). Just as the freedom to choose meaningful lives cannot exist without the essential capabilities that render meaningful choices possible, the freedom to fully participate in social, political and economic life can only be exercised when at least basic material needs are met. The socio-economic rights enshrined in the Constitution can thus be conceptualised as being informed by the underlying capabilities they represent – capabilities worthy of legal and political recognition, protection and enforcement.

Government may seek to justify its resource allocation for the realisation of socio-economic rights with reference to its longer term development goals. For courts to be able to effectively adjudicate the reasonableness of such allocative decisions, the goals and means of development must be understood in a way that promotes the objectives of the Constitution. The following part will therefore expound some of the nuances of the capabilities approach in order to identify and conceptualise the linkages that exist between State expenditure on the fulfilment of socio-economic needs and economic development.

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[11] 97.

[12] A Sen *Development as Freedom* (1999) 74.

[13] S 1(a) of the Constitution.

2 2 2 The capabilities approach and resource allocation: Conceptualising the linkages

2 2 2 1 Functionings and capabilities

Sen equates substantive freedoms with capabilities in his design of an evaluative paradigm within which the progress of development as well as the justness of social arrangements can be assessed. Relying on Aristotle, Sen incorporates the concept of "functionings" into his approach; conceived as "the various things a person may value doing or being".[14] "Functionings" represent a supple concept, which can include basic states of being (such as being adequately nourished) as well as more complex states of being (such as being able to participate effectively in community life).

This flexible conception of functionings that constitutes a spectrum ranging from simple to complex states of being complements the constitutional concept of progressive realisation in the context of the primary socio-economic rights provisions in the Constitution.[15] A substantive conception of progressive realisation implies that the State should continually improve the quality and increase the range of beneficiaries of socio-economic goods.[16] For example, twenty years ago the State might have fulfilled its obligations in respect of the right of access to sufficient water[17] by supplying the minimum quantity of water necessary to survive. However, the State's duty to progressively realise the right means that over the course of those twenty years a greater quantity of water should have been made available to a larger range of beneficiaries. Resource allocation decisions could thereby be assessed with increasing levels of scrutiny in order to determine whether government has progressively enabled more complex levels of functioning.

Capabilities constitute the substantive freedom to choose "alternative functioning combinations".[18] A person for whom more functioning combinations are possible therefore possesses a greater "capability set" than a person who cannot achieve a functioning of being well-nourished, let alone a functioning combination of good health

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[14] A Sen *Development as Freedom* (1999) 75.

[15] Ss 26(2) and 27(2) of the Constitution state that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the rights of access to adequate housing, health care, sufficient food and water and social security.

[16] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45.

[17] S 27(1) and (2) of the Constitution.

[18] A Sen *Development as Freedom* (1999) 75.

and education. Functionings thus represent actual achievements or what a person can actually do, whereas capability sets represent the substantive freedom to choose different functioning combinations.[19] Capabilities therefore constitute the real *opportunities* that people have to realise various lifestyles, rather than the choices they actually make.

2 2 2 1 1 Poverty and resource allocation

Sen views poverty as a "deprivation of basic capabilities".[20] Where elementary capabilities such as those related to health care and education are lacking, mortality, undernourishment and widespread illiteracy may result.[21] It follows that where material socio-economic needs are left unfulfilled, more complex functionings such as social and political participation cannot be realised.

This approach as opposed to one that focuses on low levels of income recognises the intrinsic significance of socio-economic deprivations while simultaneously acknowledging influences other than income on poverty.[22] Although connections can exist between income levels and capabilities,[23] Sen argues that income should be viewed as merely *instrumental* to the attainment of greater capability sets and functionings. A focus on the deprivation of capabilities and the removal of "unfreedoms"[24] in the struggle against poverty takes account of the personal characteristics and circumstances that can impede the conversion of income into capabilities.[25] In the South African context, factors that may hamper the conversion of income into capabilities are closely related to lasting patterns of structural disadvantage caused by discriminatory apartheid-era laws, policies and resource distribution.

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[19] 75.

[20] 20; for a discussion of why poverty should be viewed as capability deprivation rather than in terms of low income, see further 87-110.

[21] 20.

[22] 87-88.

[23] In that income can influence what people can choose, be or do (A Sen *Development as Freedom* (1999) 72) and capability enhancement through, for example, the provision of education and health care can increase the income levels of the recipient (19, 90).

[24] 3, 15-17.

[25] A Sen *The Idea of Justice* (2009) 254-257.

Room is thereby left for recognition of the relationships between structural and systemic disadvantage and socio-economic deprivation.[26] Where government may seek to justify a particular allocation of resources to economic growth that will aid heightened income levels in the long term, such justification cannot be accepted at face value. Instead, resource allocation should be reviewed in light of other factors that result in capability deprivation. This view of poverty also accords with the philosophy underlying the inclusion of justiciable socio-economic rights in the Constitution. As Froneman notes, true freedom remains unattainable where the material means to enjoy such freedom are absent.[27]

Courts should therefore take care to always place the vital interests that socio-economic rights represent – and the gravity of a deprivation of basic capabilities – at the forefront of any evaluation of State resource allocation decisions. This conceptualisation could justify a State resource allocation decision aimed at the immediate alleviation of a deprivation of basic capabilities over a competing resource allocation decision aimed at promoting more complex functionings on a longer term basis.[28]

2 2 2 1 2 Resource allocation beyond the minimum

Nevertheless, resource allocation cannot solely be directed at realising basic capabilities and elementary functionings. As discussed below, Sen relies on the prioritisation and valuation of capabilities through public, reasoned discussion. Nussbaum, on the other hand, has identified a list of central capabilities that she regards as deserving of priority.[29] She argues that a life of human dignity requires as

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[26] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 25-29.

[27] J Froneman "Enforcing Socio-Economic Rights Under a Transformative Constitution: The Role of the Courts" (2007) 8 *ESR Review* 20 21.

[28] As the Constitutional Court stated in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44:

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right."

[29] MC Nussbaum *Creating Capabilities* (2011) 33-34.

a minimum the provision of "ample" threshold levels for all the capabilities included in her list.[30] A sharp distinction can therefore be drawn between Sen's paradigm for the valuation of capabilities and Nussbaum's list, which is accompanied by minimum thresholds. Whereas Sen's approach resembles a balancing exercise that can easily be adapted for judicial use and is congruent with the model of reasonableness review adopted by the South African Constitutional Court,[31] Nussbaum's list raises some of the same problems associated with a "minimum core" approach to socio-economic rights adjudication.[32]

Problematic aspects related to the minimum core approach include the questions of how to judicially determine the content of the core and how to set a fixed content without excluding participatory social processes that should contribute to the identification of dynamic socio-economic needs.[33] Sen justifies his disinclination to

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[30] 32.

[31] The Constitutional Court's development of a model of reasonableness review is explained in chapter one part 1 3 above.

[32] The minimum core entails that a State is obliged to provide certain minimum threshold levels of socio-economic goods required to meet essential needs and is elucidated in UN Committee on Economic, Social and Cultural Rights *General Comment No 3: The nature of State parties' obligations (art 2(1) of the Covenant)* UN Doc E/C 14/12/90 para 10:

> "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." (Para 10).

In contrast, the UN Committee for Economic, Social and Cultural Rights *General Comment No 14: The right to the highest attainable standard of health* UN Doc E/C 12/2000/4 para 47 states that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out [in the General Comment] which are non-derogable". The Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33 and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 34 did not exclude the role of the minimum core approach in aiding in a determination of reasonableness, but ultimately developed a model of reasonableness review instead of adopting a minimum core approach for the adjudication of socio-economic rights. For a discussion of the problems related to the minimum core, especially those relating to the indeterminacy of the core and the potential of curtailing broader social dialogue regarding the content of socio-economic rights, see *inter alia* S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 163-173 and KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113.

[33] KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113 137-140; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 165-170.

formulate a list of important capabilities by pointing out, firstly, the difficulty in formulating a list and prioritising capabilities without specifying the relevant context in which such capabilities will be exercised.[34] This objection mirrors issues related to specifying a single content of a minimum core across various contexts. Secondly, Sen is averse to a list due to its potential to minimise or even ignore the role of public reasoning in establishing the nature and prioritisation of important capabilities.[35] Again, Sen's objection reflects the problem of setting a fixed minimum content without excluding social participatory processes that should help to formulate and adapt the content of socio-economic rights as socio-economic needs change.

In addition to these general problems associated with the minimum core approach and, by extension, Nussbaum's list, Nussbaum's classification also potentially gives rise to instances of over-concentrated resource allocation. If all or most resources are allocated for the realisation of the thresholds that Nussbaum identifies, such resources may be rendered unavailable for the development of capabilities beyond these minimum thresholds. Bilchitz, who likewise devises a two-fold threshold for fundamental rights, astutely warns against diverting all resources to the fulfilment of basic needs:

> "Where the realization of such [minimal] interests entails that most of society's resources are devoted to this purpose, the realization of such needs can lose its point for everyone. It is necessary for there to be resources available to retain a space beyond the basic in order for individuals to have the opportunity to realize their ends."[36]

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[34] A Sen "Elements of a Theory of Human Rights" (2004) 32 *Philosophy & Public Affairs* 315 333 n 31; KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113 137-138 who notes this important distinction between Sen's and Nussbaum's theories.

[35] A Sen "Elements of a Theory of Human Rights" (2004) 32 *Philosophy & Public Affairs* 315 333 n 31.

[36] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 210. See also D Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *SALJ* 591 601-604 where Bilchitz discusses the difficulty of striking a balance between short-term relief from poverty and long-term fulfilment of adequate access to socio-economic goods and over-all development. Bilchitz proposes that short-term, interim services may be necessary to enable recipients to enjoy the benefits of long-term programmes. However, he points out that development will not be possible without tolerating a certain level of inequality of resources until the ultimate goal of progressive realisation (equal, adequate access to socio-economic goods) is reached:

As will be elaborated upon below, Sen's approach to valuation can be developed so as to cater for resource allocation that adequately addresses the promotion of capabilities and functionings beyond the minimum.

2 2 2 2 A focus on freedom

According to Sen, development – and the success of any given society in general – should be assessed in terms of the substantive freedoms that members of that society enjoy.[37] Development thus necessitates the removal of sources of unfreedom, be they poverty, inadequate economic opportunity or "systematic social deprivation".[38] According to this approach, freedom is valuable both as an evaluative criterion and for the importance it places on the free agency of people. In turn, a particular type of agency in the context of development is both constitutive of the development process and instrumental to the promotion of agencies in other social and economic spheres.[39]

2 2 2 2 1 Agency and participation

Where socio-economic policy and concomitant State resource allocation decisions are concerned, Sen would therefore advocate agency and participation in State decision-making. Social programmes that are merely "delivered" to passive recipients of benefits are untenable within Sen's theory.[40] Resource allocation decisions cannot simply aim to deliver socio-economic goods to passive recipients. Instead, both the determination of the scope of a reasonable allocation and the subsequent utilisation of the allocation must include participatory elements.

"It is crucial to understand that the Constitution sets a long-term goal of 'equality of sufficiency': it mandates that this be achieved through a process of progressive realisation which requires some level of inequality in the short-term." (D Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *SALJ* 591 603).

[37] A Sen *Development as Freedom* (1999) 3, 18.

[38] 3.

[39] 4. Sen identifies five types of instrumental freedoms (namely political freedoms, economic facilities, social opportunities, transparency guarantees and protective security) that complement and supplement each other. Agency in one of the spheres related to these freedoms can therefore promote agencies of different types in other spheres. See further A Sen *Development as Freedom* (1999) 38-41.

[40] 19, 53.

A significant interaction exists between the freedom to participate in public affairs and the expansion of capabilities. While public policy may enhance the capabilities that people enjoy, Sen highlights the fact that the exercise of participatory capabilities may influence the direction that public policy takes.[41] The exercise of participatory freedoms by the public should likewise influence State resource allocation decisions that emanate from wider policy aims. Resource allocation decisions should thus expand capabilities, and the exercise of participatory capabilities should contribute to the formulation of reasonable resource allocation decisions.

The reciprocal relationship between capability expansion and public policy is therefore central to a theory that focuses on substantive freedom.[42] Since freedom to participate is a constitutive part of development and not merely a means to a different end, a State resource allocation decision that excludes this type of substantive freedom should not pass constitutional muster without weighty justification for the omission of participatory processes. Participation, as an *intrinsic* good, should thus be inherent in resource allocation decisions. At the same time, freedom may play "a *constructive* role in the formation of values and ethics".[43] Where State resource allocation decisions are concerned, participatory freedom can also be constructive in developing standards of review whereby similar decisions may be judicially assessed in the future.

2 2 2 2 2 Constitutive and instrumental importance

Freedom should be conceptualised as both the primary end and principal means of development and policy formation.[44] Constitutive freedom concerns the substantive freedoms that enable people to live meaningful lives. These include basic capabilities and elementary functionings such as the ability to avoid starvation or undernourishment. Constitutive freedom also includes more complex freedoms such as those related to achieving literacy or exercising political participation.[45] It follows that instead of asking how, for example, participatory processes contribute to overall development goals, the freedom to participate should instead be viewed as part of development itself.[46]

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[41] 18.
[42] 18.
[43] 292 (original emphasis).
[44] 36-37.
[45] 36.
[46] 36.

Sen also identifies certain categories of freedoms that are instrumental in promoting overall social freedom to pursue the lives we have reason to value. Instrumental freedoms include, *inter alia*, political freedoms such as opportunities for public dialogue and dissent; social opportunities such as the provision of education and health care; and transparency guarantees, which should be aimed at preventing corruption and financial irresponsibility.[47] An additional level of instrumental value of "social opportunities" is recognised in that social opportunities enable more effective economic and political activities.[48]

State resource allocation decisions can thus be judged not only for their enhancement of overall freedoms and capabilities, but also for whether they are aimed at increasing important instrumental freedoms. Similarly, a reasonable allocative decision may be one that strikes a balance between the promotion of constitutive and instrumental freedoms and capabilities. Indeed, Sen highlights the importance of recognising the connection among instrumental freedoms *inter se* – as well as between instrumental freedoms and overall capability enhancement – for the analysis of public policy.[49]

2 2 2 2 3 Opportunity and process

In *Development as Freedom*, Sen distinguishes between an *opportunity* aspect and a *process* aspect of freedom. The opportunity aspect of freedom relates to the opportunities that people have to live the lives they have reason to value, given their social circumstances. In contrast, the process aspect of freedom concerns the nature of the processes through which choices are made. Significantly, attention should not exclusively be devoted to either aspect; rather sufficient weight should be accorded to both opportunity and process.[50] Sen repeats this distinction in *The Idea of Justice*,[51] but goes on to circumscribe his argument: although both aspects are constituent of freedom, the capabilities approach relates only to the aspect of substantive opportunities. Sen argues that the capabilities approach "cannot pay adequate

[47] 38-40.
[48] 39.
[49] 40.
[50] 17, 291-292.
[51] A Sen *The Idea of Justice* (2009) 228-230.

attention to fairness and equity involved in procedures"[52] and that the procedural element is more appropriately dealt with by a theory of justice.

Sen's theory of justice as developed in *The Idea of Justice* thus makes room for procedural – and not just capability centred – justice.[53] Nussbaum has interpreted Sen's work as postulating that capabilities can relate to both procedure and substantive opportunity whereas according to Sen, human rights are confined to substantive opportunities only.[54] It is submitted that the freedom to participate in fair procedures should form part of the capabilities approach in that fair procedures indubitably form part of the types of lives we have reason to value. When resources are devoted to the opportunity aspect of freedom, this may lead to the ability to meaningfully exercise the procedural aspect of freedom. In any event, Nussbaum is undoubtedly correct when she rejects Sen's argument in the context of human rights, instead pointing out that procedural rights often constitute fundamental rights.[55]

Moreover, the procedural and substantive elements of justice are sometimes inseparable.[56] In the South African constitutional *milieu*, the development of administrative law[57] to encompass substantive reasonableness review illustrates the futility of drawing rigid distinctions between procedure and substance.[58] Likewise, socio-economic rights, such as the right of access to adequate housing, have been interpreted to inherently include elements of robust procedural fairness in the form of

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[52] 295.

[53] Sen makes the same argument in an earlier article: see A Sen "Elements of a Theory of Human Rights" (2004) 32 *Philosophy & Public Affairs* 315 336.

[54] MC Nussbaum *Creating Capabilities* (2011) 67.

[55] 67; see also MC Nussbaum "Capabilities, Entitlements, Rights: Supplementation and Critique" (2011) 12 *Journal of Human Development and Capabilities* 23 28.

[56] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.

[57] In the past, administrative law was characterised by the formalistic classification of administrative functions and an artificial distinction between procedural review and appeal on the merits. See further in this regard H Corder "Without Deference, With Respect: A Response to Justice O'Regan" (2004) 121 *SALJ* 438 443 and G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *CCR* 111 115.

[58] H Corder "Without Deference, With Respect: A Response to Justice O'Regan" (2004) 121 *SALJ* 438 443. Corder further points out that administrative law is informed by contextual values, including the constitutional founding values of accountability, responsiveness and openness (440). It is submitted that these values can serve to further infuse administrative law concepts with normative substance.

"meaningful engagement",[59] thus further blurring the distinction between substantive and procedural rights. Sen's work should therefore be developed to recognise that capabilities – and the rights they infuse – may consist of an amalgamation of substantive and procedural elements.

Whether conceptualised as part of freedom within the capabilities approach or freedom within a theory of justice, a focus on both the opportunity and process aspects is crucial for the adjudication of State resource allocation decisions in socio-economic rights cases. An instance of resource allocation, although possibly reasonable in terms of scope and purpose, may be found constitutionally wanting where it was taken without observing the procedural obligations of administrative justice. To hold otherwise would be to ignore the importance of agency and participation within State decision-making processes.

Likewise, a resource allocation decision adopted in accordance with fair procedures may nevertheless be judged as substantively unreasonable because, for example, the scope of the allocation was under-inclusive in terms of amount or the class of persons to whom the allocation was directed. A resource allocation decision may also be found to be substantively unfair[60] or unreasonable for failure to include participatory processes that are inherent in "reasonable" State conduct.

When courts adjudicate State resource allocation decisions, both the opportunity and process aspects of any decision must be taken into account in order to ensure that reasonable and fair allocations are made. Moreover, by perceiving freedom as a synergy between substantive choice and the process of choice, courts can fruitfully develop the relationship that exists between socio-economic rights and the right to just administrative action.[61]

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[59] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC). See further chapter six part 6 4 1 2.

[60] For the recognition that reasonableness as a ground for review in administrative law includes an element of substantive fairness, see the minority judgment in *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 153 and the discussion of this judgment in chapter five part 5 2 1.

[61] For a discussion of how the synergy between substance and procedure can be developed in the context of the State's duty to meaningfully engage prior to and during socio-economic policy implementation, see S van der Berg "Meaningful Engagement: Proceduralising Socio-economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376.

2 2 3 Interpreting "available resources" widely

2 2 3 1 A capabilities-based justification for the adjudication of State expenditure

The adjudication of State resource allocation decisions raises concerns that the judiciary lacks the constitutional competence to adjudicate issues that impact upon public finance and could affect matters of macro-economic policy.[62] Jowell describes "constitutional competence" as follows:

> "The question of constitutional competence involves a normative assessment of the proper role of institutions in a democracy. It starts with the assertion that it is not the province of courts, when judging the administration, to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantage of a decision. We should not expect judges therefore to decide whether the country should join a common currency, or to set the level of taxation. These are matters of policy and the preserve of other branches of government and courts are not constitutionally competent to engage in them."[63]

These concerns could prompt the judiciary to simply defer to the legislative and executive branches of government, instead of earnestly engaging with the issues at hand. Fortunately, Sen's theory can serve to put the need for public expenditure into a capabilities-based perspective – and so help to justify the evaluation of State resource allocation decisions in socio-economic rights cases by allaying concerns related to constitutional competence.

2 2 3 2 Adjudicating socio-economic expenditure

Sen negates the assumption that only wealthy countries that enjoy ample resources can finance support-led processes,[64] where programmes consisting of social support,

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[62] Concerns regarding the polycentric effects of adjudicating State resource allocation also arise. See JA King *Judging Social Rights* (2012) 192-194. The critical importance of participation and informational broadening under a transformative constitution, and the potential of such an approach to at least partially overcome concerns of polycentricity, are canvassed in part 2 4 3 and chapter six part 6 3 2 below.

[63] J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *PL* 448 451. The concept of constitutional competence corresponds to the issue of the legitimacy of the judicial branch of government to adjudicate certain matters.

[64] Sen distinguishes between "support-led processes" and "growth-mediated processes". The latter depends on and utilises fast economic growth to expand social services. The former does

education and health care are instituted.[65] Pointing to the economics of relative costs, Sen postulates that even poor countries can quickly expand education and health care. In this way, quality of life can be significantly elevated, while investment in education and health care can concurrently foster economic growth.[66]

This perspective of social expenditure as both inherently important and instrumentally important to economic growth, can aid courts when evaluating resource allocation decisions in socio-economic rights cases. For example, although the State may argue that resources are scarce in South Africa, scarcity cannot excuse non-allocation of resources for socio-economic purposes. Resources should therefore be made "available" even if government must borrow funds or take other macro-economic steps to do so.[67]

A wide interpretation of "available resources" that looks beyond merely those resources that have already been allocated to particular socio-economic programmes is thus consistent with Sen's theory. Furthermore, supported by an economic theory that is congruent with the transformative purposes of the Constitution, courts may feel more competent to venture into the terrain of State resource allocation decisions.

2 2 3 3 Adjudicating macro-economic policy

Importantly, Sen unequivocally values the realisation of capabilities above other, *instrumental* economic and macro-economic goals. Ultimately, then, the objectives of all levels of public policy must be the advancement and realisation of capabilities and functionings:

> "The role of public expenditure in generating and guaranteeing many basic capabilities calls for attention; it must be considered along with the instrumental need for macroeconomic

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not rely on fast economic growth to institute and expand social programmes. A Sen *Development as Freedom* (1999) 46.

[65] 46-47.

[66] 48-49.

[67] See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 229 who argues that foreign loans and questions of macro-economic policy generally lie outside the expertise of the judiciary. The author goes on to state that courts could only "recommend" that government consider taking macro-economic steps. This dissertation emphasises that through adjudication and participation courts can and should require government to account for the steps it has taken to procure resources where the right in question demands such allocation. See further, for example, chapter five parts 5 3 3, 5 4 1 1, 5 4 2 3, 5 4 2 5 and chapter six part 6 4 2 2.

stability. Indeed, the latter need must be assessed *within* a broad framework of social objectives."[68]

Sen's work thus constitutes an economic, theoretical basis for valuing the promotion of inherently important capabilities along with instrumental concerns of macro-economic stability. Although a court should by no means disregard the impact of its judgment on macro-economic policy, the perspective offered by Sen nevertheless highlights the fact that "macro-economic stability" is not a sacrosanct area where no court dare tread. Instead, within a transformative constitutional democracy, where law and the judiciary play a significant role in bringing about social change, no State resource allocation decision should be immune from judicial scrutiny.

This conceptualisation of State expenditure is also congruent with a wide interpretation of "available resources" that does not merely focus on the resources that a State has already allocated to a particular programme or policy. Rather, "available resources" should be determined by focusing on the broader budget as well as the macro-economic options available to the State to procure additional resources where the socio-economic need at stake is great and the impact of non-realisation of the right grave. This can prevent the State from limiting its socio-economic obligations by allocating minimal funds to relevant governmental departments (at the appropriation stage of the national budget process) or to particular socio-economic programmes (at the administrative level of resource expenditure).

Nevertheless, macro-economic instability would no doubt be detrimental to the realisation of capabilities. Where an order necessitating macro-economic action would therefore be imprudent, courts should nonetheless at least be prepared to require the State to thoroughly account for the efforts it has made to make resources available in the wide sense and the effect that any resource allocation may have on the economy.

2 3 Valuation and the role of the courts

2 3 1 A theory without content?

Sen's theory has been criticised for making little commitment to the content of valuable types of freedom, capabilities and functionings.[69] Nussbaum states that Sen

[68] A Sen *Development as Freedom* (1999) 141 (original emphasis).

[69] See, for instance, Bilchitz, who criticises Sen's approach for offering "little guidance in determining which functionings and capabilities can be said to be valuable". D Bilchitz *Poverty*

only attempts to provide an answer through "emphasis, choice of examples, and implication", while giving due weight to the question of valuation of capabilities.[70] While she finds this approach acceptable in the context of a mere comparative theory, she argues that it may well be inappropriate for developing a theory of democracy and justice:

> "Any use of the idea of capabilities for the purposes of normative law and public policy must ultimately take a stand on substance, saying that some capabilities are important and others less important, some good, and some (even) bad."[71]

Nussbaum further criticises Sen for conceptualising freedom as a "general, all-purpose social good" of which important capabilities are merely examples.[72] Nussbaum proceeds to frame a substantive answer for this question of content by the compilation of her list of central capabilities. One of her primary grounds for doing so is to aid the formulation of political principles that can inform constitutional law.[73] Importantly, her development of the theory relies heavily on the notions of human dignity and agency.

2 3 1 1 Recognising the role of the State in realising important capabilities

According to Nussbaum, it is the task of *government* to enable people to pursue a life of dignity. This can be achieved by providing at least threshold levels of the capabilities she has identified as most important.[74] Paradoxically, Sen – who aptly places the need for public expenditure within a capabilities perspective and also values agency – nonetheless seems reluctant to recognise enforceable, *primary* duties on the State to provide certain capabilities.[75] Sen's valuational theory can therefore be

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and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights (2007) 11.

[70] MC Nussbaum *Creating Capabilities* (2011) 27.

[71] 27-28.

[72] 70.

[73] 70-73.

[74] 32-33, see also 40, 168.

[75] See, for example, A Sen *Development as Freedom* (1999) 269:

> "For efficient provision of public goods, not only do we have to consider the possibility of state action and social provisioning, we also have to examine the part played by the development of social values and a sense of responsibility that may reduce the need for forceful state action."

supplemented with Nussbaum's scholarship, without the need to adopt a rigid list of capabilities or a minimum core approach to adjudication.

2 3 1 2 Recognising the role of the courts in articulating important capabilities

Significantly, Nussbaum views courts as competent *fora* for the further specification of abstract capabilities and for the setting of progressively ambitious yet realistic thresholds.[76] Nussbaum moreover recognises the responsibility of courts to enforce constitutions in a capability-enhancing manner.[77] She highlights that a written constitution is a useful way of articulating fundamental entitlements.[78] However, she goes on to state:

> "When a given capability has been recognized as a fundamental entitlement in a nation's constitution... much more work needs to be done. The capability will need further elaboration or specification, and the threshold will have to be correctly set… [A central capability] abstractly specified at the outset, can be implemented through constitutional law over time, with a deepening and incrementally specific understanding of its requirements."[79]

2 3 1 3 Recognising the role of the South African Constitution in establishing content

In the South African context, much of the concern regarding Sen's lack of commitment to substance can be overcome with reference to our transformative Constitution.[80] The inclusion of socio-economic rights and the purposes they seek to achieve can aid us in identifying what capabilities are worthy of special attention when evaluating State resource allocation decisions. Courts will often, however, be called upon to balance competing resource allocations, for example those aimed at the immediate realisation of basic capabilities *versus* those aimed at longer term

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While the development of social values and responsibility are no doubt important, the duty to provide socio-economic goods and capabilities in a country plagued by systemic disadvantage should *in the first place* lie with the State. To Sen, agency entails that the State plays an extensive but *supporting* role (53).

[76] MC Nussbaum *Creating Capabilities* (2011) 40-42, 62.

[77] 43.

[78] 73.

[79] 170, see for a discussion of judicial implementation 173-180 and part 2 3 3 3 below.

[80] See part 2 4 below, in particular part 2 4 1 where the normative values that underpin both the capabilities approach and the Constitution – and their ability to identify which capabilities constitute the substantive content of socio-economic rights – are discussed.

capabilities that can enhance other capabilities in turn.[81] Nussbaum's incremental specification of initially abstract capabilities can fruitfully take place within the valuational frameworks and mechanisms provided by Sen.

2 3 2 Adjudicating State resource allocation decisions through the lens of capabilities

Sen recognises that substantial debate can exist regarding the importance and prioritisation of diverse capabilities. This gives rise to the need to address the valuation of capabilities in an explicit manner.[82] Capability sets can compete with each other, with functioning outcomes[83] and with other considerations such as the implementation of fair procedures, for prominence – and for resource allocation. Where a court adopts a capabilities approach to adjudication, it may similarly be called upon to balance competing rights with each other and with other interests in relation to the allocation of limited resources. However, Sen does not perceive the possible diversity of valuational outcomes as a serious theoretical challenge. Instead, he relies on evaluative reasoning to overcome – at least partially – heterogeneity in valuation.[84]

2 3 2 1 A constitutional focal space establishing a "partial ordering"

Sen postulates that once a focal space for valuation is specified, judgments regarding prioritisation can result immediately. He elaborates thus:

> "When some functionings are selected as significant, such a focal space is specified, and the relation of dominance itself leads to a 'partial ordering' over the alternative states of affairs."[85]

For purposes of the adjudication of State resource allocation decisions in socio-economic rights cases, the focal space has already been specified by the

[81] Pressing socio-economic needs that all require immediate allocation of resources can also vie for resource allocation, for example expenditure on health care *versus* expenditure on education.

[82] A Sen *Development as Freedom* (1999) 75.

[83] A "functioning outcome" is comprised of the alternative functionings and combinations of functionings that people achieve given their capability sets.

[84] A Sen *Development as Freedom* (1999) 77.

[85] 78.

Constitution.[86] The socio-economic rights[87] and the right to just administrative action[88] enshrined in the Bill of Rights can provide the normative paradigm in which the further prioritisation and valuation of specific State resource allocation decisions can take place. This "partial ordering" may justify the prioritisation of spending on socio-economic programmes over expenditure on luxury items or even areas such as national defence, where expenditure is disproportionate to the defence needs of the country.

However, where more difficult questions of competing resource allocation decisions arise, there will be a need to refine the partial ordering by assigning weights to specific capabilities, different allocations and other important factors. For example, further refining of the partial ordering may be required in complex disputes where competing interests (for example short term *versus* long term spending on socio-economic rights or expenditure on education *versus* health) vie for resource allocation.

2 3 2 2 Narrowing the range of weights

The point of departure for adjudicating State resource allocation decisions is thus the identification of a partial ordering, in which rankings of an agreed-upon range of weights intersect. However, for complex resource allocation decisions to be effectively adjudicated, the permissible range of weights must be narrowed:

> "The partial ordering will get systematically extended as the range is made more and more narrow. Somewhere in the process of narrowing the range – possibly well before the weights are unique – the partial ordering will become complete."[89]

Courts can systematically assign weights to different factors, such as the content and normative purposes of socio-economic rights and the right to just administrative action contrasted with the justification proffered by the State for a particular resource allocation decision.

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[86] Resort to Nussbaum's list of central capabilities (MC Nussbaum *Creating Capabilities* (2011) 33-34) is therefore unnecessary.

[87] Particularly for purposes of this dissertation, ss 26, 27 and, to a lesser extent, 29 of the Constitution.

[88] S 33 of the Constitution.

[89] A Sen *Development as Freedom* (1999) 78.

2 3 2 2 1 Using the assignment of weights to select an appropriate level of scrutiny

Where the purpose of the right is particularly important, and the deprivation resulting from an inadequate allocation of resources is grave, the range of weights should be substantially narrowed. Where basic capabilities are at stake, the importance of the purpose of the right and the gravity of the capability deprivation will be established. The range should thus be correspondingly narrowed and the intensity of the scrutiny applied to the State's justificatory arguments should be sharpened. Referring to the distinction drawn by John Rawls between rationality and reasonableness,[90] Sen acknowledges the variability of levels of scrutiny:

> "The demands of scrutiny would have to be sharpened and tightened when we move from the idea of rationality to that of reasonableness, if we broadly follow John Rawls in interpreting that distinction."[91]

Where the State's justification seems disproportionate *vis-à-vis* the normative content and purposes of the rights and gravity of any violation thereof, the partial ordering should become complete. In such a case, the impugned State resource allocation decision will not pass constitutional muster when subjected to the level of scrutiny required by the initial assignment of weights to the rights at stake. This will be the case where, for example, a social group lacks access to adequate levels of water necessary to lead dignified lives. In this scenario, the crucial functioning outcome of living a dignified life will be seriously imperilled, and the factual context of the litigants' lived reality will illustrate the urgency with which the infringement should be treated. A strong level of scrutiny will consequently be adopted. The State will thus have to submit very strong justifications for not allocating additional resources so as to make adequate levels of water available. The range of weights will accordingly be narrowed to ascribe dominant weight to the litigants' dignity and basic capability deprivation, whereas much less weight will be afforded to justificatory arguments proffered by the State.

The assignment of varying weights serves the dual purpose of prescribing the level of intensity of scrutiny applied by the courts as well as indicating whether the resource allocation decision itself bears up to whatever level of scrutiny is appropriate.

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[90] J Rawls *Justice as Fairness: A Restatement* (2001) 5-8.

[91] A Sen *The Idea of Justice* (2009) 196.

Moreover, the variability of weights resonates with the open-ended standard of reasonableness review adopted by the Constitutional Court in adjudicating socio-economic rights[92] and administrative justice[93] claims.

2 3 2 2 2 Narrowing the range of weights in reasonableness review

Quinot and Liebenberg advocate an approach to reasonableness review that utilises the benefits of this standard of review across the fields of socio-economic rights and administrative justice cases while simultaneously developing the substantive content of socio-economic rights.[94] According to the authors, the normative and factual context of any given case should serve to "narrow the band" of options available to the State or administrator in acting "reasonably".[95] Where administrative action impacts on a socio-economic right, the normative content and purposes of the relevant right should thus narrow the range of options available to the administrator – or, in capabilities parlance, narrow the range of permissible weights.[96]

Since the "narrowing of the band, and in particular the extent of the narrowing… depends on the substantive implications of the relevant right"[97] it follows that an evaluative process of "understanding what the substantive implications of the relevant right are under the circumstances" must occur first – before the reasonableness of the administrator's conduct is established.[98] The same reasoning applies to cases where administrative action is not at issue,[99] in that "[r]easonableness must be assessed in

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[92] See in particular *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

[93] See in particular *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

[94] G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639 641.

[95] 647.

[96] 649.

[97] 650.

[98] 650.

[99] For example, where a legislative act is at issue in setting the budget or an executive act is at issue in formulating a socio-economic policy.

the light of the normative goals that the relevant socio-economic rights seek to advance".[100]

The substantive interpretation of the content and normative goals of the socio-economic right at stake is therefore a crucial first stage in the process of valuation. Similarly, the gravity of the impact of the State's actions or omissions must result in the application of a stronger standard of reasonableness review or a narrowing of the range of permissible weights.[101]

2 3 2 2 3 The crucial importance of a two-stage analysis

It is crucial to recognise that resource allocation decisions cannot be accurately weighted and adjudicated if weights have not already been assigned to the purposes, content of and impact on the rights concerned in the first stage of the rights analysis. As discussed above,[102] this initial assignment of weights to the normative purposes and substantive content of the socio-economic rights at issue should serve to establish the level of scrutiny applied to State resource allocation decisions. Where the fundamental values of freedom, dignity and equality are seriously implicated, and the factual context of the litigants shows that even basic capabilities are being threatened or deprived, a strict level of scrutiny should be adopted.[103]

For example, the overarching purpose of the right of access to adequate housing[104] may be to achieve the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The social and historical context of the case may reveal that the claimant group has been disadvantaged by race-based patterns of discrimination. This would indicate that increased allocation may be necessary to enable the claimant group to realise the functioning of living a life in a position of substantive equality with others. The factual context may furthermore show that the claimant group requires more specific capabilities to be realised for the functioning outcome of living an autonomous and dignified life to be feasible. This may

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[100] G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639 655.

[101] 652.

[102] Part 2 3 2 2 1.

[103] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 49; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 183-186.

[104] S 26 of the Constitution.

include the capability to enjoy shelter from the elements, the capability to live in a safe environment, the capability to access infrastructure, the capability to access services such as water, electricity and sanitation, and so forth. Weight will therefore be assigned to the importance of realising these capabilities in order to achieve the significant overarching functioning outcome that constitutes the normative purpose of the right. The weight so assigned will highlight the appropriate level of scrutiny to which the State resource allocation decision should subsequently be subjected. Thereafter, it should be determined whether the resource allocation decision in question passes muster when subjected to the selected level of scrutiny.

The first weighting step will be particularly important where different socio-economic rights compete for resource allocation or where short term and long term socio-economic needs vie for resource allocation. Thus, for example, where one of the socio-economic needs at issue represents a "fertile capability" that can generate improvements in other socio-economic areas, government can be expected to spend scarce resources on its realisation.[105] All socio-economic rights represent fertile capabilities in that the realisation of these rights can catalyse the realisation of other socio-economic rights, foster dignity and enhance one's ability to participate in the economic, political and social spheres. However, in certain contexts, some socio-economic capabilities will prove to be more fertile than others. For example, education, which is considered an "empowerment right",[106] constitutes a fertile capability par excellence. Education promotes agency for the realisation of further basic capabilities and more complex capability sets.[107] The fertile nature of education as a capability is recognised internationally[108] as well as by its formulation as an "unqualified" right in the Constitution.[109] In certain contexts where socio-economic rights compete for resource allocation, the exceptionally fertile nature of education might therefore justify the prioritisation of resource allocation for the realisation of the right to basic education. However, a thorough interpretation of the competing rights at stake must necessarily precede a decision regarding prioritisation.

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[105] MC Nussbaum *Creating Capabilities* (2011) 99.

[106] UN Committee on Economic, Social and Cultural Rights *General Comment No 13: The right to education (art 13)* UN Doc E/C12/1999/10 para 1; *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 4.

[107] MC Nussbaum *Creating Capabilities* (2011) 98.

[108] Art 13(1) of the International Covenant on Economic, Social and Cultural Rights (1966).

[109] S 29 of the Constitution does not contain the qualifications relating to "available resources" and "progressive realisation" that appear in ss 26 and 27.

Resource availability or constraints are thus *concomitant* factors to which weights should be assigned, but cannot be allowed to subsume the assessment of other weight-worthy considerations. Rather, such decisions should be evaluated as part of a second, "justificatory" stage of the rights analysis once the content of the right has been allowed to refine the partial ordering already established by the inclusion of socio-economic rights and the right to administrative justice in the Constitution. To conclude otherwise would be to eschew the valuation process and neglect to prioritise capabilities justly. Where resources are allocated inefficiently or unreasonably,[110] these factors should likewise increase the weights assigned to the capabilities represented by socio-economic rights in order to extend the ordering necessary to effectively adjudicate the State resource allocation decision concerned.

2 3 2 3 Valuation and rights

In congruence with Sen's general capabilities approach, his conceptualisation of human rights, and particularly socio-economic rights, contains many points of connection with the Constitutional Court's application of reasonableness review to adjudicate socio-economic rights.[111] Although the implications of valuation through weight selection for socio-economic rights have been discussed above, Sen's specific focus on human rights merits elaboration.

2 3 2 3 1 The importance of public reasoning and participation

Sen postulates that the underlying freedoms of human rights should be scrutinised so as to determine whether sufficient "thresholds" of importance and relevance exist

[110] G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639 651-652.

[111] Much of Sen's discussion regarding whether the ethical claims of human rights should be converted into legislated rights is not strictly relevant to this dissertation, which focuses on the justiciability of State resource allocation decisions within the framework of already constitutionally guaranteed, justiciable socio-economic rights. For further reading on the philosophical justification or lack thereof for human rights, see A Sen *The Idea of Justice* (2009) 355-366. For a precursor of the arguments made regarding human rights in *The Idea of Justice*, see A Sen "Elements of a Theory of Human Rights" (2004) 32 *Philosophy & Public Affairs* 315.

to justify their recognition as "rights".[112] In order to assess compliance with threshold conditions and to determine whether "rights" warrant their status as such, the ethical claims underlying rights must "survive open and informed scrutiny".[113] Reasoning and participation thus become crucial, both for justifying the recognition of rights and for subsequently "weighting" or "ranking" rights within the context of the case at hand. Likewise, reasoning cannot but play a central role in determining whether State resource allocation decisions are reasonable for purposes of realising socio-economic rights.

2 3 2 3 2 The imperfect obligation of reasonableness

Sen's exposition of the "institutionalization critique" and "feasibility critique" of socio-economic rights similarly contains some important points of commonality with the model of reasonableness review that is applied in South Africa.

The institutionalisation critique charges that for rights to be "real", they must correspond exactly to "precisely formulated" obligations.[114] Sen, however, refutes this line of critique by rightly pointing out that even traditional, first generation rights can correspond to imperfect obligations. That the qualified nature of the obligations imposed on the State does not detract from the justiciable nature of a socio-economic right is clearly reflected in South African case law:

> "[It] is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce."[115]

The primary question, according to Sen, is "what one can *reasonably* do to help the realization of another person's freedom".[116] The resemblance of this question to the reasonableness review standard applied in South Africa, whereby the court questions whether the measures adopted by the State to fulfil socio-economic rights are in fact

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[112] A Sen *The Idea of Justice* (2009) 366-367.

[113] 385.

[114] 382.

[115] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 94.

[116] A Sen *The Idea of Justice* (2009) 372 (emphasis added).

"reasonable" as required by the Constitution, is apparent. Sen is surely correct in arguing that a "loosely specified" obligation[117] – such as the duty to act reasonably – should not be confused with no obligation at all.[118]

2 3 2 3 3 Progressive realisation within available resources

What Sen terms the "feasibility critique" questions whether socio-economic rights should be recognised given that it may not be presently feasible to realise them for all. By acknowledging that "[d]emanding more from behaviour today than could be expected to be fulfilled would not be a good way of advancing the cause of justice", Sen's theory allows for the qualifications of "available resources" and "progressive realisation" as contained in sections 26 and 27 of the Constitution.[119] Yet he goes on to point out that not even traditional, civil and political rights can immediately be realised for all. The fact that nations should aspire to realise socio-economic rights maximally cannot bar the scope for further social changes that may be needed before that point is reached.[120]

The notion of progressive realisation within the Constitution recognises that all rights are not presently capable of being fulfilled for all, but that this cannot be allowed to detract from their status as enforceable rights. As Sen pertinently observes, "[n]on-realization does not, in itself, make a claimed right a non-right".[121] Similarly, the non-availability of resources does not detract from the status of the right. Where resources are not available presently, that does not relieve the government from allocating resources reasonably and efficiently towards the fulfilment of socio-economic rights as resources do become available.

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[117] The obligation on the State to adopt "reasonable legislative and other measures" under ss 26(2) and 27(2) or the requirement that all administrative action be reasonable under s 33(1) of the Constitution may both constitute "loosely specified" obligations.

[118] A Sen *The Idea of Justice* (2009) 374.

[119] 81.

[120] 384.

[121] 384.

2 3 2 3 4 Flexible contextualism

Sen allows for the weighting of different rights.[122] Whereas such weighting should in the first instance be the task of government in designing and implementing socio-economic legislation and policies, courts have an important role to play in reviewing government decisions. Where government has paid insufficient attention to the normative import of any given right, it will be up to the courts to carry out a weighting exercise. As set out above, critical scrutiny and reasoning are indispensable tools for any weighting exercise involving capabilities. In congruence with a fluid conception of reasonableness review, Sen allows for the inclusion of various considerations including "intensities, circumstances and consequences"[123] when conducting a weighting exercise.

Courts should thus adopt a flexible approach to the interpretation of the content of rights, which takes account of varying contexts. Crucially, room should always be left for further dialogue and contestation through the process of critical, normative and participation-enhancing reasoning.[124] The same flexibility inherent in the interpretation of the content of socio-economic rights in order to weight them, should be maintained when adjudicating specific State resource allocation decisions. Just as the content and ranking of rights may change with a change of circumstances, the reasonableness of an allocative decision or any justification the State may proffer for not making a particular allocation, must remain subject to reassessment and revision.

2 3 2 4 The role of reasoning

Public reasoning constitutes a crucial component of Sen's valuational theory. Whether capabilities, rights, or an amalgamation of both are weighted, Sen proposes that weights can be selected through a process of reasoned evaluation. For purposes of social evaluation, of which it is submitted adjudication should be regarded a part of, Sen argues that a "reasoned 'consensus' on weights, or at least on a range of

[122] 377, 386.
[123] 377.
[124] 386-387.

weights"[125] must be arrived at. Importantly, this can only be achieved where public discussion and democratic understanding and acceptance are allowed to take place.[126]

Sen goes on to elaborate the central significance of public reasoning in developing his theory of justice. Public reasoning is crucial for the valuation of capabilities and, closely related thereto, for the pursuit of social justice.[127] The measure of justice or injustice prevalent in a society can be gauged by making comparative judgments regarding alternate states of affairs and by determining to what extent capabilities are allowed to flourish. In order to make a sound assessment, valuation of diverse capabilities is necessary, and these judgments and valuations are carried out through a process of reasoning.

2 3 2 4 1 Participation

Participation is a crucial element of valuation by public reasoning. Moreover, it should be a significant part of policy formation including the making of economic policy. Participation should also be of central import when courts adjudicate State resource allocation decisions. Where courts focus on the capabilities that socio-economic rights represent by interpreting these rights substantively, socio-economic rights can serve to catalyse policy formulation itself as well as social activism leading to policy change.[128] Where polycentric issues call for scrutiny, participation will be critical for the assimilation of diverse informational inputs. Sen sums up the interaction between participation in policy making and participation in subsequent assessment:

> "The issue of public discussion and social participation is thus central to the *making* of policy in a democratic framework… In a freedom-oriented approach, the participatory freedoms cannot but be central to public policy *analysis*."[129]

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[125] A Sen *Development as Freedom* (1999) 78.

[126] 78-79.

[127] A Sen *The Idea of Justice* (2009) 44.

[128] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 53-54.

[129] A Sen *Development as Freedom* (1999) 110 (emphasis added).

2 3 2 4 2 Using public reasoning to make comparative judgments

Sen situates the mechanism of reasoning and the process of valuation within an adaptation of a mathematical social choice theory, which focuses on determining rankings of "alternative social realizations".[130] According to Sen, there are several factors that make social choice theory an appropriate paradigm for reasoning within a theory of justice – and, by extension, for the valuation of capabilities. For instance, social choice theory makes *comparative* assessments of different states of justice or injustice, rather than surmising about the features of a perfectly just society as a transcendental theory does. Thus, social choice theory and reasoned evaluation should focus on the actual, practical choices in existence and not on hypothetical postulations.[131]

Where State resource allocation decisions are concerned, this theory can be utilised to justify the proposition that an *ideal* resource allocation to *completely fulfil* a socio-economic right need not presently be required. Conversely, the absence of the requirement of such an ideal state of affairs should not deter courts from adjudicating specific State resource allocation decisions within the concrete factual and normative context in which socio-economic rights operate. To the extent that Sen's comparative focus eschews the elaboration of the normative content of socio-economic rights, it stands to be developed. The content, purposes and normative goals of the socio-economic rights at stake should be elucidated sufficiently. Yet an inability to achieve those purposes immediately does not render the purposive interpretation of rights superfluous. Rather, the fact that the full realisation of these rights may take time and increasing levels of resource allocation is accommodated by the notion of progressive realisation.

2 3 2 4 3 Acknowledging a plurality of competing principles

Another feature of social choice theory as a framework for reasoning is its recognition of a plurality of competing principles. Although it is acknowledged that an impasse may be reached on occasion, "the need to take note of the possibility of *durable* conflicts *of non-eliminable* principles" remains an important point for a theory

[130] 94.

[131] 106.

of justice and the reasoning that characterises it.[132] During a process of reasoned evaluation, courts may at times validly decline to prioritise among competing rights and resource allocation decisions based on a lack of institutional competence or the informational base necessary to do so. However, given the vital, "non-eliminable" interests represented by socio-economic rights, this should be a justifiable course of action only in rare, highly complex cases.

2 3 2 4 4 Re-examining polycentric decisions

Room is also made for the re-examination of decisions within social choice theory. A State resource allocation decision that was found to be reasonable today may no longer be so in ten years' time. Where the adjudication of a resource allocation decision triggers polycentric effects, social choice theory recognises that unintended consequences often arise and that further scrutiny and assessment are thus crucial:

> "[G]eneral principles about social decisions that initially look plausible could turn out to be quite problematic, since they may in fact conflict with other general principles which also look, at least initially, to be plausible… [O]nce the principles are formulated in unconstrained terms, covering *inter alia* a great many cases other than those that motivated our interest in those principles, we can run into difficulties that were not foreseen earlier…We then have to decide what has to give and why."[133]

Polycentric decisions can thus be re-examined, using the same process of public reasoning that was initially employed to ascribe weights to the capabilities at stake. Public reasoning therefore leaves room for a flexible judicial approach that takes cognisance of unforeseen consequences and changing circumstances.

2 3 3 The role of the courts

2 3 3 1 Sen's failure to recognise the value of the judiciary

The above exposition of selecting weights through the application of public reasoning begs the questions as to *who* should orchestrate the process of valuation. Courts seem an obvious choice for carrying out a process of reasoned evaluation where government policy has proved inadequate. After all, courts are designed to

[132] 106 (emphasis added).

[133] 107.

make decisions, analyse evidence, interpret rights, listen to all parties and contribute to a process of reasoning by providing reasons for their judgments.[134] Significantly, the judiciary is familiar with the balancing exercise inherent in weighting capabilities.[135]

Moreover, Sen relies on impartiality and objectivity as integral to the process of public reasoning in terms of which justice and injustice are to be measured. Sen refers to Rawls to highlight that a political precept is objective when "there are reasons… sufficient to convince all reasonable persons that it is reasonable".[136] Furthermore, he goes on to supplement this normative approach by asking to what extent political convictions can survive "informed public discussion".[137] Impartiality, objectivity and tests based on the notion of "reasonable persons" are fundamental traits of the judicial function. Yet Sen largely fails to recognise any role that courts might play and gives passing attention to institutional co-operation in *Development as Freedom*:

> "A variety of social institutions – related to the operation of markets… legislatures, political parties, nongovernmental organizations, *the judiciary*, the media and the community in general – contribute to the process of development precisely through their effects on enhancing and sustaining individual freedoms. Analysis of development calls for an integrated understanding of the respective roles of these different institutions and their interactions. The formation of values and the emergence and evolution of social ethics are also part of the process of development that needs attention…"[138]

Within a structure of institutional dialogue and co-operation, courts are well-placed to enhance individual freedoms while fostering accountability for the State's allocative priorities. Individual socio-economic capabilities can be promoted while values and "social ethics" are formed when the judiciary elaborates upon the normative, substantive content of socio-economic rights.[139] As Liebenberg pertinently notes, this can, in turn, lead to meaningful accountability:

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[134] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 122.

[135] For example, in the context of the limitations analysis in terms of s 36 of the Constitution. See H Botha "Rights, Limitations and the (Im)Possibility of Self Government" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 22.

[136] A Sen *The Idea of Justice* (2009) 42 quoting J Rawls *Political Liberalism* (1993) 119.

[137] A Sen *The Idea of Justice* (2009) 43.

[138] A Sen *Development as Freedom* (1999) 297 (emphasis added).

[139] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 37, 40, 45-46, 51, 179-183. See also D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 143 who notes that

> "Only once a focused and sustained effort to develop the values and purposes underpinning the socio-economic rights at stake in a particular case has occurred, can a proper assessment be made regarding whether the measures adopted by the State are reasonable given its obligations to 'respect, protect, promote and fulfil' the relevant rights."[140]

Liebenberg's position can be developed by recognising that Sen's valuational approach to the prioritisation of capabilities constitutes a theoretical paradigm which can be adopted by the judiciary to interpret the content and normative purposes of socio-economic rights. Once this interpretative step is completed, particular State resource allocation decisions can be adjudicated. The weighting process can thus be fruitfully directed by the judiciary, as long as a two-stage process of normative valuation followed by justification is adhered to.

Substantive interpretation of rights, context, explicit reasoning and an effort to ensure maximum participation in judicial processes are all essential components of a fair weighting judgment. Botha echoes this point:

> "What distinguishes a good balancing judgment from a bad one is... less a function of the 'correct' characterisation or the 'accuracy' of the weights attached to conflicting interests, than of the extent to which the judgment gives *concrete meaning to constitutional norms*, engages those affected by it, spells out the reasons for the decision, and articulates the moral and political reasoning that went into it."[141]

Of course, in order to recognise the importance of judicial enforcement of the second, justificatory stage of the weighting process, it is necessary to acknowledge the primary obligation that rests on the State to provide capabilities for its citizens. Nussbaum has developed this fundamental idea to a greater extent than Sen has.[142]

"[d]eference is not owed to the government in defining the content of the right… but only in allowing it a 'margin of appreciation' to decide which *measures* it will adopt in fulfilling its obligations" (original emphasis).

[140] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 183.

[141] H Botha "Rights, Limitations and the (Im)Possibility of Self Government" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 22 (emphasis added).

[142] As discussed above in part 2 3 1 1. See MC Nussbaum *Creating Capabilities* (2011) 32-33, 40, and in particular 168:

> "[A]ny government that fails to secure basic entitlements has failed in its most essential task."

2 3 3 2 Institutional and structural justice

Indeed, Sen has been criticised by Nussbaum and others for paying little heed to the place of law and institutional structures within democracy.[143] Deneulin argues that by rejecting a transcendental approach to a theory of justice, which asks what the "basic structure"[144] of a just society would look like, Sen fails to appreciate that many examples of injustice result from a failure of democratic structures.[145] Furthermore, the author points out that by emphasising the role of public reasoning throughout his work, Sen "implicitly situates the subject of justice in the quality of the democratic structure".[146] Although Sen does acknowledge that institutions are important to any theory of justice, he advocates the selection of institutions that promote justice through their *operation* rather than equating the mere *existence* of those institutions with justice.[147]

2 3 3 2 1 Examining the actual consequences of institutions

Sen warns against an institutional approach that "prevents critical examination of the actual consequences of having the recommended institutions" and instead focuses on the mere existence of certain institutions.[148] In the context of the judicial competence to adjudicate State resource allocation decisions, Liebenberg appositely argues that "courts should not simply take refuge in the theoretical institutional advantages [to prioritise and allocate resources] of the other branches of government", but should rather closely scrutinise the *actual* decisions of government.[149] The

[143] 166, 178-180.

[144] J Rawls *Justice as Fairness: A Restatement* (2001) 10 who includes an independent judiciary in a "just basic structure [that] secures what we may call background justice".

[145] S Deneulin "Development and the Limits of Amartya Sen's *The Idea of Justice*" (2011) *Third World Quarterly* 787 793-794. For further criticism see DB Rasmussen & DJ Den Uyl "Why Justice? Which Justice? Impartiality or Objectivity?" (2013) 17 *The Independent Review* 441 447, 450, 451.

[146] S Deneulin "Development and the Limits of Amartya Sen's *The Idea of Justice*" (2011) *Third World Quarterly* 787 794.

[147] A Sen *The Idea of Justice* (2009) 82.

[148] 83.

[149] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 195.

presence of theoretically just institutions cannot therefore translate into automatic deference to actual government choices where resource allocation is concerned.

2 3 3 2 2 Using institutions as platforms for public reasoning

However, Sen acknowledges that institutions can promote reasoning and valuation processes:

> "Institutions can also be important in facilitating our ability to scrutinize the values and priorities that we can consider, especially through opportunities for public discussion…"[150]

The institutional aptitude of courts to scrutinise "values and priorities" is obvious, and can be employed in the sphere of State resource allocation decisions. The ability of courts to promote "public discussion" and democracy is more controversial, and will be more fully canvassed below.[151] Nevertheless, the potential of the institution of the judiciary to practise public reasoning and enhance democracy, and thereby to promote justice, should not be underrated.

2 3 3 2 3 Acknowledging the importance of just institutional structures

Sen goes on to emphasise the superiority of a comparative approach as opposed to a transcendental approach (that includes an institutional approach) throughout *The Idea of Justice*. However, within the South African context, the importance of institutional justice and the constitutional structure should not be underestimated. More particularly, the significant role that the Constitutional Court plays as the guardian of the rights enshrined in the Bill of Rights cannot be gainsaid. To the extent that Sen rejects the importance of a just "basic structure" too easily, his theory stands to be developed.

Nussbaum has incorporated institutional concerns within her capabilities-based development of a theory of social justice.[152] In addition, she offers insight into the practical role of the courts in a process of reasoned evaluation of capabilities. Nussbaum investigates how a political "basic structure" can secure minimum levels of

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[150] A Sen *The Idea of Justice* (2009) xii.

[151] In part 2 4 3 below.

[152] MC Nussbaum *Creating Capabilities* (2011) 166-180.

basic capabilities. In this regard, she convincingly argues that the provision of at least basic capabilities and the means to live a life with dignity constitute the *raison d'etre* of government.[153] However, as noted above, once basic capabilities are guaranteed by a constitution, it becomes the task of the courts to further specify what they in fact require of government.[154] Writing from the perspective of US constitutionalism, Nussbaum advocates a form of incrementalism whereby the conditions for implementation of capabilities as well as the parameters of the rights themselves are gradually and progressively expounded.[155]

2 3 3 3 Judicial implementation of constitutionalised capabilities

2 3 3 3 1 Separate or interdependent?

Nussbaum highlights several characteristics of the judicial implementation of constitutionally guaranteed capabilities. First, she points to the separate existence, and interpretative history, of each capability. She adds that courts will only in rare instances require that protection be afforded to one right in order to protect a different right.[156] Although this may be true in certain cases, the interdependence of rights in general – and socio-economic rights in particular – should not be overlooked. Liebenberg regards the treatment of different rights as "protecting mutually discrete values and interests"[157] as a characteristic of a *formalist* approach to rights that is inappropriate under a transformative constitution.[158] The acknowledgement of the interdependent nature of rights will become relevant where different rights compete for the same resources. Courts will not be able to effectively assess the reasonableness of State prioritisation and allocation of limited resources where the different rights at stake and their interrelationship with one another cannot, as a first step, be elucidated.

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[153] 167-169.

[154] 170.

[155] 173.

[156] 174. Nussbaum draws a distinction between trade-offs between capabilities and a mutually reinforcing relationship among capabilities (174-175).

[157] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 51.

[158] For a discussion of the implementation of capabilities under a transformative constitution, see part 2 4 below.

2 3 3 3 2 Cautious incrementalism?

The second characteristic of judicial implementation that Nussbaum points to is that of "cautious incrementalism", whereby the "contours of an abstractly specified right are exceedingly unclear at the outset"[159] but are progressively and gradually clarified. Courts should therefore interpret the content and normative purposes of socio-economic rights on a case-by-case basis, in terms of which the specific context of the case at hand will determine which capabilities are implicated. Only once the actual capabilities at stake are identified, can a particular State resource allocation decision be reviewed for reasonableness.

However, in certain cases State resource allocation may be found to be structurally deficient, and to therefore require large-scale reform. In other cases, the consequences of the non-realisation of a socio-economic right may be drastic, and claimants could risk sustaining irreparable harm if a right-violation is not remedied immediately. In such instances, a departure from incrementalism may be called for. Such a departure from incrementalism can be justified with reference to the perspective provided by Sen, according to which even macro-economic impact should be assessed in terms of its instrumental value in promoting capabilities. Even where courts may lack the information necessary to overcome the dangers inherent in making polycentric decisions, they should still require the State to adequately justify its allocative choices. Where a right necessitates a particular allocation of resources, and such resources are in fact available to the State, the court should direct that the State act in accordance with its constitutional obligations. This is so even where the court's decision may have far-reaching ramifications for the State's allocative policy, or even the national budget.[160] Where an unacceptable degree of poverty is prevalent within society, and government departments are often recalcitrant or corrupt, such a departure from incrementalism may be more easily justified.

2 3 3 3 3 Contextualism

A crucial characteristic of the judicial implementation of constitutionally recognised capabilities that Nussbaum highlights is that of contextualism. Nussbaum appositely

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[159] MC Nussbaum *Creating Capabilities* (2011) 175.

[160] Cf JA King *Judging Social Rights* (2012) 293 for a carefully reasoned but conservative endorsement of incrementalism, and the rejection of the proposition that courts should make decisions with a "nation-wide allocative impact".

notes that abstract principles – such as constitutionally enshrined socio-economic rights – can only be realised within a concrete context. She goes on to state:

> "Judges cannot afford to remain at the level of generality or to take refuge in an approach that is merely formalistic, refusing to consider the *content* of each case: they need to dig into history and social reality in order to face the hard question of whether a given capability has really been secured to people."[161]

In order to face the "hard question" of whether a capability has in fact been secured, courts cannot but enquire as to the *content* of the right as informed by the factual and normative context at play. As discussed above, context must exercise an impact on the level of scrutiny that is applied to State resource allocation decisions.

In the South African jurisprudential *milieu*, an excess concentration on the State's justificatory arguments as opposed to the content of the right of access to "sufficient" water in *Mazibuko v City of Johannesburg*[162] may have been the result of minimising the factual context that persons with inadequate water had to endure. A better approach might have been one which first determined the water needs of the persons involved in their concrete lived reality. Thereafter, the needs thus identified could have been used to delineate the State's obligation in respect of the right of access to sufficient water in the light of the facts of the particular case. Only then should the State's justification for not providing such quantity of water have been assessed.

However, the critical importance of context within the capabilities approach and the judicial implementation thereof should not be confused with an "ad hoc 'situation ethics'" approach.[163] Rather, in order to implement challenging principles on a universal basis, courts must be able to appreciate people's lived socio-economic reality, where the capabilities to choose meaningful lives either exist or are absent.[164] Only once this is assessed can it be determined what resources are required to realise

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[161] MC Nussbaum *Creating Capabilities* (2011) 176 (emphasis added).

[162] 2010 4 SA 1 (CC). In this case, the Constitutional Court reverted to a weak standard of review in holding that the provision of 25 litres of water per person per day to poor residents of Phiri, Johannesburg was reasonable and did not breach s 27(1)(b) of the Constitution. However, the Constitutional Court failed to interrogate the availability of resources for the provision of an increased amount of water. See chapter four part 4 2 1 4 and generally LA Williams "The Role of the Courts in the Quantitative Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 141.

[163] MC Nussbaum *Creating Capabilities* (2011) 176.

[164] 176.

the relevant right. Thereafter, it can be determined whether the State's resource allocation decisions were reasonable when viewed in the light of both the needs that the context revealed and the availability or scarcity of resources at the State's disposal.

2 3 4 The limits of reasoned valuation

2 3 4 1 Incompleteness and partial agreement

Public discussion and reasoning will not always succeed in establishing consensus on the ranking of different capabilities in a given context or the identification of the injustice of a given state of affairs. Sen recognises that valuational exercises will often be accompanied by debates.[165] However, far from being deterred by the existence of disagreement where valuation and ranking are concerned, Sen values debates for generating political arguments and being "part of the process of democratic participation that characterizes development".[166] Sen goes on to argue that "adequate" public policies need not consist of perfectly ranked social possibilities. All that is required is that "partial agreements" delineate acceptable options:[167]

> "[A] theory of justice that makes systematic room for incompleteness can allow one to arrive at quite strong – and strongly relevant – judgements… without having to find highly differentiated assessments of every political and social arrangement in comparison with every other arrangement."[168]

The room Sen allows for incompleteness resonates with the leeway that reasonableness review affords to the State to adopt "reasonable" measures to realise socio-economic rights:

> "A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be

[165] A Sen *Development as Freedom* (1999) 75.

[166] 34. See further CR Sunstein "Incompletely Theorized Agreements in Constitutional Law" (2007) 74 *Social Research* 1 21 regarding the productive force that "incompletely theorized agreements" can exercise on adjudication.

[167] A Sen *Development as Freedom* (1999) 253.

[168] A Sen *The Idea of Justice* (2009) 103.

adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."[169]

Although precise agreement on what socio-economic rights demand need not be reached, courts can nevertheless determine whether a given instance of resource allocation is reasonable. Such determination can be based on the partial consensus that the capabilities that infuse socio-economic rights are important enough to merit their protection through constitutionally enshrined rights.

2 3 4 2 The need for substantive guidance

Yet the acceptance of lasting disagreements that arise due to, for example, "unbridgeable gaps in information, and judgemental unresolvability involving disparate considerations"[170] provides no guidance regarding the role of the courts when such an impasse is reached.[171] While Sen recognises that divergent principles can determine resource allocation,[172] he offers little assistance[173] in resolving disputes that courts may be legitimately called upon to decide in socio-economic rights cases. Where the interests at stake are important and the gravity of the non-realisation of socio-economic rights is real, courts cannot simply accept lasting disagreement in the context of a concrete case.

The absence of guidance on how to resolve disagreement about just resource allocation decisions can lead to unprincipled resource allocation or exclusive expenditure on the "worst off" in society. In this respect, Pogge argues that the capability approach could result in "indefinite increases in expenditures" aimed at

[169] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.See further A Sen *The Idea of Justice* (2009) 103.

[170] A Sen *The Idea of Justice* (2009) 103.

[171] See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 113-115 regarding the important role that courts can play in resolving disagreement.

[172] A Sen *The Idea of Justice* (2009) 15.

[173] S Deneulin "Development and the Limits of Amartya Sen's *The Idea of Justice*" (2011) *Third World Quarterly* 787 791. For criticism of Sen's "unhelpful" avoidance of complete rankings, see T Pogge "A Critique of the Capability Approach" in H Brighouse & I Robeyns (eds) *Measuring Justice: Primary Goods and Capabilities* (2010) 17 51.

alleviating the plight of those whose capability needs are the greatest.[174] However, Anderson responds to Pogge's critique by pointing out that the capabilities approach does not endorse futile expenditure of resources. Furthermore, she argues that capabilities-based criteria for the limitation of expenditure can be formulated, for example by limiting concentrated resource allocation that prejudices a different, larger group by rendering resources unavailable for the advancement of their capabilities.[175] However, since such criteria have not been established by Sen, his theory must be developed in order to mitigate incompleteness where competing resource allocation decisions call for adjudication in socio-economic rights cases.

2 3 4 3 The need for content

Another problematic area in the context of incompleteness and disagreement, is Sen's insistence that only manifest instances of injustice – not precise allocations – need to be determined. To Sen, it is unnecessary to identify what exact allocation of, for example, food would be just – although, by contrast, it would be appropriate to recognise persistent famine as unjust.[176]

Sen's approach in this regard is inconsistent with the two-stage adjudicatory process advocated above, whereby courts should interpret the content of rights before adjudicating particular State resource allocation decisions. In certain contexts, this may involve the determination of a precise allocation for purposes of constituting "sufficient" or "adequate" levels of the relevant socio-economic right as required by the Constitution. This would be the case where, for example, the State provides indigent persons with an insufficient quantity of water, and thereby severely infringes their dignity interests. Here, a court might have to determine what quantity of water is "sufficient" to prevent capability deprivation and a concomitant impact on the freedom, dignity and equality of those affected by insufficient allocations. Once such a determination is made, the State's justification for not providing full realisation of the right (albeit based on a policy of progressive realisation or limited resources) still falls

[174] T Pogge "A Critique of the Capability Approach" in H Brighouse & I Robeyns (eds) *Measuring Justice: Primary Goods and Capabilities* (2010) 17 53.

[175] E Anderson "Justifying the Capabilities Approach to Justice" in H Brighouse & I Robeyns (eds) *Measuring Justice: Primary Goods and Capabilities* (2010) 81 97.

[176] A Sen *Development as Freedom* (1999) 254.

to be assessed. Determining the content of the right does not therefore result in an immediate obligation on the State to fully realise such content presently.

2 3 4 4 Rationing scarce resources

The incompleteness of ranking that flows from Sen's focus on reasoning holds serious implications for situations where "tragic choices" fall to be made. Nussbaum asserts that where two fundamental capabilities must be traded off against one another, for example due to scarce resources, an injustice of a distinct nature results. Nussbaum notes that Sen denies the possibility of ranking one alternative above another in such situations. However, she goes on to draw a distinction between the existence of a tragic choice and the impossibility of ranking alternatives at all, arguing that "one choice may be clearly better than another in a tragic situation, even though all available choices involve a violation of some sort".[177]

In South Africa, where poverty pervades society, tragic choices may arise often. Where people are denied the ability to live an autonomous life with human dignity, courts cannot simply decline "ranking" or adjudicating difficult choices. Scott and Alston persuasively argue this point:

> "When priorities are in essence cited as the problem, the very point of constitutional rights as priority setters for government would seem to have been missed. Positive rights and the notion of core guarantees *do* have a significant prioritising function. Trying to interpret the constitution to remove or neutralise this function thus misses the constitutional point."[178]

Where a constitutional violation is justified by the advancement of a different constitutional right in the context of limited resources, courts should acknowledge and articulate why a certain ranking is chosen. Government policy and subsequent adjudication thereof in difficult circumstances must always aim to eliminate similar dilemmas in the future.[179] The fact that the State must often make "agonising choices"[180] regarding the allocation of scarce resources should not render such

[177] MC Nussbaum *Creating Capabilities* (2011) 37.

[178] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 252 (original emphasis).

[179] MC Nussbaum *Creating Capabilities* (2011) 39.

[180] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 59.

allocative choices immune from scrutiny merely because difficult decisions are involved.[181] Such decisions must be reasonable and aimed at promoting fundamental capabilities to the greatest extent possible in order to pass constitutional muster. To the extent that Sen's theory fails to recognise the need for ranking and subsequent scrutiny in cases of scarcity, it should be developed by drawing from Nussbaum's work in this regard.

2 4 Implementing capabilities under a transformative constitution

A unified and constitutionally informed approach to the valuation of capabilities promotes a vision of "transformative constitutionalism". Karl Klare has defined "transformative constitutionalism" as follows:

> "By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed… to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."[182]

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[181] For an incisive criticism of the "tragic choice" discourse, see generally M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 and particularly 519-520:

> "As in the case of other socio-economic rights, the constitutional entrenchment of justiciable rights to health care services thus demands a rethink of conventional judicial approaches to the various political processes and decisions that determine the distribution of resources within society… Courts, in turn, must decide whether challenged rationing decisions are constitutionally justifiable and can no longer shelter behind the 'tragic reality' and discretionary nature of the decisions."

[182] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150. For the incorporation and development of Klare's concept of transformative constitutionalism by other authors, see, *inter alia*, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 23-76; D Davis "Transformation: The Constitutional Promise and Reality" (2010) 26 *SAJHR* 85; C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" (2008) 24 *SAJHR* 281; J Froneman "Enforcing Socio-Economic Rights Under a Transformative Constitution: The Role of the Courts" (2007) 8 *ESR Review* 20; P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351; S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155; D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 309; C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence on Equality" (1998) 14 *SAJHR* 248.

From this description it is apparent that for transformative constitutionalism to become a reality, legal tools must be creatively harnessed to adjudicate government development policies. The same holds true for the adjudication of specific instances of State resource allocation decisions that impact on the realisation of socio-economic rights.

Sen's capabilities approach (as supplemented by the scholarship of Nussbaum) and theory of justice provide an evaluative framework that is largely consonant with a vision of transformative constitutionalism. Informed by the overarching values of freedom, dignity and equality, the capabilities approach seeks to promote social justice while enhancing agency. Similarly, transformative constitutionalism envisions social change through, *inter alia*, meaningful participation in the redistribution of resources necessary to achieve socio-economic justice.

Sen's focus on freedom allows participation to play a crucial role in evaluating capabilities. Courts can serve as one forum in which the State is compelled to engage with its citizens, thereby contributing to a comprehensive agenda of public discussion and reasoning. Nussbaum's inclusion of *context* in her strategy of judicial implementation of capabilities adds value to Sen's paradigm of reasoning by allowing the normative purposes of rights to be informed by the reality in which they operate. Public discussion as espoused by Sen and developed with reference to Nussbaum is thus congruent with an emphasis on deliberative democracy and dialogue that is necessitated by a transformative constitution.[183] Furthermore, the instrumental value that Sen places on public expenditure is consonant with a wide interpretation of "available resources", thereby leaving room for the normative purposes underpinning socio-economic rights to determine the pool of available resources to a degree.

However, as discussed above, certain aspects of Sen's theory merit development. For example, Sen fails to recognise the significant role that the judiciary can play in facilitating evaluative exercises while simultaneously fostering accountability. Sen's reluctance to commit to the substance of important capabilities (or to acknowledge that justice may require a precise determination of what resources should be allocated) may likewise frustrate the transformative vision encapsulated by the Constitution.

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[183] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 29, 31-34, 51, 64.

This *lacuna* in Sen's theory can be addressed by drawing from the overarching values that underlie (and constitute the *raison d'etre* for) the capabilities approach, namely freedom, dignity and equality. Significantly, the values that inform the capabilities approach largely correspond to the foundational values of the Constitution.[184] The purposes of transformative constitutionalism will only be achieved if these fundamental values are manifested in the lived reality of all who reside in South Africa. The similarity of these fundamental values can therefore allow courts to use capabilities to lend normative substance to socio-economic rights without straying from the constitutional ethos.

2 4 1 The role of the fundamental constitutional values in a capabilities approach to adjudication

A capabilities approach to adjudication will identify the normative purpose of socio-economic rights as achieving the complex functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The values of freedom, dignity and equality therefore inform the overarching functioning outcome that socio-economic rights aim to achieve.

By considering the social, historical and factual context of the case at hand, the court can ask which (more basic) capabilities need to be realised in order to achieve each aspect of this functioning outcome. The social and historical context may indicate that increased allocation is necessary to bring claimants who suffered from class- and race-based patterns of disadvantage into a position of substantive equality with other groups. The factual context or lived reality of the claimants may indicate further basic capabilities that must be fulfilled in order for the achievement of the functioning outcome to become possible. For example, in the context of the right of access to health care services, specific capabilities may include access to safe and hygienic health care facilities, or access to essential medicines, in order to achieve the further capability of enjoying an adequate state of health. In this way, the content of socio-economic rights can be determined with reference to the capabilities that the rights seek to foster in concrete contexts.

Furthermore, these values are closely interrelated and interdependent both in terms of the capabilities approach and the Constitution. Although a certain case may highlight

[184] Ss 1 and 7(1) of the Constitution.

one value to a greater extent than the others, courts should remain cognisant of the fact that all three values may be implicated to some extent in all socio-economic rights claims. Nevertheless, where one fundamental value is most imperilled by a State resource allocation decision, its protection and enforcement can aid courts in ranking competing capabilities. For example, the value of dignity as manifested in the functioning of living a dignified life may lead to the conclusion that the State should marshal its resources to provide access to adequate water even where the affected litigants, while poor, are not the "worst off" in society.

2 4 1 1 Substantive freedom

The overarching value that informs the content of capabilities in terms of Sen's approach is that of substantive freedom.[185] However, Nussbaum cogently argues that not all types of freedom should serve as the basis of capabilities, since not all types of freedom are central to political projects such as transformative constitutionalism or to the attainment of basic socio-economic entitlements.[186] Thus, freedom should not be conceived of in a negative sense as merely preventing obstacles that could hamper one's liberty or freedom. Instead, freedom should be conceptualised as the positive creation of the capabilities necessary to make autonomous choices and to participate in political, social and economic life. Substantive freedom in terms of the capabilities approach must therefore include the provision of the material conditions required for possessing meaningful capability sets.[187] In order to achieve the functioning of living an autonomous life, freedom-enabling material conditions must be aimed at realising the capabilities related to enjoying sufficient levels of health care, education, shelter, food and water, and social security. Where these capabilities are realised, participation in all spheres of life and the achievement of even more complex functionings become possible.

State resource allocation decisions that impact on socio-economic rights should thus be carefully scrutinised to determine whether they enhance substantive freedom or limit it.[188] While socio-economic capabilities are critical prerequisites for meaningful

[185] See part 2 2 2 2 above.

[186] MC Nussbaum *Creating Capabilities* (2011) 70-72.

[187] S Liebenberg "The Value of Freedom in Interpreting Socio-economic Rights" (2008) *Acta Juridica* 149 159-160.

[188] 167.

participation, participation and autonomy should at the same time play a part in the implementation of socio-economic rights.[189] By substantively interpreting these rights as requiring freedom-enhancing resource allocation while devising innovative remedies to include participatory processes,[190] courts can give expression to the fundamental value of freedom. For example, a social security grant must be sufficient to allow participation in social life. Simultaneously, the needs of the poor must be taken into account in determining what a sufficient grant entails and what resources should be allocated for purposes of social security payments.[191]

2 4 1 2 Dignity

Human dignity as a value features most prominently in Nussbaum's development of the capabilities approach.[192] While acknowledging that dignity can be a vague concept,[193] Nussbaum argues that it can and should exert an influence on policy choices. Nussbaum illustrates how the *prima facie* abstract concept of dignity can acquire specification by means of the compilation of her list of central capabilities.[194] However, Nussbaum's list need not be transplanted into South African jurisprudence. Instead, courts can infuse socio-economic rights with the normative substance of what dignity demands depending on the facts and *context* of the particular case at hand. For example, it would seem obvious that where people do not possess the capabilities to bathe, drink and tend to other necessities of life, the achievement of the functioning of living a dignified life would require a greater allocation of water. The specification of dignity with reference to relevant contextual circumstances was elucidated by the Supreme Court of Appeal in *Mazibuko*:

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[189] 168.

[190] See further chapter six part 6 4 1.

[191] For the recognition that basic socio-economic needs must be met for freedom to flourish, see for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 52.

[192] MC Nussbaum *Creating Capabilities* (2011) 29.

[193] Nussbaum argues that debate can clarify what dignity requires in a certain instance. Moreover, "the quality of the debate, not the number of supporters, is crucial". MC Nussbaum *Creating Capabilities* (2011) 32.

[194] 33-35.

> "A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence... The quantity of water that is required for dignified human existence would depend on the circumstances of the individual concerned."[195]

Generally, resource allocation decisions that limit agency can be held to infringe upon the dignity of those affected. Furthermore, unfavourable social and economic conditions can stunt capability development, thus deeply violating the inherent dignity of all those concerned.[196] When adjudicating State resource allocation decisions that impact on socio-economic rights, courts should thus ask which capabilities must be realised for the functioning of living a dignified life to be feasible. A resource allocation decision made after engagement with recipients can bolster the agency and dignity of those involved. Similarly, resource allocation decisions must aim to effectively realise socio-economic capabilities that can foster dignified lives. Where these capabilities are left unfulfilled, State conduct and resource allocation decisions must be subjected to strict scrutiny.[197]

The value of dignity thus justifies demands for socio-economic resources while requiring a proportionate response from the State where material needs are not met.[198] If the State is not compelled to prove the reasonableness of its socio-economic resource allocation decisions, this may convey the message that the poor are not worthy of respect or the chance to live with dignity. However, care must be taken to promote a *relational* concept of dignity, which recognises the interdependence between individual and social welfare. This approach may at times necessitate the restriction of individual claims on resources.[199]

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[195] *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA) paras 17-18.

[196] MC Nussbaum *Creating Capabilities* (2011) 30-31.

[197] See S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 17.

[198] 18, 24-25.

[199] 11-13.

2 4 1 3 Substantive equality

The capabilities approach further advocates the equal worth and dignity of all persons.[200] Transformative constitutionalism's goal of substantive equality shares the same tenet by requiring a contextual analysis of structural disadvantage in order to facilitate the treatment of all as equals or as ends in themselves.[201] Human dignity and equality are thus closely related, and need not degenerate into a liberal theory that focuses on "individual personality issues"[202] as opposed to group-based patterns of disadvantage.

A focus on equality of the capabilities we require to choose the type of lives we have reason to value moreover reconciles notions of absolute *versus* relative poverty while incorporating the notion of dignity. Absolute poverty holds that if certain minimum levels of sustenance are fulfilled, poverty is consequently eradicated regardless of remaining inequalities in society, whereas relative poverty holds that even where basic needs can be met, poverty exists where inequality is rife.[203] The harmonisation of these ostensibly divergent concepts can aid courts in importing the value of equality into the normative content of socio-economic rights when adjudicating State resource allocation decisions. Whereas "[d]eprivation of capabilities is absolute... the resources needed to fulfil those capabilities are relative to society".[204] In other words, although resource allocation may not be strictly necessary to ensure survival, it may nevertheless remain crucial "for the avoidance of the shame that accompanies poverty" and the consequent enhancement of human dignity.[205]

Other themes within Sen's theory seemingly call out for application under a transformative constitution and can be easily adapted to enhance the adjudication of State resource allocation decisions. These include a reconceptualisation of just institutional relationships with a focus on the responsibilities incumbent on the judiciary

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[200] MC Nussbaum *Creating Capabilities* (2011) 31.

[201] As opposed to requiring equal treatment. See S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 14.

[202] C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence on Equality" (1998) 14 *SAJHR* 248 258.

[203] S Fredman "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 22 *Stell LR* 566 568-570.

[204] 573.

[205] 573.

under a transformative constitution, the demand for informational broadening as a means of facilitating meaningful participation and an insistence on explicit reasoning.

2 4 2 The responsibility of the judiciary in terms of the separation of powers doctrine under a transformative constitution

Where State resource allocation decisions fall to be adjudicated, separation of powers-related concerns inherent in the adjudication of socio-economic rights become magnified. It is therefore necessary to understand what role the judiciary plays in terms of the separation of powers under a transformative constitution.

Sen's aversion to a transcendental or institutional theory of justice has been evaluated above.[206] However, Sen does not offer a comprehensive alternative vision of institutional justice that can be transplanted into a transformative approach to adjudication, other than by laying emphasis on the importance of reasoning and democracy by public discussion. Nussbaum acknowledges the resultant *lacuna* in the capabilities approach, stating that "[a] major challenge for the Capabilities Approach in the future, then, is to think more systematically about political structure".[207] The political structure in South Africa constitutes a crucial engine for the realisation of transformation through the implementation of capabilities.

2 4 2 1 The need for institutional transformation

Sen's refusal to blindly accept the justness of a given institutional structure[208] accords with our constitutional vision in that transformation entails a "social and economic revolution"[209] that demands constant change.[210] Such change necessarily encompasses institutional reform. How we perceive the institutional structure of our democracy, and the separation of powers under a transformative constitution, will affect the roles and competencies we ascribe to different branches of government. This will, in turn, impact upon the question as to the justiciability of State resource allocation decisions in socio-economic rights adjudication. As Liebenberg appositely states:

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[206] In part 2 3 3 2 above.
[207] MC Nussbaum *Creating Capabilities* (2011) 180.
[208] A Sen *The Idea of Justice* (2009) 82-84.
[209] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 352.
[210] 354.

> "[The separation of powers doctrine] has the potential to frustrate transformation when it assumes an idealist form of strictly demarcated separate spheres, instead of a functional and pragmatic device to facilitate responsible, accountable governance. In its idealised, static form, the separation of powers doctrine may be ritually invoked by the courts as a way of avoiding their constitutional mandate to interpret and enforce constitutionally guaranteed rights."[211]

The separation of powers doctrine should thus be reconceptualised as a dynamic, collaborative relationship among the different branches of government. Certain matters will fall predominantly into the terrain of one branch or another.[212] However, all branches must share the common purpose of transforming society and achieving the purposes of the Constitution. Thus, the legislative branch should draft constitutionally compliant legislation; the executive should formulate constitutional policies aimed at transformation; the administration should act in accordance with the constitutional precept of administrative justice and the judiciary should interpret rights and uphold the Constitution.

2 4 2 2 The role of the judiciary

Sen's failure to accord due attention to the institution of the judiciary detracts from the capabilities approach's transformative potential. The judiciary plays an important role in facilitating the transformation of society through its interpretation of socio-economic rights.[213] As guardians of the socio-economic rights enshrined in the Bill of Rights, South African courts have the ability and responsibility to facilitate deliberation and enforce accountability.[214] The participation thus fostered is crucial for the realisation of fundamental capabilities. The realisation of fundamental, socio-economic capabilities is in turn crucial for the eventual actualisation of more complex functioning combinations. Moreover, the overarching project of fulfilling capabilities cannot be successful unless all stakeholders are dedicated thereto and held accountable for the measures they choose to implement.

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[211] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 67.

[212] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 98.

[213] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 37.

[214] 45.

Where State resource allocation decisions fall to be adjudicated, the judiciary should thus attempt to overcome problems of legitimacy and institutional competence by enhancing participation by various parties, rather than abdicating its constitutional duty by simply deferring to other branches of government.[215] A State resource allocation decision should never be held to be completely non-justiciable based on concerns that could result in the invocation of deference.[216] Rather, by drawing from the capabilities approach, the substantive content and normative purposes underpinning the socio-economic right at issue should be elucidated. This weighting exercise should determine what level of scrutiny is applied to the resource allocation decision in question. Only then should the State's justification, or the lack of availability of resources, enter into the weighting exercise. Where the introduction of these secondary factors highlights institutional or legitimacy concerns, courts should attempt to overcome such through various judicial strategies.[217]

The refusal to seriously entertain claims that necessitate the adjudication of State resource allocation decisions is in conflict with both transformative constitutionalism and the capabilities approach. It amounts to a negation of the purposes for which socio-economic rights were included in the Constitution as justiciable rights.

2 4 3 Participation and informational broadening

South Africa's transformative Constitution requires that participation be fostered in all spheres of government and in all decisions that may impact on the rights and interests of the South African people.[218] Langa eloquently describes transformation:

> "Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected."[219]

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[215] See further D Brand "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 622-625, 631-632.

[216] For a critical evaluation of the doctrines of non-justiciability and deference in the United Kingdom, see chapter three part 3 2 3 2 below. K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 25-26.

[217] Discussed further in chapter six part 6 3 below.

[218] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 155; D Brand "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 622-623.

[219] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354.

Liebenberg echoes this understanding of transformation by emphasising the centrality of democratic deliberation to the transformation agenda.[220] In particular, the processes through which deliberation occurs should accommodate a diversity of perspectives and interests.[221] However, for this to become a reality, a redistribution of resources is required.[222] Just State resource allocation decisions are therefore necessary to foster meaningful participation; such resource allocation decisions should themselves result from participatory decision-making and should subsequently fall to be adjudicated by a judicial process that promotes participation. Thus it emerges that participation is crucial for transformation and social justice generally, and for the adjudication of State resource allocation decisions in particular.

Participation is likewise central to Sen's capabilities approach and is manifested in the public reasoning required to evaluate and rank capabilities and varying levels of justice or injustice.[223] Sen views debates regarding the ordering of capabilities as forming part of democratic participation.[224] Furthermore, participation can result in the formation of social values over time:

> "[T]he freedom to participate in critical evaluation and in the process of value formation is among the most crucial freedoms of social existence. The choice of social values cannot be settled merely by the pronouncements of those in authority who control the levers of government."[225]

2 4 3 1 Promoting participation at all stages of the adjudicative process

The realisation of socio-economic capabilities, combined with the optimisation of deliberative democracy and the enforcement of accountability can be achieved with

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[220] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 29, 32.

[221] 32.

[222] 32.

[223] Sen notes the close relationship between democracy by public discussion and justice: "If the demands of justice can be assessed only with the help of public reasoning, and if public reasoning is constitutively related to the idea of democracy, then there is an intimate connection between justice and democracy, with shared discursive features." A Sen *The Idea of Justice* (2009) 326.

[224] A Sen *Development as Freedom* (1999) 34.

[225] 287.

reference to Rodríguez-Garavito's model of dialogic activism.[226] This model advocates the judicial implementation of strong (substantively interpreted) rights, moderate (participatory) remedies and strong monitoring.[227] The first stage of this model allows for a capabilities-based weighting exercise during which the content of the socio-economic right at stake dictates to what level of scrutiny a State resource allocation decision should be subjected. The remedial and supervisory stages of this model furthermore allow for an emphasis on participation and public discussion – two elements that are central to the capabilities theory.

According to this approach, participation and accountability can be bolstered where courts substantively interpret rights and issue participatory remedies according to which the State is responsible for formulating just allocative decisions within the normative parameters set by the court. Crucially, to ensure both participation and accountability, moderate remedies must be accompanied by judicial supervision, where courts can assess the implementation of their orders and of socio-economic rights more broadly. It is during the supervisory process that the ambit of participating parties can be significantly widened to include non-governmental organisations, activists and others whose rights may be implicated but were not originally before the court.[228] This results in the expansion of the information available to the court in order to effect meaningful socio-economic capability implementation while simultaneously leaving room for revision. Where polycentric concerns actualise or the broadening of available information leads to conclusions different from those arrived at in the original judgment, the supervisory process can help ensure that the implementation of the judgment can be revised if necessary.[229]

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[226] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1688.

[227] 1692.

[228] 1691-1692.

[229] See generally chapter six regarding the use of the structural interdict to ensure effective capability realisation by incorporating the central capabilities theory tenets of explicitness and participation as informational broadening. The retention of supervision helps ensure the efficacy of the remedy.

2 4 3 2 Informational broadening

As was alluded to above, the entire capabilities approach[230] is predicated on the informational base used to make evaluative judgments.[231] According to Sen, informational broadening can serve to establish coherent criteria for social and economic assessment.[232] It follows that where courts orchestrate the ranking of capabilities in the context of an impugned State resource allocation decision, informational broadening can aid in the crystallisation of norms or benchmarks by which such allocative decisions can be judged in the future.

As discussed above, Sen's conception of reasoning holds that although judgments should be final, they should also be revisable.[233] Consequently, as participation develops value formation – or criteria whereby the reasonableness of State resource allocation decisions can be judged – judgments can accommodate changing *mores* and varied contextual realities.[234] Courts should thus be cognisant of the factual, lived socio-economic context of any case before it while simultaneously determining a response thereto with reference to the normative purposes underpinning our constitutional democracy.

It is crucial that when adjudicating a State resource allocation decision, no relevant perspective should be excluded from the evaluative exercise. Sen argues that in addition to the interests of those parties directly involved in a dispute, the perspectives of other parties who can shed light on particular judgments should also be included.[235] Judgments should thus be arrived at after considering a diversity of perspectives.[236] This emphasis on participation and informational broadening is harmonious with a

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[230] As opposed to an approach that focuses on liberty, utility, wellbeing or real income.

[231] A Sen *Development as Freedom* (1999) 56-57.

[232] 253, 286.

[233] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 109; A Sen *The Idea of Justice* (2009) 107.

[234] In the context of socio-economic rights, the need for a flexible response to changing circumstances is encapsulated by the concept of progressive realisation enshrined in ss 26(2) and 27(2) of the Constitution. As more resources become available and circumstances change over time, access to socio-economic rights should be made available to a broader range of people as obstacles to access are removed. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45.

[235] A Sen *The Idea of Justice* (2009) 44.

[236] 109.

conception of the judiciary and judicial process under a transformative constitution.[237] However, to truly foster participation and give voice to a diversity of perspectives, access to courts should be facilitated. Furthermore, the formal adherence to the adversarial process should give way to broader rules of standing and greater ease of intervention by, for example, *amici curiae*. Finally, innovative remedies and supervisory processes can likewise facilitate informational broadening while ensuring revisability as circumstances change during the implementation phase following a judgment.

2 4 3 3 The limits of participation in the courtroom

However, there are limitations to the degree that the judiciary can foster participation. Concerns regarding polycentricity arise in relation to the adjudication of State resource allocation decisions, since a judgment on a specific instance of resource allocation could result in unforeseen consequences for other budgetary allocations. Unforeseen consequences for budgetary allocations could result where groups in need of State resources are left unrepresented in litigation. Where such groups do not enjoy the opportunity to participate in litigation that leads to the adjudication of State resource allocation decisions, revised allocation policy may not take their needs into account. A participation deficit in the adjudication of State resource allocation decisions can therefore perpetuate under-inclusive allocative choices. However, concerns of polycentricity should not result in automatic non-justiciability, but should lead a court to carefully scrutinise any justificatory arguments proffered by the State for inadequate resource allocation.[238] Courts can further mitigate these concerns by issuing orders that require the participation of a broader range of parties than those originally involved in the litigation.

Courts can also limit participation by declining to adjudicate certain issues.[239] When this occurs, a court effectively removes itself from the role that it can play as constituting a forum for public discussion and reasoning. A strategy of deference thus defeats the participatory purposes inherent in the vision of transformative constitutionalism. Courts can promote just resource allocation decisions while

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[237] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 105.

[238] See JA King *Judging Social Rights* (2012) 192-194.

[239] D Brand "The 'Politics of Need Interpretation' and the Adjudication of Socio-economic Rights Claims in South Africa" in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17 25.

stimulating public debate by choosing to substantively interpret socio-economic rights instead of merely holding the State to account for "procedural good governance standards".[240] Where concerns regarding a lack of institutional competence of the judiciary or a significantly polycentric dispute arise, courts should still provide a substantive, normative interpretation of socio-economic rights while simultaneously devising remedies that can ensure stakeholder input.

Ultimately, the transformative potential of the courts to enable greater participation through the enforcement of socio-economic rights – and to serve as a platform and catalyst for public reasoning – should trump the tensions inherent in rights and democracy. Without the realisation of basic socio-economic capabilities, the achievement of more complex functionings, including those related to political, social and economic participation, is not possible. Furthermore, authoritative pronouncements by the judiciary and its ability to hold the State to account for its socio-economic obligations can serve as political currency whereby public debate and activism can be stimulated. Moreover, and especially where government recalcitrance mars any meaningful participation during policy formulation, courts can compel collaboration and participation through the crafting of innovative remedies and supervisory mechanisms. Means of facilitating deliberation and informational broadening in the courtroom and beyond in order to enable effective adjudication of State resource allocation decisions merit further elaboration and will be discussed in a later chapter.[241]

2 4 4 Explicitness and substantive reasoning

One of the central tenets of transformative constitutionalism is a shift from a culture of authority to a culture of justification, in terms of which all exercises of public power must be justified.[242] This requires that State actors must account for the creation and implementation of socio-economic policy as well as for specific instances of resource allocation decisions. Hoexter notes that the culture of justification entailed by a

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[240] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 49, 53.

[241] Chapter six part 6 4 1.

[242] E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

transformative constitution is clearly exemplified by the right to administrative justice enshrined in section 33 of the Constitution.[243] However, a culture of justification encompasses more than requiring justification from just the executive and legislative branches of government and the administration. Instead, as Quinot succinctly puts it, "[c]ourts are… required to both extract justification and reflect justification".[244]

The judiciary under a transformative constitution is thus bound to demand justification from other branches of government while simultaneously adhering to the requirements of a culture of justification through the manner in which it adjudicates disputes. This can be achieved through the use of a method of "transformative adjudication", whereby substantive, purposive reasoning triumphs over the restrictive practise of formalistic reasoning that can allow courts to avoid their adjudicative responsibilities.[245] By justifying judgments with reference to the substantive content and underlying norms and values of constitutional rights, courts can contribute to the project of transformative constitutionalism.[246] Langa pertinently sums up transformative constitutionalism's demand for substantive reasoning:

> "The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."[247]

Embracing a commitment to substantive reasoning implies the articulation of the underlying considerations and values that lead to certain judicial outcomes. This can, in turn, allow the judiciary to come to terms with its constitutional obligation to promote social justice through its adjudicative practices.[248] By bringing underlying

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[243] C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" (2008) 24 *SAJHR* 281 288.

[244] G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *CCR* 111 113.

[245] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 357; C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" (2008) 24 *SAJHR* 281 287.

[246] G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *CCR* 111 113.

[247] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 353.

[248] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 164.

considerations to light,[249] judicial "candour" could promote public scrutiny of the "often hidden political and moral assumptions" that inform adjudication.[250]

The demand for substantive reasoning is accommodated by the concept of "explicitness" in Sen's capabilities approach and theory of justice. Sen argues that instead of obscuring reasoning during evaluative weighting processes in an "implicit framework",[251] explicitness in resolving judgmental questions is preferable. Explicitness furthermore allows for open public scrutiny of valuational judgments where prioritisation takes places in a context of diversity.[252] Consequently, participation is allowed to flourish in the setting of social and economic priorities.

Sen recognises that values and social reasoning often give way to complexities that do not allow for easily formulated axioms. Nevertheless, he advocates the balancing of the benefits of and need for explicitness against the difficulty of translating complexities into axiomatic terms.[253] Furthermore, Sen is not oblivious to the vulnerability of public institutions to succumb to the practice of inarticulate and implicit reasoning:

> "The avoidance of reasoned justification often comes not from indignant protesters but from placid guardians of order and justice. Reticence has appealed throughout history to those with a governing role, endowed with public authority, who are unsure of the grounds for action, or unwilling to scrutinize the basis of their policies."[254]

Sen argues that an approach whereby explicitness and substantive reasoning are avoided can lead to a failure of justice, an absence of accountability and reduced opportunity for participation through public scrutiny.[255]

Where State resource allocation decisions require adjudication in socio-economic rights cases, both the demands of transformative constitutionalism and Sen's capabilities approach and related theory of justice require substantive reasoning. Where courts decline to review an allocative decision, they must clarify why institutional concerns must lead to a strategy of deference that favours the case made by the State

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[249] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 51.

[250] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 164.

[251] A Sen *Development as Freedom* (1999) 75.

[252] 30.

[253] A Sen *The Idea of Justice* (2009) 109-110.

[254] 4.

[255] 5.

at the expense of litigants whose socio-economic capabilities are at stake.[256] Furthermore, where a State resource allocation decision is held to be reasonable, or its scope is justified due to scarce resources, substantive reasoning similarly demands reference to the capabilities and purposes represented by socio-economic rights.

2 5 Conclusion

This chapter has shown that the capabilities approach as developed by Sen and Nussbaum can be harnessed to constitute a theoretical justification for the judicial review of State resource allocation decisions that impact on socio-economic rights. On a general level, the focus that the capabilities approach places on the freedom that people actually enjoy to choose the lives they have reason to value resonates with the inclusion of socio-economic rights in the Constitution. Furthermore, Sen's theory places State resource allocation decisions into a capabilities perspective and justifies a wide interpretation of "available resources".

Significantly, Sen proposes a framework for the valuation and weighting of diverse and oft-competing capabilities. This valuational framework can be developed with reference to Nussbaum's scholarship to constitute a review paradigm for the adjudication of State resource allocation decisions. According to this model, the Constitution establishes a partial ordering of important capabilities through its inclusion of socio-economic rights and the right to just administrative action. In order to review allocative decisions, courts must narrow the range of weights assigned to capabilities and other factors with reference to the historical, social and factual context of the case at hand. This evaluative exercise is largely congruent with the model of reasonableness review adopted by the Constitutional Court for the adjudication of socio-economic rights and the right to just administrative action. However, it is imperative that a two-stage analysis is adhered to, according to which the content of the relevant socio-economic right is established before a particular allocative decision or a justificatory argument proffered by the State is reviewed.

The value of a capabilities approach to adjudication is that the content of socio-economic rights can be determined with reference to the overarching functioning outcome that these rights aim to achieve. The normative purposes of socio-economic

[256] D Brand "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 221.

rights can be broadly defined as achieving the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. When considered along with the historical, social and factual context of the case at hand, specific capabilities that need to be realised in order for the functioning outcome to be achieved, will become apparent. The weighting of capabilities at this stage will indicate which level of scrutiny should be adopted to review a given allocative decision. Thereafter, the reasonableness or deficiency of allocative choices can be adjudicated. Importantly, the entire valuational process occurs through a process of public reasoning. The capabilities approach thus constitutes a theoretical justification for the review of allocative decisions, while simultaneously offering a practical method for applying a two-stage rights analysis to the adjudication of such decisions. The intricacies of a capabilities-based standard of review are elucidated in chapter five.

A capabilities approach to the review of State resource allocation decisions can promote the purposes of transformative constitutionalism. Such an adjudicative approach must likewise take into account the fundamental tenets of transformative constitutionalism. Key linkages that exist between a capabilities approach to adjudication and adjudication under a transformative constitution have therefore been elucidated. First, the foundational constitutional values of freedom, dignity and equality are central to both a project of transformative constitutionalism and a capabilities approach to adjudication. These values will consequently play an important interpretative role when courts weight capabilities and other factors in order to scrutinise State resource allocation decisions.

Second, transformative constitutionalism requires a reconceptualisation of the separation of powers doctrine to recognise a more collaborative partnership between all branches of government. Similarly, Sen's theory of justice implores us to evaluate the actual consequences of institutions, instead of merely assuming the justness of institutional structures. Whereas Sen accords insufficient weight to the role that the judiciary can play in prioritising capabilities and so promoting the ends of justice, Nussbaum illustrates that the values underlying the capabilities approach can be fleshed out through incorporation into a constitution and subsequent elaboration by the courts. The role of the judiciary as the ultimate guardian of constitutional rights under a thus reconceived notion of the separation of powers must be acknowledged.

Third, participation is a crucial element of transformative constitutionalism. Public reasoning, participation and informational broadening occupy a similarly significant place in a capabilities approach to adjudication. Courts should thus scrutinise allocative

decisions in order to determine whether allocations were arrived at after engaging in participatory processes and whether the allocations are aimed at promoting participation in all spheres of life. Courts should simultaneously support participatory judicial processes by broadening the range of interests before it to the greatest extent possible. This challenge can be met at the remedial stage of adjudication by designing participatory remedies that involve a wide range of stakeholders during the supervisory phase of remedial action. This important implication of a capabilities approach to adjudication is fully explored in chapter six.

Finally, when a State resource allocation is reviewed, the State should provide explicit evidence of how it arrived at and implemented its allocative decision. It is equally important for courts to engage in substantive, explicit reasoning when weighting capabilities and reviewing allocative decisions. Such substantive, explicit reasoning should extend to the remedial phase of adjudication. Paradoxically, formalistic reasoning stands at odds with the ethos of transformative constitutionalism and the capabilities theory.

The following chapter will critically evaluate the approach of the judiciaries in the United Kingdom and India in respect of the judicial review of State resource allocation decisions that impact on socio-economic interests.

Chapter 3: Adjudicating resource allocation decisions in the United Kingdom and India: Strengths and weaknesses

3 1 Introduction

The previous chapter expounded the suitability of the capabilities theory as a theoretical paradigm that justifies and aids the judicial review of State resource allocation decisions that impact on socio-economic rights. This chapter critically evaluates the strengths and weaknesses of the judicial approach to the adjudication of resource allocation decisions in the United Kingdom ("UK") and India against the measure of what a capabilities approach to adjudication requires.

Both South Africa and India are common-law jurisdictions that share a genealogical connection with the United Kingdom given their history of colonisation by Britain.[1] The United Kingdom's influence on South African law has been extensive, and it is therefore understandable why our Constitutional Court has referred to English judgments in its own jurisprudence regarding resource allocation decisions impacting on socio-economic rights.[2] Yet whereas the United Kingdom adheres to a system of parliamentary sovereignty, the South African and Indian judiciaries now operate under a system of constitutional supremacy.

The transformative nature of India's supreme constitution makes it apt for normative comparative analysis. In contrast, a normative-dialogical comparative methodology will be used to question whether doctrines applied by the UK judiciary to review resource allocation decisions can still be appropriately relied on by South African courts. This critical analysis is necessary given the material difference in constitutional design and the divergent normative assumptions that underlie the institution of judicial review in the United Kingdom, on the one hand, and South Africa and India, on the other.

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[1] India attained independence from British colonial rule in 1947 and adopted the Constitution of India in 1949 ("Indian Constitution"). For an overview of the drafting process leading to the adoption of the Indian Constitution, see R Abeyratne "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 38 *Brook J Int'l L* 1 25-32. For an explanation of why these two jurisdiction were selected for comparison, see chapter one part 1 6 4 above.

[2] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC). See further chapter one part 1 6 4 1 above.

Neither the United Kingdom nor India explicitly recognises socio-economic rights as justiciable.[3] The method whereby each jurisdiction's judiciary attempts to afford protection to critical socio-economic capabilities in the context of State resource allocation decisions is therefore instructive from the vantage point of South Africa's relatively new constitutional democracy.

The United Kingdom judiciary has traditionally displayed a conservative and formalistic approach to rights adjudication in general, and resource allocation decisions that impact on socio-economic capabilities in particular. The normative assumption that the will of the legislature is supreme, underlies the institution of judicial review and the application of the doctrine of deference. Academic debate regarding the justification for judicial review will be scrutinised for the light it sheds on the arguable deficiencies of the current underlying normative justification for this institution. Administrative law's restricted formulation of reasonableness review, and a judicial tendency to reflexively defer to other branches of government, will be critically evaluated. The underlying constitutional tenet of parliamentary sovereignty furthermore supports a rigid distinction between civil and political rights, on the one hand, and socio-economic rights, on the other – since only rights recognised by the legislature as such are regarded as legitimate. This distinction will be critically analysed. Furthermore, academic proposals to utilise proportionality as a standard head of review will be examined, since proportionality resonates strongly with the weighting exercise inherent in a capabilities approach to adjudication.[4]

The prevalent constitutional framework in India, as well as selected jurisprudence by the Indian Supreme Court,[5] will be evaluated in order to determine whether the Indian adjudicative paradigm is congruent with a capabilities approach to the adjudication of resource allocation decisions. The normative assumption that underlies the institution of judicial review in India is that the Indian Constitution is supreme law that aims to facilitate the socio-economic transformation of society. The interpretative approach followed by the Supreme Court will be scrutinised in order to discern whether capabilities are allowed to determine the intensity of review to which resource

[3] The UK Human Rights Act, 1998 makes no provision for socio-economic rights. Art 37 of the Indian Constitution explicitly states that the Directive Principles of State Policy, which recognise socio-economic capabilities, "shall not be enforceable by any court".

[4] See further chapter five part 5 3 below.

[5] This chapter only analyses the jurisprudence of the Supreme Court, given the proliferation of High Court judgments coupled with easy access to the Supreme Court, resulting in a comprehensive body of jurisprudence.

allocation decisions are subjected. Furthermore, Indian jurisprudence will be critically analysed to establish whether it promotes capabilities-centred participation and explicit, substantive reasoning that can be fruitfully incorporated into South African law. However, weaknesses in the approach of the Indian judiciary will be evaluated in the light of the possible incoherence and unprincipled resort to deference displayed by the Court thus far. Moreover, the arguably fragmented nature of Indian administrative law will be investigated.

Once the comparative evaluation is complete, conclusions will be drawn regarding the negative and positive guidance that South African courts and scholars can draw from the jurisdictions under scrutiny. The normative assumptions that underlie the operation of certain doctrines in both jurisdictions will thus be examined for their congruence with South Africa's project of transformative constitutionalism and a capabilities approach to adjudication.

3 2 The United Kingdom

3 2 1 Introduction

A system of parliamentary supremacy – and not constitutional supremacy – is prevalent in the United Kingdom.[6] In the UK, government power is vast, and the role of the courts has traditionally been subsidiary to that of Parliament. As noted by Lord Steyn, the judiciary is merely charged with interpreting the law, and lacks the power to alter the law as determined by Parliament.[7] Unrestrained parliamentary law-making power is controlled by a presumption that legislation is not intended to upset the rule of law or violate fundamental rights. Ultimately, however, Parliament retains the power to reverse any judicial decision of which it disapproves.[8] Theoretically, therefore, the

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[6] The principle of parliamentary sovereignty was first espoused by Dicey and held a superior constitutional status than the rule of law in his theory. J Jowell "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *PL* 562 562. However, it is important to bear in mind that "[i]n the absence of a constitutional text… the allocation of authority is assumed not by reference to any formal grant, or to the original intent of that grant, but on the basis of a moral claim to its exercise (or limitation)" (565).

[7] Lord Steyn "Deference: A Tangled Story" (2005) *PL* 346 347.

[8] This is also the position under the HRA. S 4(6) of the HRA states with regard to a declaration of incompatibility:

"(6) A declaration under this section ("a declaration of incompatibility") –

counter-majoritarian difficulty and associated concerns of judicial legitimacy should not arise.[9]

Nevertheless, judicial review in the UK remains acutely restricted by a pervasive awareness of parliamentary sovereignty and a concomitant oversensitivity to issues of constitutional and institutional competence.[10] However, there has been some movement, largely driven by academic debate, towards a more capabilities-congruent approach to adjudication. With the advent of the Human Rights Act, 1998 ("HRA"), the rights enshrined in the European Convention on Human Rights[11] ("European Convention" or "Convention") have been incorporated into UK law.[12] Although UK courts were tasked with upholding fundamental rights at common law to a more limited extent prior to the adoption of the HRA, the judicial responsibility to do so is now beyond doubt. This development will be analysed and its potential to posit a rights-based justification for judicial review to replace the *ultra vires* doctrine will be investigated.

Thereafter, the need for adjudicative reform will be evaluated in the light of the highly constraining test of *Wednesbury* unreasonableness and reflexive resort to deference in socio-economic matters. In addition, the rigid distinction between civil and political rights, on the one hand, and socio-economic rights, on the other, will be critically analysed in order to establish whether it prevents the courts from developing a truly capabilities-based approach to the adjudication of resource allocation decisions. The aversive example set by the UK judiciary may thus be regarded as illustrating the

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(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made."

[9] Lord Steyn "Deference: A Tangled Story" (2005) *PL* 346 348.

[10] "Constitutional competence" refers to the legitimate role of institutions such as the judiciary in a democracy. Jowell's elaboration of this concept has been described in chapter two part 2 2 3 1. The concept of "institutional competence" is explained by J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *PL* 448 451 thus:

"The question of *institutional competence* involves a practical evaluation of the capacity of decision making bodies to make certain decisions. It starts with the recognition that some matters are not ideally justiciable. It thus focuses not upon the appropriate role of the judge, but upon the inherent limitations of the process of adjudication. This is because courts are limited in their capacity to decide matters which admit of no generalised or objective determination." (Emphasis added).

[11] 1950 ETS 5; 213 UNTS 221.

[12] Whereas judicial review has always been a remedy in the UK, judicial review under the HRA now constitutes an alternative to ordinary, common-law judicial review.

pitfalls that other common-law jurisdictions should avoid when grappling with the issue of how best to advance socio-economic capabilities without encroaching upon the traditional preserve of other branches of government.[13]

Finally, calls for adopting proportionality as a uniform head of review will be evaluated in order to establish whether by employing a structured analysis, the intensity of which is determined by the capability at issue, government resource allocation decisions can be fairly and effectively adjudicated.

3 2 2 The effort to develop rights-based review

In the UK, no written constitution with a justiciable bill of rights exists to create a focal space or partial ordering in which capabilities, resource allocation decisions and other factors can be weighted. The absence of a written constitution has led to a protracted debate regarding the justification for judicial review. Such justification is important in terms of what it tells us about the nature of constitutional democracy in the UK. It therefore highlights the normative assumption that underlies the institution of judicial review in the UK, and the impact that this over-arching assumption has on the formulation of standards of judicial review, the application of deference and the distinction drawn between civil and political rights and socio-economic interests.

3 2 2 1 The ultra vires doctrine

On the one end of the spectrum of the debate regarding the justification for judicial review are those who believe that the *ultra vires* doctrine ultimately provides the most accurate and constitutionally stable justification for judicial review.[14] The *ultra vires* doctrine casts no doubt on the supremacy of Parliament, and holds that it is *Parliament* that determines the principles of judicial review. When interpreting legislation or reviewing the conduct of public bodies, courts are therefore in fact merely enforcing legislative intent. According to this doctrine, the judiciary is unquestionably subordinate

[13] For a discussion of the comparative value of analysing “aversive” examples found in foreign jurisdictions in terms of a normative-dialogical methodology, see chapter one part 1 6 4 3 1.

[14] C Forsyth “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 29; M Elliot “The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law” in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 83.

to Parliament and is merely an instrument for the implementation of the legislature's will.[15]

The modified *ultra vires* doctrine recognises the creative role of the judiciary in specifying principles of good administration, but nevertheless replaces the concept of "specific legislative intent" with that of "general legislative intent". Specific legislative intent purportedly indicates in a particularised manner what principles of judicial review should be applied. Courts therefore sought to discover such specific parliamentary intent in concrete cases in order to justify judicial review.[16] In contrast, general legislative intent is *implied* consent by Parliament for courts to develop the principles of judicial review, and thus specific consent need not be discovered in particular cases.[17] According to the modified *ultra vires* doctrine, general legislative intent is said to govern the application and existence of the principles constituting the rule of law and justifies judicial review. Where general legislative intent is absent, judicial review flouts parliamentary sovereignty.[18]

It emerges that a two-stage capabilities-based model of review, according to which the importance of the capabilities at stake and the severity of their infringement should determine the level of scrutiny to which an impugned resource allocation decision is subsequently subjected,[19] will be difficult to justify under either of the *ultra vires* doctrine's incarnations. An exclusive focus on the will of Parliament, coupled with the unequivocally subservient role of the judiciary, will likely result in the unprincipled resort to deference to the legislature. Moreover, this conceptualisation of the nature of judicial review pushes the content and normative purposes of rights to the margins, instead of using rights as a starting point for weighting competing factors. Where the intention of

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[15] J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *PL* 448 448; J Jowell "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *PL* 562 573; P Craig "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *PL* 92 93.

[16] P Craig "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *PL* 92 93.

[17] Where the legislature is silent, "a presumption of continuing consent by Parliament to be bound by the rule of law as elaborated by the courts" is inferred by the courts. J Jowell "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *PL* 562 573.

[18] J Jowell "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *PL* 562 574-575; P Craig "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *PL* 92 93; M Elliot "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 83 101, 108-109.

[19] See chapter two part 2 3 2 2 1 above.

the legislature can be shown to support a resource allocation decision that impacts gravely on a socio-economic capability, such decision will nevertheless survive judicial scrutiny under the *ultra vires* doctrine.

3 2 2 2 A common-law, rights-based model

In response to the analytical and normative problems inherent in both manifestations of the *ultra vires* doctrine, scholars including Craig, Jowell and Oliver have posited a common-law justification for judicial review.[20] According to the common-law model of justification, courts assume an independent role from that of the legislature. Balance is restored to the separation of powers through the acknowledgment that courts and the legislature *share* power. This approach thus perceives principles of judicial review as a common-law creation located in notions of the rule of law, justice, rights, legality and abuse of power. The common-law approach is therefore more realistic regarding the true source of review. Furthermore, it avoids the artificiality and indeterminacy that characterise the *ultra vires* doctrine.[21]

The stark contrast between the two positions constituting the debate regarding the justification for judicial review (ie the *ultra vires* doctrine *versus* the common-law, rights-based model) illustrates an underlying normative divergence regarding the foundations of constitutional law in the UK. Significantly, the common-law model provides a *segue* into rights-based review that is more congruent with a capabilities approach to adjudication than the *ultra vires* doctrine has allowed in the past. Furthermore, to the extent that rights are permitted to assume a central role in any weighting analysis, the potential for rigorous scrutiny of resource allocation decisions is increased.

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[20] P Craig *Administrative Law* 7 ed (2012) 10-27; P Craig "Ultra vires and the Foundation of Judicial Review" in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 47; P Craig "Competing Models of Judicial Review" in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 373; J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *PL* 448; J Jowell "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) *PL* 562; D Oliver "Is the Ultra Vires Rule the Basis of Judicial Review" in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 3. See J Laws "Law and Democracy" (1995) *PL* 72; Lord Woolf "Droit Public – English Style" (1995) *PL* 57.

[21] P Craig *Administrative Law* 7 ed (2012) 15; J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *PL* 448 449.

Simultaneously, a rights-based approach to judicial review may promote a culture of justification.[22]

Craig has developed a rights-based approach according to which legislation and administrative action should be interpreted to conform to fundamental rights. A rights-based approach demands heightened levels of scrutiny and more thorough justifications for legislation and conduct that may encroach on fundamental rights. Craig recognises that this approach will necessarily require judicial choices regarding the meaning to be attributed to fundamental rights, in particular the extent of protection that socio-economic interests should enjoy.[23]

Significantly, Craig points out that the inherent limitations of the adversarial process do not render polycentric disputes, including those related to resource allocation, judicial "no go areas".[24] Although he concedes that differences exist between judicial review and political forums for debate, Craig nonetheless contends that the superiority of political processes should not be assumed.[25] Value-driven judicial review can therefore be penetrating enough to contribute to the elucidation of capabilities. In addition, the role of the courts in facilitating the broadening of information through participatory processes and promoting explicit, substantive reasoning should be acknowledged.[26] These considerations, related to "principles of good administration", are accommodated by Craig's approach.[27] Craig argues that courts can both ensure that participation occurred in the initial decision by the administrative body and promote participation in the judicial process itself by construing rules relating to standing and intervention broadly.[28]

Craig submits that a rights-focused, common-law basis for review need not challenge parliamentary sovereignty, even though reasons for the alteration of the model may exist.[29] Craig further postulates that even if the necessity to mitigate parliamentary sovereignty is conceded, such can be accommodated through the adoption of heightened levels of scrutiny and rights-based canons of construction, and

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[22] For the importance of a culture of justification under a transformative constitution, and the role of substantive legal reasoning in achieving it, see chapter two part 2 4 4 above.

[23] P Craig *Administrative Law* 7 ed (2012) 17.

[24] 25.

[25] 25.

[26] See chapter two part 2 4 above.

[27] P Craig *Administrative Law* 7 ed (2012) 17.

[28] 24.

[29] P Craig "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *PL* 92 107.

need not entail the judicial power to invalidate legislation.[30] Craig regards the rule of law as substantive, in the sense that it gives rise to a spectrum of substantive rights.[31] All rights-based claims against government are thereby encompassed by the rule of law, although the substantive conception of the rule of law is not consistent with only one theory of justice.[32]

Where clear legislative intent seriously threatens fundamental rights, and thereby jeopardises the rule of law itself, Lord Woolf's statement is apposite:

> "[I]f Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent… [T]here [are] advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold… They are no more than are necessary to enable the rule of law to be preserved."[33]

A "gradual re-ordering of… constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law"[34] is therefore required to bring the common-law approach even more in line with an approach whereby *capabilities* are of central import for the exercise of judicial review. Only once fundamental rights are regarded as truly sovereign, will the importance of resource allocation decisions aimed at the realisation of socio-economic capabilities be put into perspective. Craig's approach provides an excellent platform from which nuanced development towards a truly capability-centred approach to the adjudication of resource allocation decisions can be undertaken. However, this approach by no means obviates the need for wide-spread adjudicative reform.

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[30] 107-111.

[31] P Craig *Administrative Law* 7 ed (2012) 19-20.

[32] P Craig "Constitutional Foundations, the Rule of Law and Supremacy" (2003) *PL* 92 96-98.

[33] Lord Woolf "Droit Public – English Style" (1995) *PL* 57 69. See also J Laws "Law and Democracy" (1995) *PL* 72 92.

[34] Lord Justice Laws "Illegality: The Problem of Jurisdiction" in C Forsyth (ed) *Judicial Review and the Constitution* (2000) 73 77.

3 2 3 The need for adjudicative reform

3 2 3 1 A legacy of Wednesbury unreasonableness

For decades, administrative law in the UK has struggled to emancipate itself from the shackles imposed by the Court of Appeal's decision in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*[35] ("*Wednesbury*"). In that judgment, the court severely restricted reasonableness review of administrative action when it stated:

> "[I]f a decision on a competent matter is *so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere* ... but that would require *overwhelming proof*... [A decision] must be proved to be unreasonable in the sense, not that it is what the court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether. The court may very well have different views from those of a local authority on matters of high public policy of this kind ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another... provided .... [that the administrative authorities] *act ... within the four corners of their jurisdiction*, *the court ... cannot interfere*."[36]

The near impossible threshold for a determination of unreasonableness imposed by *Wednesbury* was later exacerbated when Lord Diplock held that an unreasonable decision is "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[37]

Although a test for proportionality is applied in so far as rights-based claims under the HRA are at issue,[38] borderline cases where the implication of a recognised right

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[35] [1948] 1 KB 223.

[36] 233-234 (emphasis added).

[37] *Council for Civil Services Union v Minister of Civil Service* [1984] 3 All ER 935 951.

[38] Confirmed in *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26, see especially the judgment of Lord Steyn paras 24-28. Prior to the advent of the HRA, fundamental rights-based claims were subjected to "anxious scrutiny" as formulated in *R v Ministry of Defence, ex parte Smith* [1996] QB 517. However, a review standard of "anxious scrutiny" did not require a deviation from *Wednesbury* reasonableness. See further E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 157-161; P Craig *Administrative Law* 7 ed (2012) 622-623.

incorporated in terms of the HRA is debatable, remain cause for concern.[39] Since the utilisation of resources is central to administrative decision-making,[40] judicial review of resource allocation decisions that implicate non-recognised socio-economic capabilities may be rendered impotent.

It is clear that *Wednesbury* sets a standard for unreasonableness that will rarely, if ever, be met.[41] Craig notes in this regard that the consequences of any legal test must be evaluated in terms of real world circumstances, and that the *Wednesbury* test may be near-impossible for claimants to meet.[42] Moreover, it reflects a highly deferential standard that places the burden of presenting "overwhelming proof" on the individual litigant while severely circumscribing the role of the courts in interfering with administrative action. Adhering to *Wednesbury* will hinder courts from aiding the realisation of crucial socio-economic capabilities when called upon to adjudicate a government resource allocation decision. Apart from setting an impractically high standard of unreasonableness, the test directs courts to focus on the conduct of government and its justificatory arguments to an almost exclusive degree. Little room is left to take account of the normative and factual context of a given case[43] and to thereby substantively interpret the right at stake.

A decisive move away from *Wednesbury* unreasonableness in favour of a more flexible proportionality standard of review is thus required if the UK is to progress to the point where rights, and the capabilities they should give rise to, form the core of judicial review.[44]

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[39] P Craig "Proportionality, Rationality and Review" (2010) *New Zealand L Rev* 265 272-273.

[40] E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 162.

[41] J Jowell "In the Shadow of Wednesbury" (1997) *JR* 75 75; P Craig "Proportionality, Rationality and Review" (2010) *New Zealand L Rev* 265 274, 275; E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 158, 161; C Hoexter *Administrative Law in South Africa* 2 ed (2012) 346.

[42] P Craig *Administrative Law* 7 ed (2012) 665.

[43] See TRS Allan "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 *Cambridge LJ* 671 686. However, in arguing that a theory of deference has no place in a constitutional democracy, Allan appears to endorse *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA) to the extent that it serves to appropriately delineate a separation of powers, thereby obviating the need to resort to deference. It is submitted that Allan is incorrect in this regard and that *Wednesbury* unreasonableness can amount to the same abdication of judicial responsibility as automatic resort to deference does.

[44] See parts 3 2 2 and 3 2 4.

3 2 3 2 From non-justiciability to deference

3 2 3 2 1 The doctrine of non-justiciability

Prior to the advent of the HRA, a "doctrine of non-justiciability" operated where an allocation of resources was challenged on the basis of *Wednesbury* unreasonableness.[45] Courts thereby defined matters of public finance as "no go areas" which lay within the exclusive competence of the elected branches of government and administrators.[46] As McLean observes, the judicial determination that a matter is non-justiciable amounts to "extreme" or absolute deference.[47] Troublingly, the doctrine of non-justiciability applied even where fundamental rights were implicated.[48] It follows that where judges wholly refuse to engage with the normative and factual context at issue, they eschew a capabilities approach to adjudication. The relevant capabilities are left unacknowledged and rights remain uninterpreted.[49] Moreover, the absence of reasoning in failing to adjudicate a particular resource allocation decision negates the role of the judiciary under the separation of powers,[50] shuts down any possibility of meaningful participation,[51] and eliminates a space for substantive, explicit discussion, debate and reasoning.[52]

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[45] King distinguishes between "discretionary allocative decision-making", which is non-justiciable, and in which the cost of the allocation features as a consideration affecting the correctness of the decision; and "allocative impact", where the decision imposes a burden on resources, but which is nonetheless justiciable. See generally JA King "The Justiciability of Resource Allocation" (2007) 70 *MLR* 197.

[46] E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 162. See further *Nottinghamshire County Council v Secretary of State for the Environment and another appeal* [1986] AC 240 (HL) and *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521 (HL), where local councils challenged expenditure targets established by the Secretary of State for the Environment. The House of Lords declined to review matters of economic policy in both instances.

[47] K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 26.

[48] E Palmer *Judicial Review, Socio-economic Rights and the Human Rights Act* (2007) 162-163.

[49] See chapter two and especially part 2 4 above.

[50] See chapter two part 2 4 2 above.

[51] See chapter two part 2 4 3 above.

[52] See chapter two part 2 4 4 above.

Given the grave impact that a position of absolute deference can exert on capabilities, a doctrine of non-justiciability is not tenable within a democracy that values fundamental rights. This is perhaps most pertinently illustrated by the Court of Appeal's judgment in *R v Cambridge Health Authority, ex parte B*[53] ("*Ex parte B*"). In deciding the review of the health authority's decision not to provide cancer treatment to a ten year old girl, Sir Thomas Bingham MR held:

> "Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court."[54]

The doctrine thus operated to rule out any engagement with the capabilities underlying a claim that a resource allocation decision was unfair. Even if the outcome of *Ex Parte B* was justified, the refusal to at least demand a cogent explanation for the health authority's prioritisation and subsequent decision was not. Regrettably, the Court of Appeal took a regressive stance when it overruled the court of first instance, in which prior judgment Laws J had held that where a fundamental interest such as life is at stake, the decision-maker "must do more than toll the bell of tight resources... they must *explain* the priorities that have led them to decline to fund the treatment".[55] A culture of justification, which is desirable in any democracy, as well as a capabilities approach to adjudication were seriously impeded by the Court of Appeal's subsequent decision.

Even where courts ostensibly departed from *Ex Parte B*,[56] the relevant judgments are characterised by an overwhelming awareness of parliamentary sovereignty, manifested in a statutory-based approach to review instead of an approach that is rights- or capabilities-based.[57] Thus, in *R v East Sussex County Council, ex parte*

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[53] [1995] 2 All ER 129 (CA).

[54] 137. See also *R v Gloucestershire County, ex parte Barry* [1997] AC 584, [1997] 2 All ER 1, where mandatory duties were interpreted as mere powers in an effort to alleviate any burden on financial resources of local authorities providing residential care services to the elderly.

[55] *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) 137 (emphasis added).

[56] In line with the distinction drawn by JA King "The Justiciability of Resource Allocation" (2007) 70 *MLR* 197.

[57] See further part 3 2 2 2 above regarding the common-law based justification for judicial review and the ability of a substantive conceptualisation of the rule of law to accommodate fundamental rights-based claims.

Tandy[58] ("*Tandy*"), a departure from *Ex parte B* was effected through formalistic statutory interpretation[59] and not through an open-ended and normative analysis of the rights and interests at play. *In casu*, the reduced provision of home education to sick children was at issue.[60] Since only two other children were similarly affected by the policy under review in *Tandy*, the financial impact of the judgment was negligible. Therefore, the House of Lords was not compelled to weigh the importance of the underlying interest against any resource-based arguments raised by the local authority. In any event, no meaningful weighting exercise can occur where formalistic, artificial reasoning is routinely used as a shield against the demands that a normative, rights-based approach elicits from the judiciary. It follows that even when, in the wake of *Tandy*, lower courts felt empowered to produce rights-based outcomes,[61] the catalytic effect that jurisprudence can have on issues of structural social injustice remains severely restricted.

[58] [1998] AC 714, [1998] 2 All ER 770.

[59] E Palmer "Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law" (2000) 20 *OJLS* 63 83. In fact, the House of Lords in *R v East Sussex County Council, ex parte Tandy* [1998] AC 714, [1998] 2 All ER 770 777 endorsed *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) when it stated:

> "Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to review. The court cannot second-guess the local authority in the way in which it spends its limited resources."

[60] In terms of a capabilities approach to review, the fertile capability constituted by education would have justified the adjudication of the resource allocation decision within the normative and factual context of the case without the need to resort to artificial statutory construction to justify such a robust approach. See chapter two part 2 3 2 2 3 regarding the fertile nature of certain capabilities.

[61] See, for example, *R v Birmingham City Council, ex parte Mohammed* [1998] 3 All ER 788 and *Royal Borough of Kensington and Chelsea, ex parte Kujtim* [1999] 4 All ER 101. In her discussion of these and other judgments, Palmer notes that although these cases "fall squarely within the statutory paradigm of review, their outcomes are consistent with the protection of the rights of vulnerable individuals in welfare needs contexts". E Palmer "Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law" (2000) 20 *OJLS* 63 85.

3 2 3 2 2 Deference

(a) The potential to collapse deference and non-justiciability

Since the entry into force of the HRA, the doctrine of non-justiciability has been discarded in human rights cases and replaced (arguably haphazardly) with the concept of deference or the recognition of a "discretionary area of judgment" for decisions by government.[62] In cases where the implication of a recognised right has called for a weighting exercise to be judicially conducted, courts have invoked concerns regarding their constitutional and institutional competence – as well as the potential polycentricity of resource allocation decisions – to justify resort to deference.[63] Although the language of deference now at least partially recognises the underlying concerns for declining to adjudicate resource allocation decisions, it is possible that deference can lapse into a judicial attitude of non-justiciability. The *obiter* statement of the Court of Appeal in *R (on the application of Anne Marie Rogers) v Swindon NHS Primary Care Trust, Secretary of State for Health*[64] illustrates this danger:

> "[T]his case would be very different if the [decision-maker] had decided that as a matter of policy it would adopt the Secretary of State's guidance that applications should not be refused solely on the grounds of cost but that, as a hard-pressed authority with many competing demands on its budget, it could not disregard its financial restraints and that it would have regard both to those restraints and to the particular circumstances of the individual patient in deciding whether or not to fund ... treatment in a particular case. *In such a case it would be very difficult, if not impossible, to say that such a policy was arbitrary or irrational*."[65]

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[62] JA King "The Justiciability of Resource Allocation" (2007) 70 *MLR* 197 220-221; *R v Director of Public Prosecutions, Ex Parte Kebeline* [2000] 2 AC 326 380-381; *Alconbury* [2001] UKHL 23; [2001] 2 All ER 929 paras 69-70; *Brown v Stott* [2001] 2 WLR 817 834-835. See also P Craig *Administrative Law* 7 ed (2012) 618-621.

[63] *Donoghue v Poplar Housing & Regeneration Community Association Ltd* [2001] EWCA Civ 595 para 69.

[64] [2006] EWCA Civ 392, [2006] 2 WLR 2649.

[65] Para 58 (emphasis added).

(b) Defining the boundaries of legitimate judicial intervention

An overriding awareness of parliamentary sovereignty and the circumscribed role of the judiciary has often manifested itself in attempts to draw bright line divisions between law (on which courts may pronounce and to which the judiciary is itself subject to) and politics (which are best left to the "legitimate" branches of government). Thus, where difficult choices arise between individual rights and the interests of the larger community,[66] courts have attempted to define such cases as "political" thereby requiring only political – and not legal – resolution.[67] Courts have even gone so far as to suggest that the question of when to defer – as well as the illegitimacy of the judiciary to pronounce on matters of resource allocation – are themselves legal principles that must be upheld. Seeking to justify judicial abstention from adjudication, Lord Hoffman stated in *R (on the application of ProLife Alliance) v British Broadcasting Corporation*:[68]

> "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... The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in article 6 of the Convention. On the other hand, *the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law*."[69]

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[66] The European Convention and the HRA make some allowance for these types of conflicts through the inclusion of generally qualified (Arts 8-11 of the European Convention) and specifically qualified (Arts 2 and 5 of the European Convention) rights. Where these rights are implicated, the application of a proportionality enquiry seeks to balance conflicting interests. The position in the UK in respect of unqualified rights (Arts 3, 4, 6, 7 and 14 of the European Convention) is more controversial, but it is likely that a proportionality enquiry or some form of deference will be allowed to limit these rights in certain circumstances despite their unqualified nature. See further in this regard A Kavanagh *Constitutional Review under the UK Human Rights Act* (2009) 257-267.

[67] *A v Secretary of State for the Home Department* [2004] UKHL 56 para 29:

> "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."

See also para 38.

[68] [2003] UKHL 23.

[69] Para 76 (emphasis added).

The proposition that resource allocation decisions should not be subject to judicial review *as a matter of law* holds vast implications for the institution of judicial review in general, and for fundamental rights in particular. Lord Steyn, writing extra-judicially, rightly observes the "massive sweep" of Lord Hoffman's statement.[70] He goes on to argue that, at most, the implication of resource distribution or policy merely constitutes *factors* to be considered when a particular decision by government is reviewed. However, automatic judicial abstention in these areas cannot be treated as a legal principle.[71] Lord Hoffman's attempted classification thus falls to be rejected.

A judicial approach whereby the legitimacy of Parliament is used to justify deference endorses a perception that the institution of judicial review is, in contrast, "profoundly undemocratic".[72] A superficially conceived of "democratic principle" should not be allowed to validate the apportionment of undue weight to secondary factors, such as the fact that resource allocation is the subject that falls to be adjudicated. This is especially so given that while courts may declare a particular legislative provision to be inconsistent with the HRA,[73] they cannot invalidate any legislation. The judiciary's role is thus already inherently limited to accord with the prevalent conception of democracy in the UK.

Instead of allowing justificatory arguments to dominate the judicial enquiry in the name of "legitimacy", the fundamental right at stake along with the factual context of the case must be allowed to dictate to what level of scrutiny a particular instance of resource allocation is subjected. Majority approval of resource allocation decisions must assume a secondary role where rights are imperilled. Jowell forcefully argues this point:

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[70] Lord Steyn "Deference: A Tangled Story" (2005) *PL* 346 357.

[71] 357.

[72] *Alconbury* [2001] UKHL 23; [2001] 2 All ER 929 para 60; see also S Fredman "From Deference to Democracy: the Role of Equality under the Human Rights Act 1998" (2006) *LQR* 53 56. For the argument that the "democratic ideal" has little relevance where judges exercise their law-making function in resource allocation cases, see M Chamberlain "Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffman" (2003) *JR* 12 19.

[73] S 4 of the HRA. R Clayton "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" (2004) *PL* 33 46 argues that where a court declares legislation to be incompatible with the HRA in terms of s 4 of the Act, an opportunity for dialogue between the courts and the legislature is created.

> "No longer can we equate 'democratic principle' with 'majority approval'. Nor can we any longer arrogate the monopoly of legitimacy to those decisions endorsed by the electorate. The new expectations have at their heart the protection of a limited but significant catalogue of rights even against overwhelming popular will ... The courts are charged by Parliament with delineating the boundaries of a rights-based democracy. In doing so, they ought not in any way to be influenced by the fact that Parliament may in the end disregard their pronouncements. Nor should they prefer the authority of Parliament or other bodies on the ground alone that they represent the popular will, or are directly or indirectly accountable to the electorate."[74]

Legitimacy-based concerns should therefore yield to the judicial responsibility to serve as catalyst for public discussion regarding the content and weighting of rights and the review of resource allocation decisions.[75] This is especially apposite when government inaction in respect of resource allocation is taken into account.[76] By reconceiving courts as a supplemental space in which deliberative democracy can be practised, substantive judgments can spur subsequent debate.[77] Moreover, courts can ensure that the allocative decisions that enable the flourishing of capabilities are themselves reached through deliberative processes.[78] In this way, courts can reinforce a dialogic conception of democracy instead of detracting therefrom.

(c) Coming to terms with institutional limitations

Concerns based on the institutional competence of courts to review complex and polycentric cases are better founded than those based on legitimacy. Thus, in *Donoghue v Poplar Housing & Regeneration Community Association Ltd*[79] ("*Poplar*") the court stated:

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[74] J Jowell "Judicial Deference: Servility, Civility or Institutional Capacity?" (2003) *PL* 592 597.

[75] For the responsibility of the judiciary to serve as a platform and catalyst for public reasoning in terms of a capabilities approach to adjudication under a transformative constitution, see further chapter two part 2 4 3 above.

[76] M Chamberlain "Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffman" (2003) *JR* 12 18-19.

[77] See further chapter two parts 2 4 3 and 2 4 4 above.

[78] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 105-109; P Craig *Administrative Law* 7 ed (2012) 24-25.

[79] [2001] EWCA Civ 595.

> "The economic and other implications of any policy in [the area of housing] are *extremely complex and far-reaching.* This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference..."[80]

Whereas courts may rightly acknowledge their institutional limitations, automatic resort to deference as a *legal principle* where resource allocation decisions that impact on rights are at issue, is ill-advised. Deference is an exceedingly vague concept.[81] Ultimately, courts cannot shirk from the task of interpreting and enforcing rights, even where resource allocation decisions stand to be reviewed.[82] In some instances, judicial review may result in better-reasoned evaluations that can pave the way for more meaningful debate regarding the content of rights and the resources necessary to realise them. Chamberlain argues thus:

> "In many if not most cases, the choice is between an allocation which is the outcome of a *principled judicial decision* and one which is justified by parliamentary inaction, itself the result of a filibuster, the sudden emergence of a more pressing issue or (most likely) a simple lack of interest on the part of Parliamentarians."[83]

Instead of relinquishing the inherently judicial function of interpreting rights through substantive review, courts should instead acknowledge the advantages of judicial review and seek to mitigate the disadvantages thereof. A court is able to focus on areas of government action that may be detrimental to the realisation of rights and burgeoning capabilities, while requiring the widest practicable spectrum of evidence to be placed before it. Moreover, courts are an excellent forum in which accountability can be fostered. By demanding explicit reasoning from government parties, a culture of justification can be facilitated. Importantly, whereas complex disputes are often proffered as justification for a deferential approach, "their very complexity might make it even more important to reinforce the duty of explanation" where fundamental capabilities are at stake.[84]

Where the structure of UK courts and the procedural rules governing an adversarial process exacerbate concerns of institutional competence, it should be remembered

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[80] Para 69 (emphasis added). See also *Alconbury* [2001] UKHL 23; [2001] 2 All ER 929 para 60.

[81] J Jowell "Judicial Deference: Servility, Civility or Institutional Capacity?" (2003) *PL* 592 599.

[82] 598-599.

[83] M Chamberlain "Democracy and Deference in Resource Allocation Cases: A Riposte to Lord Hoffman" (2003) *JR* 12 19 (emphasis added).

[84] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 103.

that the prevalent institutional structure is capable of adaptation, as is evident from the analysis below of the Indian legal system.[85] What should emerge clearly is that if a strategy of deference – a concept that is inscrutably vague[86] – is succumbed to reflexively, unprincipled judgments will result while little will be done to develop mechanisms that can help mitigate institutional limitations.

(d) Renouncing a theory of deference: a non-doctrinalist approach

Given the stifling effect that reflexive resort to deference can exercise on capabilities-based jurisprudence, should the quest for a coherent theory of deference be abandoned? Allan forcefully argues that it should, perceiving deference as a (poor) substitute for searching, context-driven scrutiny of rights-based claims.[87] For Allan, any degree of latitude that should be afforded to Parliament or the executive can only be discovered through context-sensitive judicial analysis, and is therefore internal to a balancing enquiry and the "ordinary principles of administrative law".[88]

Moreover, Allan rightly observes that no judgment where rights are implicated can be value neutral. To defer to the decision of a different branch of government based purely on the identity of the decision-maker is in no way a neutral judicial choice.[89] Instead, Allan advocates an approach whereby the justificatory arguments proffered by other branches of government – and not the unexamined expertise of those branches – are permitted to persuade the court.[90] Thus, even in highly complex cases, a *presumption* of deference must be rejected in favour of coherent argument and explanation:[91]

> "The allocation of scarce resources is a matter for which primary responsibility must lie with the political branches of government; but any complaint of illegality *must be examined on its own terms*. If it is alleged that financial resources are so unevenly distributed between

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[85] 100.

[86] JA King "The Justiciability of Resource Allocation" (2007) 70 *MLR* 197 221-223.

[87] TRS Allan "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 *Cambridge LJ* 671.

[88] 676; TRS Allan "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 *LQR* 96 112, 115.

[89] TRS Allan "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 *Cambridge LJ* 671 683.

[90] 689.

[91] 691.

> competing claimants that the unfairness amounts to the breach of constitutional rights, the *distribution must be judicially considered in the context of the rights at issue*. It is likely that any unfairness would have to be grave in order to amount to a constitutional wrong; but the court would have to confront the relevant questions of law. To dismiss such claims as a matter of discretion, where the allegations were plausible, would be to render the rights in question non-justiciable – rights without any remedy for infringement."[92]

Furthermore, Allan's non-doctrinalist approach circumvents the potential for double counting deference. As Young's work demonstrates, deference is an inherently vague concept and is susceptible to a multitude of classifications.[93] This plethora of conceptualisations can easily lead a court, relatively unfamiliar with rights-based review, to misapply or over-apply a doctrine of deference. This can happen when a court resorts to deference both in deciding to adopt a lighter level of scrutiny for reviewing government conduct and by subsequently resorting to deference in actually applying the selected level of scrutiny. Moreover, deference can be applied thrice if a court resorts thereto at remedial level. In the UK context, this could happen when a court decides whether to interpret a statute to comply with rights obligations or to declare the statute incompatible with the relevant right.[94]

Instead of becoming lost in the confusing landscape of deference, it will be argued in later chapters that concerns related to institutional competence and polycentricity can thus rather be *considered* during the weighting exercise and *accommodated* at remedial level.[95] Preferably, deference should be replaced with participatory remedies that recognise the aptitude of government bodies and involve government in the implementation of remedial programmes.[96] Although the scope for designing innovative remedies is limited in the UK, a court can arguably facilitate dialogue by declaring legislation incompatible with Convention rights in terms of section 4 of the HRA, thereby catalysing legislative change without entering into the domain of law-making itself.[97] Furthermore, where administrative action infringes a recognised right

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[92] 693.

[93] AL Young "In Defence of Due Deference" (2009) 72 *MLR* 554.

[94] In terms of ss 3 and 4 of the HRA. See also AL Young "In Defence of Due Deference" (2009) 72 *MLR* 554 577.

[95] Chapters five and six, respectively.

[96] See chapter six part 6 3 below.

[97] R Clayton "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" (2004) *PL* 33 46; F Klug "Judicial Deference under the Human Rights Act 1998" (2003) *LSE* 1 7-8 <http://www.lse.ac.uk/humanRights/articlesAndTranscripts/Judicial_deference_under_HRA1

in terms of the HRA, courts retain remedial discretion to make an order it considers "just and appropriate",[98] which can arguably include participatory administrative remedies.[99] In this way, weighting exercises that accord primary importance to the rights at stake can be conducted, thus moving the UK closer to a capabilities approach to adjudication.

3 2 3 3 A rigid division of rights

In the previous chapter, it was shown that the deprivation of basic socio-economic capabilities can undermine the achievement of more complex functionings, including those related to meaningful social, political and economic participation.[100] Socio-economic capabilities and civil and political capabilities interact on the level of resource allocation, since resources must be allocated to ensure basic capabilities, without which participation in other spheres of life is not possible. Equally, through political participation, adequate resources can be identified and allocated to socio-economic capabilities. Socio-economic and civil and political capabilities are therefore inextricably related to each other.

Whereas the Indian Constitution explicitly recognises the importance of socio-economic capabilities in its Directive Principles of State Policy,[101] the UK maintains a rigid distinction between non-recognised socio-economic rights, on the one hand, and legislatively sanctioned civil and political rights, on the other. This distinction constitutes another consequence of the normative assumption that underlies the institution of judicial review in the UK, which calls for critical comparative assessment. In *A v Secretary of State for the Home Department*,[102] the House of Lords reinforced

998.pdf> (accessed 06-02-2014). But see A Kavanagh *Constitutional Review under the UK Human Rights Act* (2009) 128-132.

[98] S 8 of the HRA.

[99] For the controversy surrounding administrative remedial discretion even where an administrative act is held to be invalid and thus void *ab initio*, see C Forsyth "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) *Social Science Research Network* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317277> (accessed 05-09-2014).

[100] See chapter two part 2 2 2 1 and parts 2 4 1 to 2 4 3 above.

[101] The Directive Principles of State Policy are used to interpret the rights enshrined in part III of the Indian Constitution. See further part 3 3 below.

[102] [2004] UKHL 56.

this distinction when it relegated "matters of economic or social policy" to the category of disputes which questionably call for *a priori* deference.[103]

3 2 3 3 1 An implicit recognition of basic capabilities

Despite this unsound distinction, UK courts have on occasion interpreted Convention rights to include the provision of minimum subsistence. In *R (Adam and Limbuela) v Secretary of State for the Home Department*[104] ("*Limbuela*") the House of Lords had to decide when the Secretary of State became obliged to provide support such as accommodation and welfare benefits to asylum seekers, even where a claim for asylum had not been made as soon as reasonably practicable after arrival in the UK as required by relevant legislation.[105] In terms of the Nationality, Immigration and Asylum Act, 2002, the Secretary of State became obliged to provide support to late applicants for asylum where the provision of support would prevent the breach of the applicants' Convention rights.[106] *In casu*, the Secretary of State's duty not to violate Article 3 of the Convention,[107] which prohibits "inhuman or degrading treatment", was therefore at issue.

The Court implicitly recognised the basic capabilities at stake,[108] and the suffering that would result if asylum seekers were deprived of such capabilities. Moreover, the Court acknowledged (without using capabilities terminology) the heterogeneity of circumstances that could aggravate capability deprivation or hamper the conversion of basic capabilities into the functioning of leading minimally dignified lives. In determining

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[103] Para 108. This dichotomous approach led the court in *Donoghue v Poplar Housing & Regeneration Community Association Ltd* [2001] EWCA Civ 595 to fail to examine the justifiability of possession orders that could arguably amount to arbitrary eviction in contravention of the right to have one's home respected (in terms of Art 8 of the European Convention). As Fredman points out, the Court of Appeal *in casu* conflated the duty not to interfere with the exercise of the right (for example, by means of eviction) with the resource intensive duty to provide housing. S Fredman "From Deference to Democracy: the Role of Equality under the Human Rights Act 1998" (2006) *LQR* 53 58.

[104] [2005] UKHL 66, [2006] 1 AC 396.

[105] The Nationality, Immigration and Asylum Act, 2002.

[106] *R (Adam and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 para 5.

[107] Art 3 states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[108] Although the Court did not use capabilities terminology.

whether the right not to be subjected to inhuman or degrading treatment had been violated by denying subsistence support to asylum seekers, Lord Bingham stated:

> "When does the Secretary of State's duty [to provide subsistence support to asylum seekers] under section 55(5)(a) [of the Nationality, Immigration and Asylum Act, 2002] arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."[109]

The Court thus adopted a holistic and context-sensitive approach congruent with a capabilities-based method of review. Moreover, the Court noted that the duty on government not to subject anyone to inhuman or degrading treatment could amount to a positive duty to act, marshal resources and provide support to asylum seekers.[110] Importantly, in applying a test to determine whether the treatment in question was severe enough to constitute "inhuman or degrading" treatment, the Court dismissed the court *a quo*'s analysis according to which the test would be more exacting if the treatment resulted from "legitimate government policy".[111]

Nevertheless, the Court was careful to circumscribe the duty to apply only where the imposition of a statutory regime had itself led to the deprivation of means of generating subsistence.[112] Thus, Article 3 of the Convention was interpreted as not imposing a duty to provide minimum support to all those who may be in socio-economic need:

> "It is not the function of article 3 to prescribe a minimum standard of social support for those in need ... That is a matter for the social legislation of each signatory state. If individuals find themselves destitute to a degree apt to be described as degrading the state's failure to give them the minimum support necessary to avoid that degradation may well be a shameful reproach to the humanity of the state and its institutions but, in my opinion, does not without more engage article 3."[113]

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[109] *R (Adam and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396 para 8. See further paras 9, 59, 71 and 78.

[110] Para 47.

[111] Para 55.

[112] Paras 66-67.

[113] Para 66.

It follows that although the judgment in *Limbuela* is laudable, it has not gone far enough to ensure that the socio-economic capabilities and well-being of those residing in the UK can be ensured for all – even where resources must be allocated to do so. Furthermore, despite being progressive, *Limbuela* nevertheless again illustrates the judiciary's tendency to draw rigid distinctions between political and legal issues.[114]

3 2 3 3 2 Using the Equality Act to challenge resource allocation

Government resource allocation decisions that impact deleteriously on socio-economic capabilities have also been challenged through the mechanisms of the Equality Act, 2010.[115] Relying on the duty on public entities to have "due regard" to

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[114] Lord Hope drew this distinction forcefully:

> "The question whether, and if so in what circumstances, support should be given at the expense of the state to asylum-seekers is, of course, *an intensely political issue*. No-one can be in any doubt about the scale of the problem caused by the huge rise in the numbers of asylum-seekers that has occurred during the past decade due to the fact that more and more people are in need of international protection. There is a legitimate public concern that this country should not make its resources too readily available to such persons while their right to remain in this country remains undetermined. There are sound reasons of policy for wishing to take a firm line on the need for applications for asylum to be made promptly and for wishing to limit the level of support until the right to remain has been determined, if and when support has to be made available... It is important to stress at the outset, however, that *engagement in this political debate forms no part of the judicial function*. *The function which your Lordships are being asked to perform is confined to that which has been given to the judges by Parliament*."

R (Adam and Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396 paras 13-14 (emphasis added). See further Baroness Hale's statement that "we are respecting, rather than challenging, the will of Parliament" (para 75).

[115] S 1 of the Equality Act, which deals with public sector duties regarding socio-economic inequalities, has not been brought into force. Government Equalities Office "Equality Act 2010: Guidance" (2013) *UK Government* <https://www.gov.uk/equality-act-2010-guidance> (accessed 04-08-2015) indicates that "government has decided not to take forward… [the] public sector duty regarding socio-economic inequalities". Reliance has thus been placed on s 149 of the Act, which reads, in part:

> "149 Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to -
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

equality considerations, severe budget cuts falling under the umbrella of "austerity measures" have been brought under review.

In *R (on the application of Harjula) v London Councils*,[116] the Court stressed that the standard of "due regard" should be stringently applied where a large group of vulnerable persons was detrimentally impacted by a funding decision. Similarly, in *R (on the application of Meany, Glynn and Sanders) v Harlow District Council*,[117] although a significant budget cut for welfare services was not in itself held to be irrational, a failure to have "due regard" to criteria set out in discrimination legislation resulted in the Court quashing the said budgetary cuts. In *R (on the application of W) v Birmingham City Council*[118] it was held that, prior to a funding cut, it was incumbent on the decision-making body to consider whether the impact of a budgetary cut on disabled persons would be so draconian so as to compel the decision-making body to find additional resources "even if they had to come from other budgets or from reserves".[119]

Although these cases therefore grappled with the lawfulness of allocative choices that impacted negatively on socio-economic capabilities, an approach whereby such engagement must be found in the weak requirements of the Equality Act is not ideal. Fredman pertinently observes the serious difficulties inherent in this approach:

> "The equality duties are... a fragile platform from which to launch these attacks. First, success is unpredictable, and when it comes, potentially unfulfilling... Provided the public body has given due consideration to the protected group, the duty is fulfilled. This might have the perverse effect of legitimizing cuts. Second, many of the cases have capitalized on the significant overlap between socio-economic disadvantage and gender, race or disability… The risk is that the duty gives priority to groups who can congregate under a 'status' label to the detriment of those living in poverty more generally. Ultimately, the due regard standard cannot produce more funding: at most it can prompt a reconsideration of priorities among those competing for reduced resources. This means that the duty could well give rise to conflicts between status groups and other poor and disadvantaged groups, redistributing poverty without redistributing wealth."[120]

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

[116] [2011] EWHC 448.

[117] [2009] EWHC 559.

[118] [2011] EWHC 1147 (Admin).

[119] Para 180.

[120] S Fredman "Breaking the Mold: Equality as a Proactive Duty" (2012) 60 *Am J Comp L* 265 282.

Thus, it is imperative that substantive review that recognises the critical importance of socio-economic capabilities in their own right – and engages with resource allocation decisions on this basis – is developed.

3 2 3 3 3 The "manifestly without reasonable justification" test in welfare benefits cases

Litigants have also attempted to challenge allocative decisions pertaining to welfare benefits by relying directly on the HRA. Usually, the proportionality test applied under the HRA in terms of the jurisprudence of the European Court of Human Rights demands strong justification for discrimination in respect of a Convention right.[121] This would be the case where a policy aimed at the realisation of civil and political rights is at issue. However, a different justificatory standard is applied where general social and economic strategy is challenged.[122]

In the recent judgment of *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions*,[123] the introduction of a welfare benefits cap was challenged on the basis that it discriminated against women, since most single parent households affected by the cap were headed by women.[124] The Convention right to which the discrimination allegedly pertained was Article 1 of the First Protocol to the Convention, which protects the right to property. Government sought to justify the introduction of the cap, and hence the discrimination, on the basis of its socio-economic policy aimed at limiting the public funding of welfare benefits, incentivising work and decreasing public expenditure.[125]

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[121] In *Stec v United Kingdom* (2006) 43 EHRR 1017 the European Court of Human Rights explained that a difference in treatment will amount to discrimination if "it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (para 51). The Court went on to state that "very weighty reasons" would have to be proffered for discrimination based on sex (para 52), but that a different test applies in respect of matters of general social or economic policy (para 52).

[122] *Stec v United Kingdom* (2006) 43 EHRR 1017 para 52; *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 para 16.

[123] [2015] UKSC 16.

[124] Paras 1-2; Art 14 of the European Convention.

[125] *R (on the* application *of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 para 4.

The majority of the Supreme Court was quick to reaffirm the wide margin of appreciation granted by the European Court of Human Rights to national authorities in discrimination cases where general socio-economic strategy was concerned.[126] Thus, it was held, that whereas discrimination based on sex would normally require weighty reasons of justification, discrimination would only breach a Convention right in welfare benefits cases where it was found to be "manifestly without reasonable justification".[127] The majority of the Court applied a proportionality test as between the socio-economic policy aims of government and the means employed to achieve the aims,[128] and concluded that the benefits cap did not amount to discrimination in contravention of Article 14 of the Convention.[129]

Importantly, the majority per Lord Reed was at pains to emphasise that since the proportionality analysis involved issues of socio-economic policy and public expenditure, "due weight" was to be accorded to the decisions of the democratically elected institutions whose pre-eminent function was to make determinations on those issues.[130] Deference based on constitutional and institutional competence concerns therefore again elided a capabilities approach to adjudication in terms of which the weighting of the capabilities of the litigants should determine the standard of scrutiny applied to the government's justificatory arguments for introducing the welfare benefits cap.

The factual context of the appellants was only considered in the dissenting judgment delivered by Lady Hale.[131] Significantly, Lady Hale acknowledged that the benefits cap did not take into account varying family sizes of single parent families, and that a purported aim of the cap was not to limit family size or penalise large families.[132]

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[126] *Stec v United Kingdom* (2006) 43 EHRR 1017, confirmed by the UK Supreme Court in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18.

[127] *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 para 11; *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 paras 16-21. The "manifestly without reasonable justification" test was formulated by the European Court of Human Rights for discrimination cases in the context of State parties' general social and economic policy; see *Stec v United Kingdom* (2006) 43 EHRR 1017 para 52.

[128] *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 paras 67-77.

[129] Paras 96 (per Lord Reed), 133 (per Lord Carnwath), 134 (per Lord Hughes).

[130] Paras 92-93.

[131] Paras 169-177.

[132] Para 190.

Although accepting the applicability of the "manifestly without reasonable foundation" test, Lady Hale reiterated her sentiments in a previous judgment to the effect that the test did not obviate the need to carefully scrutinise the justificatory arguments proffered by government.[133] Lady Hale concluded that the best interests of the affected children had not been sufficiently taken into account,[134] and that depriving single mothers of basic subsistence through the discriminatory implementation of the cap was not a proportionate means of achieving the government's socio-economic policy aims.[135]

Lord Kerr reinforced Lady Hale's opinion in a second dissenting judgment, regarding the effect of the cap (ie the deprivation of adequate food, clothing, housing and warmth) as antithetical to the best interests of children.[136] The fact that a consideration of the appellants' lived reality led to a conclusion that differed materially from that reached by the majority of the Court highlights the importance of adopting a capabilities approach to the adjudication of allocative decisions. In terms of such an adjudicative approach, the context of the case at hand should always play a significant role in courts' decisions.

An overarching presumption that Parliament and the executive intend to uphold the rule of law forms a cornerstone of the UK's unwritten constitution.[137] Where deference-related distinctions between civil and political rights and socio-economic rights are allowed to erode the protection of fundamental values such as freedom and dignity,

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[133] Para 210, referring to *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 para 22.

[134] Lady Hale and Lord Kerr both found that the UK's international obligations in terms of the UN Convention on the Rights of the Child GA Res 44/25, 20 November 1989 should be taken into account in interpreting the rights enshrined in the European Convention and in order to determine whether discrimination in terms of those rights was justified (see especially *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 paras 211-229 per Lady Hale and para 269 per Lord Kerr). Lord Carnwath found that the regulations pertaining to the benefits cap were not compatible with the duty to consider the best interests of the child (para 128) but that owing to the UK's dualist system in respect of international law, this was an issue that had to be resolved by the political – and not the legal – system (para 133). Lord Hughes (para 155) found that the best interests of children had been taken into account, whereas Lord Reed held that the question was not relevant to an enquiry regarding discrimination against women (para 89).

[135] *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 paras 227-229.

[136] Para 269.

[137] TRS Allan "Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective" (2006) 59 *Current Legal Problems* 27 44, 45.

the rule of law is consequently threatened. Lamentably, a rigid distinction between socio-economic rights and "traditional" civil and political rights, exacerbated by the absence of a supreme Bill of Rights[138] that explicitly guarantees both sets of rights, hampers the substantive review of resource allocation decisions and ultimately prevents the judiciary from a developing a truly capabilities-infused standard of review.

3 2 4 Towards a capabilities approach to adjudication: Proportionality as weighting

For the adjudication of State resource allocation decisions within a capabilities paradigm to evolve, substantive judicial review must be coherently developed. Since socio-economic capabilities are not enshrined as justiciable rights in the UK, the danger exists that these capabilities and concomitant resource allocation decisions will be reviewed in terms of *Wednesbury* unreasonableness.

3 2 4 1 Recognising socio-economic rights at common law?

UK courts have, fortunately, relaxed the *Wednesbury* test even in some cases not involving fundamental rights.[139] Furthermore, if the law in the UK were to develop to recognise vital socio-economic capabilities as rights at common law – or as forming *part of* other recognised common-law rights and values,[140] related resource allocation decisions could be reviewed in terms of a modified *Wednesbury* test of "anxious scrutiny".[141] According to this approach, a decision that impacts gravely on a human right will require significant justification to be held reasonable by the reviewing court. The more grave the interference with a right, the more substantial such justification would need to be. If a resource allocation decision therefore seriously imperilled a basic capability such as those related to health and life, government would have to proffer

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[138] It is submitted that the Joint Committee on Human Rights *A Bill of Rights for the UK?* 29th Report of Session 2007–08 (2008) 6 does not go far enough in recognising the need for *justiciable* socio-economic rights.

[139] P Craig *Administrative Law* 7 ed (2012) 647.

[140] This development could possibly track developments in India where a variety of socio-economic rights have been interpreted to form part of the justiciable right to life. See part 3 3 2 below.

[141] In *R v Secretary of State for the Home Department, Ex Parte Brind* [1991] UKHL 4, decided prior to the HRA, a test of proportionality for rights cases was required; *R v Ministry of Defence, ex parte Smith* [1996] QB 517 developed the test for anxious scrutiny in rights cases.

considerable explanations by way of justification for its allocative choices to survive a test of anxious scrutiny. Although this form of review is more in tune with a test for substantive reasonableness than restrictive *Wednesbury* review, it would nonetheless demand substantial groundwork for socio-economic capabilities to qualify as "rights" for purposes of this modified standard of review.

3 2 4 2 Using proportionality as a standard head of review

A more theoretically coherent and capabilities-congruent approach would be to apply the test for proportionality currently used for review under the HRA, as a standard head of review. A test for proportionality will be applied to allocative decisions in socio-economic cases where it is possible to read socio-economic interests into the rights protected by the European Convention.[142] If proportionality were to be applied uniformly, this would allow for the gradual development of a judicial approach that recognises the importance of socio-economic capabilities where their deprivation results in the impingement of fundamental values such as freedom, dignity and equality.[143] Once such development is allowed, allocative choices with a socio-

[142] Socio-economic interests can be protected through the interpretation of, for example, Art 8 of the European Convention (right to respect of one's private family life, including one's home) or Art 1 of the First Protocol to the European Convention (protection of property). Thus, in *Manchester City Council v Pinnock* [2010] UKSC 45, the UK Supreme Court accepted that where a local authority seeks a possession order of a person's home, Art 8 of the Convention requires that a court must assess the proportionality of granting such an order (para 49). In drawing this conclusion, the Court accepted the reasoning of the European Court of Human Rights regarding the proportionality enquiry required by Art 8 of the Convention in eviction cases. See, *inter alia*, *Chapman v United Kingdom* (2001) 33 EHRR 399; *Connors v United Kingdom* (2005) 40 EHRR 9; *McCann v United Kingdom* (2008) 47 EHRR 40; and *Kay v United Kingdom* [2010] ECHR 1322.

[143] See TRS Allan "Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective" (2006) 59 *Current Legal Problems* 27 41 for a substantive conception of the rule of law that includes these values. The recognition of fundamental rights at common law is arguably derived from these values. *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26 para 30:

> "[S]ome rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them."

In *Osborn v The Parole Board* [2013] 3 WLR 1020 para 68 the Supreme Court recognised that specific, common-law rights derive from fundamental values such as dignity.

economic component will no longer attract a reflexively deferential stance from the judiciary.

3 2 4 2 1 Proportionality as weighting

In *R v Secretary of State for the Home Department, Ex Parte Daly*[144] ("*Daly*"), Lord Steyn held that proportionality review differs materially from *Wednesbury* review in that it entails a more searching level of scrutiny. Lord Steyn's exposition of proportionality as a test resonates strongly with the weighting exercise inherent in a capabilities approach to adjudication:

> "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 p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."[145]

Proportionality as a standard of review is thus strikingly similar to the weighting exercise that occurs under the capabilities approach to prioritise capabilities and other competing factors. First, the rights, interests or capabilities at issue should be identified. Once identified, a particular weight should be ascribed to them. According to a capabilities-based approach to adjudication, this would demand that the content of the right be interpreted with reference to the capabilities such right seeks to foster in the relevant historical, social and factual context. Moreover, it is this first stage of the rights analysis that should indicate with what intensity the proportionality test should be applied to the allocative decision under consideration. Once this stage is completed, the resource allocation at issue should be adjudicated to determine whether it was proportionate in the light of the first, interpretative stage of the analysis.

Craig espouses the most common manifestation of the proportionality analysis as follows:

> "i. [W]hether the measure was suitable to achieve the desired objective;
> ii. whether the measure was necessary for achieving the desired objective; and

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[144] [2001] UKHL 26.

[145] Para 27 (emphasis added).

iii. whether it none the less imposed excessive burdens on the individual. The last part of this inquiry is often termed proportionality stricto sensu."[146]

The UK possesses no written constitution which accords constitutionally significant weight to certain rights.[147] In those instances where a socio-economic capability is not regarded as a fundamental right and cannot be read into the rights protected under the HRA, the reviewing court will need to assign weight to the capability at stake *ab initio*. This will necessarily require substantive review. However, this is no reason to shy away from an exercise of substantive weighting, since "[t]he reality is that the court is concerned with substance and procedure in HRA cases *and ordinary judicial review*".[148]

The UK jurisprudence shows a healthy development with regards to the application of proportionality in respect of the review of resource allocation decisions in certain cases decided under the HRA. As shown above, the socio-economic capabilities imperilled in *Limbuela* led the House of Lords to reject the lack of subsistence support provided to destitute asylum seekers as disproportionate while recognising the need to impose positive duties on government in certain circumstances. In *Anufrijeva v Southwark London Borough Council*,[149] although not focusing on proportionality as head of review, the Court similarly held that where the welfare of children hung in the balance, a positive duty to provide support could be read into Article 8 of the European Convention.[150] The balancing exercise inherent in these cases should therefore be extended to cover all situations where a socio-economic capability may be implicated.

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[146] P Craig *Administrative Law* 7 ed (2012) 657. Pillay argues that this test combines factors suggested by the South African Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC). A Pillay "Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights" (2007) 6 *EHRLR* 616 632. The test for reasonableness set out in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45 is unmistakably a substantive one. See chapter five part 5 2 2.

[147] See P Craig *Administrative Law* 7 ed (2012) 658 regarding the application of proportionality in rights cases. For the development of proportionality to apply to positive socio-economic rights, in general, and resource allocation decisions in particular, see chapter five parts 5 3 1 4 and 5 3 3 2 below.

[148] P Craig *Administrative Law* 7 ed (2012) 660 (emphasis added). For the proposition that process and substance interact, see further P Craig *Administrative Law* 7 ed (2012) 20.

[149] [2003] EWCA Civ 1406.

[150] The right to respect of private and family life. Likewise, in *R (on the application of Razgar) v Secretary of State for the Home Department (No.2)* [2004] UKHL 27; [2004] 2 AC 368 the

3 2 4 2 2 The structured nature of the proportionality test

The desirability of utilising proportionality as a standard head of review is further supported by the structured nature of the proportionality analysis. The test requires explicitness and substantive reasoning both in the justifications proffered by government for its allocative decisions as well as by the court in its reasoning and ultimate judgment regarding whether such allocation was proportionate or not.[151] Such explicitness is commensurate with a capabilities approach to adjudication and furthermore promotes a culture of justification.[152] Moreover, explicitness aids the difficult choices that courts must make in weighting and balancing competing rights or capabilities – with each other, as well as against the justifications raised by government.[153] Difficult choices obscured in implicit reasoning do little for the development of a coherent jurisprudence or the facilitation of subsequent public scrutiny of evaluative judgments.

By employing the test of proportionality uniformly to all instances of judicial review, substantive review can truly develop in UK law. Furthermore, such an approach will eliminate the danger that vulnerable claimants who narrowly fail to frame their claims in terms of recognised "rights" in borderline cases, will be left with no remedy – and thus no justice – should their claims be scrutinised within the confines of *Wednesbury* unreasonableness.

3 2 5 Conclusion

The system of parliamentary sovereignty that is prevalent in the UK renders the development of a capabilities approach to the adjudication of government resource allocation decisions difficult. Since socio-economic rights are not recognised as justiciable rights, resource allocation decisions that impact deleteriously on socio-economic capabilities could potentially be subjected to very light rationality review as

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House of Lords held that an "extreme" threat to the health of a potential deportee could contravene Art 8 of the European Convention.

[151] P Craig *Administrative Law* 7 ed (2012) 668.

[152] For the importance of explicitness and substantive reasoning in terms of a capabilities approach to adjudication, see further chapter two part 2 4 4 above. For the importance of explicitness in applying a capabilities-based standard of review, see chapter five part 5 4 2 3 below.

[153] P Craig *Administrative Law* 7 ed (2012) 671-672.

manifested in *Wednesbury* reasonableness. An overwhelming awareness of the supremacy of Parliament has resulted in an overconcentration by the judiciary on its own constitutional and institutional incompetence to review such matters. This has, in turn, led the judiciary to reflexively defer to other branches of government.

However, a deferential approach is not necessarily mandated by a system of parliamentary supremacy. Instead, deference emerges as a judicial mechanism to deal with cases where courts feel ill-equipped to adjudicate polycentric or complex matters. In certain instances, courts justify deference on the basis of their purported illegitimacy as an unelected institution to make decisions that might have far-reaching, political impacts. Given the already limited role of the judiciary in the UK, coupled with the democratic nature of judicial review that aims to protect fundamental rights, the need for deference on grounds of constitutional competence is questionable.[154]

Furthermore, determining the need for deference based on concerns regarding institutional competence is not unique to a system that adheres to parliamentary sovereignty. Instead, it is a problem that courts in jurisdictions that apply the common-law method grapple with even under a system of constitutional supremacy.[155] A move towards a rights-based justification for judicial review signals an opportunity for substantive review to develop. If this occurs, courts may feel more empowered to acknowledge and interpret important socio-economic capabilities. This will, in turn, provide a capabilities paradigm within which government resource allocation decisions can be effectively adjudicated.

One potentially viable avenue for the introduction of a capabilities approach to adjudication is to apply proportionality as a uniform head of review. Given the many parallels between the proportionality test and the weighting exercise required by the capabilities approach, such application could allow the normative content of the rights at issue to determine to what level of scrutiny a particular resource allocation decision should be subjected.

The approach of the judiciary in the United Kingdom therefore highlights the need for the development of substantive, rights-based judicial review, while illustrating the shortcomings of reflexive resort to deference where important socio-economic capabilities are at issue.

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[154] See part 3 2 3 2 2 (b) above.

[155] For example, in India and South Africa.

3 3 India

3 3 1 Introduction

India boasts an ambitious, transformative constitution.[156] Compared with the South African Constitution,[157] the Indian Constitution may be said to encompass a similar vision of social transformation by its inclusion of Directive Principles of State Policy[158] ("DPSP") that were intended to facilitate a "social and economic revolution" in India.[159] The socio-economic capabilities that the DPSP aim to advance include those related to education, public assistance or social security, nutrition, health and an improved standard of living.[160] However, the explicitly non-justiciable nature of the DPSP suggests that the constitutional framers envisaged that primary responsibility for socio-economic transformation in India would lie with the legislative and executive branches of government, and not with the judiciary.[161] The Indian judiciary is instead empowered to adjudicate matters concerning the fundamental rights set out in part III of the Indian Constitution. The most prominent fundamental rights that have been interpreted as including socio-economic capabilities are the rights to equality;[162] to life;[163] and to education.[164]

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[156] J Kothari "Social Rights Litigation in India: Developments of the Last Decade" in D Barak-Erez & AM Gross (eds) *Exploring Social Rights: Between Theory and Practice* (2007) 171 174; P O'Connell *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (2012) 84.

[157] The Constitution of the Republic of South Africa, 1996.

[158] Part IV of the Indian Constitution and discussed further below.

[159] MP Jain "The Supreme Court and Fundamental Rights" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 1 65. For similar comments, see J Kothari "Social Rights Litigation in India: Developments of the Last Decade" in D Barak-Erez & AM Gross (eds) *Exploring Social Rights: Between Theory and Practice* (2007) 171 173-174.

[160] See generally the DPSP set out in part IV of the Indian Constitution.

[161] Art 37 of the Indian Constitution; R Abeyratne "Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy" (2014) 38 *Brook J Int'l L* 1 30-32.

[162] Art 14 of the Indian Constitution.

[163] Art 21.

[164] Art 21A.

The separation of powers doctrine is not explicitly articulated in the Indian Constitution but has been recognised by the Supreme Court.[165] Under the separation of powers prevalent in India, judicial review constitutes a critical facet of India's constitutional democracy: Judicial review enjoys the status of a fundamental right along with the other fundamental, justiciable rights set out in part III of the Indian Constitution.[166] An infringement of a fundamental constitutional right thus triggers the right to judicial review.

Given that the Indian Constitution does not contain a general limitations clause analogous to section 36 of the South African Constitution,[167] a judicial weighting exercise is essential for determining whether a fundamental right has been infringed, and for limiting rights where appropriate. However, the wide powers granted to the Supreme Court in respect of the infringement of fundamental rights[168] have arguably led to a proliferation of claims being formulated as fundamental rights claims. Thus, for example, constitutional adjudication is sought by framing claims in terms of fundamental rights even where administrative law review would ordinarily be available.[169] Consequently, certain facets of Indian administrative law have not developed substantively: the restrictive test for reasonableness in administrative law (as distinguished from the test that prevails where fundamental rights are concerned) is that of *Wednesbury* unreasonableness.[170] The implications of this trend for the substantive development of administrative law therefore call for further investigation.

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[165] See A Nolan *Children's Socio-economic Rights, Democracy and the Courts* (2011) 137 n 13 who notes that the separation of powers doctrine in the sense of checks and balances was endorsed by the Court in *IR Coelho (Dead) v State of Tamil Nadu* 2007 2 SCC 1. For a more rigid view of the separation of powers doctrine that emphasises the limits of judicial review rather than the creation of a collaborative inter-branch relationship, see *MP Oil Extraction Pvt Ltd v State of Madhya Pradesh* AIR 1982 MP 1 para 41; *Fertilizer Corporation Kamgar v Union of India* 1981 2 SCR 52 71 and *BALCO Employees Union v Union of India* (2002) 2 SCC 333 *Indian Kanoon* <http://www.indiankanoon.org/doc/1737583/> (accessed 12-12-2012).

[166] Art 32(1) of the Indian Constitution.

[167] Certain fundamental rights in the Indian Constitution contain specific limitations. See, for example, art 19 which sets out certain freedoms in subs (1) and continues to limit the right in the remainder of the article.

[168] Art 32(2) of the Indian Constitution.

[169] See further part 3 3 3 4 below.

[170] From the well-known English decision of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA) 233-234. For an analysis of the development of this doctrine in the UK, see part 3 2 3 1 above.

The following part evaluates the Indian Supreme Court's attempts to bring critical socio-economic capabilities into the balance where State resource allocation decisions fall to be adjudicated. In particular, the Court's innovation of Public Interest Litigation will be critically examined. Thereafter, potential pitfalls of the Court's approach, including the need for a principled approach to deference and substantive development of administrative law, will be identified and critically analysed.

3 3 2 A capabilities-infused framework and approach

3 3 2 1 Bringing socio-economic capabilities into the balance

Justiciable fundamental rights, including the right to equality[171] and the right to life,[172] are contained in part III of the Indian Constitution, whereas non-justiciable DPSP are included in part IV thereof.[173] Muralidhar states in this regard that the division between justiciable rights and DPSP was introduced as a "compromise" between those who felt that DPSP were not capable of enforcement as rights and those who emphasised the social agenda incorporated within the Indian Constitution.[174] However, consensus seems to exist that whereas the inclusion of non-justiciable DPSP may have been aimed at limiting the courts' power to pronounce on socio-economic justice,[175] the DPSP were not intended to be of less importance than the fundamental rights. Although this divide could be explained by an admiration for a Westminster model of democracy that advocates minimal interference with the legislature,[176] the DPSP were nonetheless directed at precipitating significant social transformation by way of State

[171] Art 14 of the Indian Constitution.

[172] Art 21.

[173] Art 37 states:

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

[174] S Muralidhar "India: The Expectations and Challenges of Judicial Enforcement of Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 102 103-104.

[175] P O'Connell *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (2012) 85.

[176] SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003) 3.

action.[177] The Supreme Court initially displayed some ambivalence regarding the relationship between the fundamental rights and the DPSP. Legislative efforts at social reform were thwarted by the Court, which apparently regarded fundamental rights as superior to the DPSP.[178] However, the Court gradually came to recognise the "complementary and supplementary"[179] nature of fundamental rights and the DPSP.[180]

The capabilities approach to adjudication that is advocated throughout this dissertation requires that the social goals at which the DPSP aim should infuse any enquiry regarding State resource allocation decisions that impact upon a fundamental right. If the fundamental rights are the means through which the ends embodied by the DPSP are attained,[181] sufficient resources should be efficiently spent on facilitating the realisation of such ends. The DPSP similarly illuminate what capabilities were regarded as important enough to merit constitutional recognition, even if not susceptible to adjudication.

The justiciable rights contained in part III of the Indian Constitution thus created the initial focal space and partial ordering in which a weighting exercise can take place to further prioritise competing capabilities and concomitant resource allocation.[182]

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[177] See SP Singh "Constitutionalization and Realization of Human Rights in India" in CR Kumar & K Chockalingam (eds) *Human Rights, Justice and Constitutional Empowerment* 2 ed (2010) 26 32-33 who argues that the judiciary, as opposed to the executive and legislature, is most often guilty of misunderstanding the redistributive spirit of the Constitution. Singh asserts that the various constitutional amendments seeking to harmonise the relationship between fundamental rights and DPSP so as not to subordinate the latter to the former, relay the message that "the positive obligations of the state cannot be taken less seriously than its negative obligations" and that in cases of conflict both types of obligations must be given equal effect (33).

[178] *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

[179] *Chandra Bhavan Boarding & Lodging v The State of Mysore* 1970 2 SCR 600 612.

[180] See further *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 para 634. The Court *in casu* established that Parliament could pass constitutional amendments only when such did not purport to amend the "basic structure" of the Indian Constitution (the so-called "basic structure doctrine"). It later emerged that the basic structure included the courts' power of judicial review. See also *State of Kerala v NM Thomas* 1976 1 SCR 906 993; *Pathumma v State of Kerala* 1978 2 SCR 537 545-547; *Minerva Mills Ltd v Union of India* 1981 1 SCR 206 255-256; *Unni Krishnan JP v State of Andhra Pradesh* (1993) 1 SCC 645.

[181] *Minerva Mills Ltd v Union of India* 1981 1 SCR 206 255.

[182] For an analysis of how the weighting exercise demanded by the capabilities approach can be incorporated into the adjudication of State resource allocation decisions, see chapter two part 2 3 2 above. See in particular chapter two part 2 3 2 1 for a discussion of the focal space

However, the DPSP import normative content into this space through the consensus it represents on what socio-economic capabilities are important. A court adjudicating a particular State resource allocation decision can thus draw from the socio-economic capabilities represented by the DPSP, along with the fundamental right implicated in a given case, in order to determine to what level of scrutiny the allocative decision should be subjected.

3 3 2 2 Including socio-economic rights in the weighting exercise

In 1978 the Supreme Court started interpreting the fundamental rights enshrined in the Indian Constitution widely.[183] This paved the way for the development of the jurisprudence to recognise socio-economic rights within the fundamental rights enshrined in part III. The Court expanded this trend in *Francis Coralie Mullin v The Administrator*[184] when it interpreted the right to life enshrined in article 21 of the Indian Constitution:

> "The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person."[185]

Such a broad and flexible interpretation of rights is to be welcomed. By interpreting a right expansively, a court does not necessarily require government to *immediately* allocate resources to achieve the *complete* fulfilment of the relevant right.[186] The capabilities approach recognises that the inability to immediately realise a right does

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and partial ordering created by the inclusion of socio-economic rights and the right to just administrative action in the South African Constitution.

[183] Art 21 of the Indian Constitution provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law". In *Maneka Gandhi v Union of India* 1978 2 SCR 621 626 ("*Maneka Gandhi*") the Court held that such procedure must be "fair, just and reasonable".

[184] 1981 2 SCR 516.

[185] 528.

[186] For an analysis of Sen's response to the feasibility critique of socio-economic rights, see chapter two part 2 3 2 3 3 above.

not detract from the nature of such right.[187] A right can therefore be broadly interpreted while flexibility is maintained to cater for changing circumstances and the concomitant evolution of what "reasonable" resource allocation requires.

Importantly, the Court went on to enumerate a bundle of socio-economic interests (reminiscent of Nussbaum's list of central human capabilities)[188] inherent in the broadly construed right to life:

> "We think that the right to life includes the right to live with human dignity and *all that goes along with it*, namely, the *bare necessaries of life* such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings."[189]

As is apparent from the above statement by the Supreme Court, the right to human dignity implicates socio-economic capabilities.[190] Dignity therefore informs the content of the right to life by identifying what socio-economic capabilities are required to live with dignity in a particular context. This interpretation thereby opened the door for a variety of socio-economic rights to be read into the right to life – or on an expansive reading, the right to live with dignity. The Court went on to take cognisance of the impact that varying degrees of national economic development would have on the right to live with dignity:

> "Of course, the *magnitude* and *content* of the components of this right would *depend upon the extent of the economic development of the country*, but it *mus*t, in any view of the matter, *include the right to the basic necessities of life* and also the right to carry on such functions and activities as constitute the *bare minimum expression of the human-self*. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."[191]

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[187] A Sen *The Idea of Justice* (2009) 384. For a discussion of how the capabilities approach accommodates the notion of progressive realisation, see further chapter two part 2 3 2 3 3 above.

[188] See MC Nussbaum *Creating Capabilities* (2011) 33-34 and the discussion of the capabilities approach in chapter two.

[189] *Francis Coralie Mullin v The Administrator* 1981 2 SCR 516 529 (emphasis added).

[190] Similarly, the South African Constitutional Court has recognised that socio-economic rights will almost always implicate the right to human dignity. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21.

[191] *Francis Coralie Mullin v The Administrator* 1981 2 SCR 516 529 (emphasis added).

It transpires from the above statement that the Court envisages the level of economic development of a country as determining both the scope and content of the various socio-economic facets of the right to life. Pragmatically, economic development and financial constraints should be taken into account in establishing to what extent the right's full realisation is *presently* feasible in the prevailing circumstances. However, slow development or inadequate resources should not determine the *content* of the right. Rather, in line with a capabilities approach to adjudication, the content of the right should determine what resources are made available.[192] If the resources required to realise the content cannot reasonably be acquired and allocated, then inadequate resources could potentially constitute a justifiable limitation of the right – but does not diminish its content.

The Court went on to hold that regardless of the level of economic development (and, it follows, resource constraints), the right to life "must … include the right to the basic necessities of life". There is evidently a limit to the extent to which inadequate resources can justifiably limit a right.[193] The Court's statement is to be welcomed to the extent that it preserves the basic socio-economic content of the right notwithstanding constrained resources. However, instead of interpreting the Court's statement as one that supports the minimum core approach to socio-economic rights, it should instead be read to require weighty justification where resource allocation does not provide for at least basic capability realisation.[194]

By drawing from various specific DPSP as well as general principles that should inform State policy in terms of article 39,[195] other specific socio-economic rights such

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[192] See chapter two part 2 3 2 above.

[193] Even in cases where the prioritisation and ranking of capabilities are difficult, certain "non-eliminable" principles remain. See further chapter two part 2 3 2 4 3 above.

[194] For a discussion of what the minimum core entails, and problematic aspects inherent in the minimum core approach and Nussbaum's list of central capabilities, see chapter two part 2 2 2 1 2 above.

[195] Art 39 directs that State policy should secure, *inter alia*, a means of livelihood for its citizens; the distribution of material resources so as to promote the common good; an economic system that does not result in the detrimental concentration of wealth; equal pay for equal work; health; and children's interests.

as the right to shelter,[196] the right to a livelihood,[197] the right to health[198] and the right to education[199] have since been interpreted as forming part of the fundamental rights enshrined in part III.[200] It follows that questions of resource allocation will often arise in cases where these socio-economic rights are implicated, given the fact that such rights require prioritisation.

3 3 2 3 Promoting participation and informational broadening through Public Interest Litigation

The right to approach the Supreme Court for a writ order where someone's fundamental rights have been infringed is accorded the status of a fundamental right in the Indian Constitution.[201] The importance of judicial review, socio-economic justice, and the need to ensure access to courts was evidently recognised by the drafters of

[196] As forming part of the right to life as enshrined in art 21 of the Indian Constitution: *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630. In interpreting the right to life to include reasonable forms of shelter, the Court specifically referred to the DPSP contained in art 46, which directs the State to "promote with special care the educational and economic interests of the weaker sections of the people".

[197] As forming part of the right to life as enshrined in art 21 of the Indian Constitution: *Olga Tellis v Bombay Municipal Corporation* 1985 2 SCR Supl 51. In interpreting the right to life to include the right to a livelihood, the Court specifically referred to the DPSP contained in arts 39(a) ("[t]he State shall... direct its policy towards securing... that the citizens... have the right to an adequate means of livelihood") and 41 (concerning the right to work, to education and to public assistance in certain cases).

[198] As forming part of the right to life as enshrined in art 21 of the Indian Constitution: *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37. The Court did not refer to a particular DPSP but did allude to the duty of government in a welfare state to provide medical facilities. This duty is recognised in art 47 of the Indian Constitution, which directs the State to, *inter alia*, improve public health.

[199] As closely related to dignity and the right to life as enshrined in art 21 of the Indian Constitution: *Miss Mohini Jain v State of Karnataka* 1992 3 SCR 658; *Unni Krishnan JP v State of Andhra Pradesh* (1993) 1 SCC 645. The Court in both instances held that the DPSP in art 45 amounted to a justiciable right since it contained a time limit for realisation. The Indian Constitution was subsequently amended to include the justiciable fundamental right to education in art 21A.

[200] For the need to develop the capabilities approach to recognise the interdependence of rights and capabilities, see chapter two part 2 3 3 3 1 above.

[201] Art 32(1) of the Indian Constitution.

the Indian Constitution.[202] Although article 32 is widely formulated, access to justice remained barred for a significant portion of India's society – the poor, vulnerable and indigent – for decades.[203] The legacy of a colonial legal system that was individualistic and adversarial in nature, coupled with the poverty and lack of legal knowledge of large groups of the Indian population, resulted in an elitist system that largely excluded the poor. Moreover, the exclusionary nature of the legal system was exacerbated by narrow rules of standing that could not be utilised by those who were unaware of their constitutional rights in the first place and who in any event lacked the resources necessary to approach the Supreme Court for redress.[204]

3 3 2 3 1 A novel form of litigation

In order for the poor to meaningfully make use of the right to approach the Supreme Court where their fundamental rights had been infringed, the rules regarding *locus standi* and procedure had to be relaxed.[205] In *SP Gupta v President of India*,[206] it was held that anyone with a "sufficient interest" in the matter could approach the Supreme Court for relief.[207]

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[202] MP Jain "The Supreme Court and Fundamental Rights" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 1 3-4; V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 1 4; IP Massey *Administrative Law* 7 ed (2008) 437-438. One may also approach the Supreme Court in terms of art 32 where administrative action impinges upon a fundamental right. SP Sathe *Administrative Law* 5 ed (1991) 344.

[203] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 570.

[204] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 570-571; AH Desai & S Muralidhar "Public Interest Litigation: Potential and Problems" in BN Kirpal (ed) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159 161-162.

[205] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 570-571.

[206] 1982 2 SCR 365.

[207] Para 22:

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty [*sic*] or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective."

In *People's Union for Democratic Rights v Union of India*[208] the Supreme Court expounded the legally radical nature of Public Interest Litigation ("PIL"), a judge-led initiative that had been developed over some time:

> "[P]ublic interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties… Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest [*sic*] which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of government..."[209]

The Court justified its activism with reference to the "utter grinding poverty" that prevails in India.[210]

Emphasising the wide language of article 32, the Supreme Court in *Bandhua Mukti Morcha v Union of India*[211] held that any *bona fide* member of the public could now move the courts on behalf of another person or class of persons.[212] In addition, courts could be moved to enforce a fundamental right by means of any "appropriate proceedings":

> "[T]his requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right."[213]

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[208] 1983 1 SCR 456.

[209] 467.

[210] 468.

[211] 1984 2 SCR 67.

[212] 106-107. In *State of Uttaranchal v Balwant Singh Chaufal* JT 2010 1 SC 329 the Court attempted to provide guidelines regarding the use of PIL so as to try to curb abuse of the process. These guidelines included directions to the courts to encourage *bona fide* PIL applications while rejecting petitions filed for "extraneous considerations". In addition, courts must ensure that "substantial public interest" is involved and must further prioritise petitions according to public interest, gravity and urgency. PIL should thus be launched in the public interest, and not in order to promote private interests or secure personal gain (para 198).

[213] *Bandhua Mukti Morcha v Union of India* 1984 2 SCR 67 107. The rules of standing had similarly been relaxed in the oft-coinciding field of administrative law. Standing was thus expanded from limiting *locus standi* to an "aggrieved person" to encompassing "notional injury standing", "class standing" and, finally, "public concern standing". IP Massey "Evolving

The right at stake should thus, initially, impact upon the procedure and litigation style adopted by the court. Thereafter, the right should continue to exert an influence on the level of scrutiny applied to the resource allocation decision in question.

3 3 2 3 2 A collaborative partnership between the courts and other stakeholders

The Supreme Court went even further in emphasising the important role of the courts, together with the petitioners and other branches of government, in securing critical socio-economic rights and interests:

> "[T]he task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor… is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and *it is only through multidimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective*. Public interest litigation… is essentially a co-operative or *collaborative effort* on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them."[214]

This collaborative partnership between the legislature, executive, judiciary, and the petitioner as representative of vulnerable groups of society, as well as input provided by commissions and *amici curiae*, is particularly helpful in the context of the adjudication of State resource allocation decisions. Objections that courts are institutionally inept or illegitimate forums for adjudicating polycentric resource allocation decisions can be overcome when courts enter into a dialogue with other branches of government. Courts should furthermore facilitate dialogue between the government and vulnerable sectors of society.

A "judicial conversation" decentres the role of the courts and facilitates an inclusive conversation that allows even marginalised voices to be heard.[215] Through discussion

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Administrative Law Regime" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 101 107-108.

[214] *People's Union for Democratic Rights v Union of India* 1983 1 SCR 456 469 (emphasis added).

[215] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 133. See further IP Massey *Administrative Law* 7 ed (2008) 438 who describes PIL as a

and multi-stakeholder participation, all parties can work together to arrive at a mutually agreed upon, reasonable resource allocation that best advances the capabilities of all people affected thereby. By engaging in meaningful collaboration, "the Court does not feel constrained to defer to government, and government does not challenge the figure arrived at" – instead, a capabilities-enhancing resource allocation decision can be formulated.[216]

Participation is thus crucial for the prioritisation of capabilities and concomitant resource allocation. Furthermore, resources must be allocated to realise capabilities that enable meaningful social, economic and political participation.[217]

3 3 2 3 3 Informational broadening through participatory mechanisms

(a) Commissions and *amici curiae*

PIL is characterised by an expansion of *locus standi* to facilitate access as well as the relaxation of procedural rules.[218] Furthermore, the Court has often appointed commissioners or commissions where it lacked information. When adjudicating State resource allocation decisions, the involvement of a commission could help overcome concerns that courts are incompetent *fora* for evaluating matters of resource allocation. The commissions are tasked with gathering facts and submitting a quick, but detailed, report to the Court. Either party may dispute the content of the report by filing affidavits.[219] *Amici curiae* have similarly aided the Court in verifying facts presented by all parties as well as in carrying the matter forward in legal terms. By making use of these innovative participatory mechanisms, informational broadening occurs. With a

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collaborative effort between the court, the petitioner and government with the purpose of making socio-economic programmes meaningful to the poor.

[216] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 134.

[217] For the importance of participation for a capabilities approach to adjudication under a transformative constitution, see chapter two part 2 4 3 above.

[218] Whereas a letter addressed to the court initially sufficed to invoke judicial review, the practice has become rare. Instead, after screening by the PIL cell of the court, *amici curiae* are appointed to draft petitions. SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003) 206-207; AH Desai & S Muralidhar "Public Interest Litigation: Potential and Problems" in BN Kirpal (ed) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159 165.

[219] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 575.

broad informational base at its disposal, a court is able to rank and prioritise capabilities more effectively by incorporating a diversity of perspectives into its decisions.[220]

(b) A non-adversarial, collaborative process

An essential characteristic of PIL is its non-adversarial nature.[221] Although India inherited an adversarial system from its British colonisers, the advent of constitutional supremacy paved the way for a departure from this system. This is of particular significance set against a backdrop of socio-economic capabilities. A collaborative process aimed at effectively realising these critical capabilities is more in line with a transformative constitution than an adversarial process where the litigant with deeper pockets often occupies an advantageous position. Moreover, by carving out a more inquisitorial role for the judiciary, it becomes better equipped to deal with polycentric matters. Although this may be undesirable from the perspective of those who advocate a rigid separation of powers, the reality of an overburdened legislature and corrupt executive, as well as the imperative to vindicate critical rights, justify a more activist approach.[222]

(c) Monitoring agencies

In line with the purpose-driven, proactive nature of PIL as opposed to an adversarial system, the Court has not shied away from issuing unconventional remedies. Commissions have also been directed to recommend appropriate remedies.[223] Where the government has been recalcitrant in implementing them, the Court has responded by appointing monitoring agencies.[224] The composition of the monitoring agencies is

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[220] For the crucial importance of informational broadening for making social and economic assessments, see chapter two part 2 4 3 above.

[221] AH Desai & S Muralidhar "Public Interest Litigation: Potential and Problems" in BN Kirpal (ed) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159 162-167.

[222] SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003) 210-211.

[223] J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495 500.

[224] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 575-577; J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495 506. For the role of monitoring or supervision in

flexible, and they can be comprised of judicial officers or even members of the executive. Importantly, the Supreme Court decided to appoint monitoring agencies in order to ensure effective justice to litigants and preserve the public's trust in the judiciary.[225]

3 3 2 4 Relying on crucial capabilities to justify robust adjudication of State resource allocation decisions

The Supreme Court of India has often adopted a robust approach where State resource allocation decisions were at issue. This approach has encompassed the rejection of averred resource constraints and the issuing of resource-intensive orders.[226] In the following part, selected judgments where important basic capabilities

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ensuring participation and accountability, see chapter six part 6 4 3 below, and, generally, C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669.

[225] PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 577.

[226] The Supreme Court has issued monetary orders with, cumulatively, potentially far-reaching consequences for the public purse. Perhaps most well-known is the case of *Mehta v State of Tamil Nadu* 1996 6 SCC 756 in which the Court scrutinised the conditions of child labourers. The Court ordered that employers of child labourers should pay a set amount into the so-called "Child Labour Rehabilitation-cum-Welfare Fund". Furthermore, the Court recognised that compelling the State to provide employment for as many adults as there were child labourers would unduly strain State resources. Therefore, the Court held that the State could make a contribution to the said Welfare Fund where it was unable to provide substitute adult employment (paras 27-30). Given the widespread nature of the problem of child labour in India, the Court cannot be faulted for attempting to spur employers and government into action so as to at least start the complex task of eradicating child labour. The Court observed that the financial implications of its judgment were aimed at building a "better India". In addition, the Court noted that similar financial considerations had not prevented other developing countries from eradicating child labour (para 32). The judgment has not escaped criticism for constituting a breach of the separation of powers doctrine and for failing to acknowledge that projects of such complexity were purposefully left for the executive to deal with. (SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003) 250; V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 24.) One must question whether to ask the Court to instead "shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority" (*Pandey v State of West Bengal* 1987 2 SCR 223 242) would have been tenable where the rights of children were at stake. It is submitted that such a proposition cannot hold.

were implicated in the context of resource allocation, are analysed in order to illustrate the judicial approach's congruence with a capabilities approach to adjudication.

3 3 2 4 1 Health and life

In *Municipal Council, Ratlam v Shri Vardhichand*[227] the municipality had failed to provide adequate drainage and sanitation facilities for resident slum dwellers, thereby allowing a public nuisance to be created. Capabilities relating to health and life, necessary to achieve the functioning of living a dignified life, were therefore implicated. The municipality alleged that it had insufficient resources to remedy the situation. The Court, however, firmly rejected an attempted defence of resource constraints, holding that insufficient resources can never justify failure by an organ of State to perform its primary function:

> "A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies."[228]

The Court was fortified in its decision to issue positive directions and impose time limits by its observation that the municipality had chosen the route of litigation for seven years. During this period, the municipality could have employed the resources spent on the litigation to take action that would abate the public nuisance.[229] Other than wasteful litigation and recalcitrance in fulfilling its primary duty, the implication of the slum dwellers' dignity seems to have informed the Court's robust approach.[230]

The Court directed the municipality to "slim its budget on low priority items and elitist projects to use the savings on sanitation and public health".[231] A court should not be barred from perusing a budget and identifying distinctions between items with high priority and those with lower priority. By directing reprioritisation while leaving the details thereof to the government body concerned, a court can fulfil its constitutional

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[227] 1981 1 SCR 97.

[228] 110.

[229] 101; 110-112.

[230] For a discussion of the value of human dignity's ability to identify important capabilities and trigger robust review of State resource allocation decisions, see further chapter two part 2 4 1 above.

[231] *Municipal Council, Ratlam v Shri Vardhichand* 1981 1 SCR 97 114.

mandate to prevent and remedy rights violations while not itself entering into the arena of polycentric priority setting. A capabilities-based weighting exercise can therefore identify the need for the original decision-maker to revaluate its own weighting processes.

3 3 2 4 2 Education

The Court has similarly displayed a forceful approach towards the realisation of the fertile capability of education. In *Miss Mohini Jain v State of Karnataka*[232] ("*Mohini Jain*") the question at issue was whether the State could allow private educational institutions to charge a capitation fee for admission. A related question was whether the right to education constituted a fundamental right in terms of the Indian Constitution. At the time that judgment was given, the right to education was not *prima facie* a justiciable, fundamental right contained in part III of the Indian Constitution. It was, however, included in two non-justiciable DPSP in part IV of the Indian Constitution. The Court held that while the majority of the country remained illiterate, both the fundamental rights in part III and the overall objectives of the Indian Constitution as set out in the preamble, would remain meaningless. The fertile nature of education as a capability that can lead to a variety of more complex functionings was thus recognised.[233]

The Court went on to emphasise the importance of human dignity as expressed through the fundamental right to life enshrined in article 21. Based on its conclusions regarding the critical role of education in the Indian Constitution's vision of social justice, the Court held that the right to education formed part of human dignity and was thus concomitant to article 21.[234] The Court further emphasised that government was constitutionally mandated "to provide educational institutions at all levels" to benefit Indian citizens.[235]

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[232] 1992 3 SCR 658.

[233] For the significance of "fertile" capabilities that can generate improvements in other socio-economic areas, see chapter two part 2 3 2 2 3 above.

[234] *Miss Mohini Jain v State of Karnataka* 1992 3 SCR 658 667-670.

[235] 670. One factor that seems to have encouraged the Court to take such a forceful stance was the fact that it was primarily the State's obligation to provide education. To the extent that private institutions offered education, they constituted "agents" of the State, fulfilling the State's obligations (672). A similar factor played a role in catalysing a robust judicial role in the South African High Court decisions of *National Association of Welfare Organisations and Non-*

Although the Court's capabilities-infused interpretative approach can be wholly supported, the Court could have done more, as a second step, to determine the practicality of its judgment in the light of possibly strained resources. Jain states in this regard that "[t]he *Mohini Jain* ruling was hardly viable, feasible and tenable, for no state currently has the financial wherewithal to meet the public demand for professional colleges".[236]

In *Unni Krishnan JP v State of Andhra Pradesh*[237] ("*Unni Krishnan*"), the Court had the opportunity to reassess its far-reaching decision in *Mohini Jain*. *Unni Krishnan* again dealt with the limit of capitation fees charged by professional colleges. The Court held that the *ratio* in *Mohini Jain* was correct to the extent that it held that the right to education was indeed implicit in article 21. However, the Court went on to limit the content of the right to education, thereby overruling *Mohini Jain* to the degree that that judgment had implied an unqualified right to education *at all levels*.[238] Based on the text of the DPSP in articles 41 and 45,[239] the Court held that the right to education was unqualified for citizens between the ages of seven and fourteen. Thereafter, the right

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Governmental Organisations v MEC for Social Development (1719/2010) [2010] ZAFSHC 73 (5 August 2010); *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011); *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013); *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014) and *Assosiasie van Welsynsorganisasies en Organisasies Sonder Winsoogmerk v Die LUR vir Maatskaplike Ontwikkeling van die Provinsie Vrystaat* 2003 JDR 0112 (O).

[236] MP Jain "The Supreme Court and Fundamental Rights" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 1 32.

[237] 1993 1 SCR 594.

[238] 654-655.

[239] Art 41 of the Indian Constitution states:

> "The State shall, *within the limits of its economic capacity and development*, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want." (Emphasis added).

Art 45 of the Indian Constitution states:

> "The State shall endeavour to provide, *within a period of ten years* from the commencement of this Constitution, for free and compulsory education for all children *until they complete the age of fourteen years*." (Emphasis added).

was circumscribed by the economic capacity and development of the State.[240] The Court noted that article 45 was the only DPSP that contained a time limit for its achievement – *in casu*, ten years, which had long since passed:

> "Does not the passage of 44 years, more than four times the period stipulated in Article 45 convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that *allocation of available funds to different sectors of education in India discloses an inversion of priorities* indicated by the Constitution… What has actually happened is more money is spent and more attention is directed to higher education than to and at the cost of primary education."[241]

While adopting a more moderate approach than that apparent in *Mohini Jain*, the Court nevertheless did not shy away from adjudicating the State's prioritisation of resource allocation.[242] Again, it was the Court's focus on the capability and the rights it imbues with content that allowed it to adopt a robust yet prudent approach to the adjudication of resource allocation decisions.

3 3 2 4 3 Food

Furthermore, the Court has issued in excess of 50 far-reaching orders in a series of right to food petitions initiated by the People's Union for Civil Liberties.[243] The PIL was launched following a protracted period of drought that resulted in wide-spread famine, malnutrition and starvation. The Court held that the right to food is encompassed by the right to life as enshrined in article 21 of the Indian Constitution, read with the DPSP in article 47, which directs the State to regard nutrition, standard of living and public health as constituting part of its primary duties.[244] The Court thus expanded on the

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[240] *Unni Krishnan JP v State of Andhra Pradesh* 1993 1 SCR 594 655.

[241] 656 (emphasis added).

[242] Kothari argues that the issue of resource constraints was "ingeniously" dealt with when Reddy J pointed to the distinct wording in arts 41 and 45, respectively, in that economic capacity only qualified art 41: J Kothari "Social Rights Litigation in India: Developments of the Last Decade" in D Barak-Erez & AM Gross (eds) *Exploring Social Rights: Between Theory and Practice* (2007) 171 189.

[243] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001). For a full index of all the interim orders issued to date, see *Right to Food Campaign* <www.righttofoodindia.org> (accessed 08-10-2013).

[244] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001): Interim order dated 2 May 2003.

broad interpretative approach espoused in *Francis Coralie Mullin v The Administrator*, according to which the right to life entails the right to live with dignity.[245]

Ample stockpiled food was available since the initiation of proceedings, but was not accessible to vulnerable and destitute segments of the population who faced the real risk of starvation. One of the original orders thus directed the State to distribute food in terms of the Targeted Public Distribution Scheme; to commence the effective implementation of its schemes directed at the most vulnerable segment of society as well as those related to old age pensions, maternity benefits and family benefits; to start the roll out of a Mid-Day Meal Scheme in terms of which cooked meals would be provided to school-attending children; and to fully implement its Integrated Child Development Scheme.[246] Subsequent orders have attempted to enforce effective implementation, accountability and community participation. However, the inaccessibility of stockpiles remains a serious concern despite recent legislative intervention.[247]

Significantly, the implication of nutrition and health-related capabilities, as informed by the value of human dignity, led to the Court adopting a robust approach to the protracted litigation. The Court has issued orders setting out the State's obligations in terms of the nutritional requirements of children, adolescent girls and pregnant women, in detail.[248] In doing so, the Court has ordered government to prioritise the needs of the most vulnerable members of society before attempting to implement programmes aimed at achieving universal food security.[249] Moreover, the Court has not shied away from scrutinising the budgets and actual expenditure of recalcitrant States, and ordering re-allocation or expenditure where under-spending has occurred.[250]

The severely deleterious effect that the deprivation of nutrition-related capabilities would have on a range of other basic capabilities such as those related to life and

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[245] *Francis Coralie Mullin v The Administrator* 1981 2 SCR 516 529.

[246] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001): Interim order dated 28 November 2001.

[247] The National Food Security Act 20 of 2013. For criticism of the Act, with regards to its cost and implementation implications in particular, see *inter alia*, D Sinha "Cost of Implementing the National Food Security Act" *Economic & Political Weekly* (28-09-2013) 31.

[248] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001): Interim order date 28 November 2001.

[249] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001): Interim order dated 14 May 2011.

[250] *PUCL v Union of India* (Writ Petition [civil] No 196 of 2001): Interim order dated 20 April 2004; Interim order dated 13 December 2006.

health, together with the serious implication for the achievement of the functioning outcome of living an autonomous and dignified life, therefore justified the adoption of a robust standard of review to adjudicate State resource allocation decisions in this on-going matter.

3 3 3 Aspects in need of capabilities-infused development and reform

Positive elements of the judicial approach in India have been discussed above. These characteristics of judicial review rest on the normative assumption that the Indian Constitution is aimed at the transformation of Indian society. Furthermore, the judiciary forms part of a collaborative partnership with other branches of government, the purpose of which is to attain the Indian Constitution's transformative objectives. This fundamental normative assumption has led to judgments which are largely congruent with the capabilities approach to adjudication espoused in this dissertation.

However, the Indian Supreme Court's approach cannot be unreflectively transplanted into South African law. There are several aspects of the Indian judiciary's approach which do not reflect the normative purposes of transformative constitutionalism. Instead, aspects in need of reform sometimes result from India's history of colonisation by the British, and the incorporation of English law despite the fact that the latter rests on fundamentally different normative assumptions. The following part critically analyses those elements of Indian jurisprudence that are in need of capabilities-based reform.

3 3 3 1 Thwarting participation and informational broadening

As was noted above, a collaborative partnership between all three branches of government, litigants and other stakeholders can best serve to arrive at reasonable resource allocation decisions without triggering concerns that justify resort to judicial deference. Participation by all stakeholders is critical in such a co-operative conversation.

Yet some of the very characteristics that make PIL such an innovative development in general and a good framework for the adjudication of State resource allocation decisions in particular, paradoxically shut down participation in certain respects. For example, the appointment of commissions can "create a parallel structure of decision-

making deep within the area of executive competence".[251] When one additionally factors in the (empirically unverified) opinion that appointed commissions often discourage the executive from acting on its own initiative and thereby perpetuates recalcitrance,[252] the possibility begins to emerge that commissions with parallel jurisdiction can stifle participation. This concern is strengthened where the reports of the commissioners are not subject to cross examination.[253]

Furthermore, the expanded scope of PIL "runs the risk that those who already have political and economic power will drown or even silence the voices of the poor and marginalised",[254] thus further diminishing the scope for meaningful participation by all stakeholders. Where the needs of those affected by a resource allocation decision cannot be determined, it is unlikely that a reasonable resource allocation can be arrived at. The necessity of incorporating a broad range of perspectives in allocative design is underscored by the polycentric nature of socio-economic resource allocation decisions. Courts partial to PIL should thus be particularly careful to boost participation lest PIL's innovative and well-intended mechanisms have the counterproductive effect of shutting out the voice of the executive and silencing the voice of the poor and vulnerable classes it was originally intended to protect.

3 3 3 2 Lack of explicit reasoning and informational broadening

Another pertinent criticism of PIL is the failure of government to implement the Court's orders. Often, this is due to the fact that the Court makes an order with

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[251] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 135.

[252] 135; S Khurshid *Judicial Activism in Indian Law* (2012) address by Mr S Khurshid, Minister of Law and Justice and Minority Affairs, Government of India hosted by University of Oxford, Faculty of Law, 12-10-2012.

[253] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 136; V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 1 23-24.

[254] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 137. See also V Gauri *Public Interest Litigation in India: Overreaching or Underachieving?* The World Bank Development Research Group Human Development and Public Services Team Policy Research Working Paper 5109 (2009) 16 Table 2a which shows the win rate of advantaged classes *vis*-à-*vis* disadvantaged classes in selected fundamental rights cases sharply increasing from 1961-1989 to 2000-2008. See further IP Massey *Administrative Law* 7 ed (2008) 448, 449 who comments on the development of PIL into middle class interest litigation.

potentially vast resource implications in a show of judicial activism without according sufficient weight to real problems of resource constraints.[255]

In *Paschim Banga Khet Majoor Samity v State of West Bengal*[256] ("*Samity*") an agricultural labourer fell from a moving train and sustained serious head injuries. He was denied admission to several hospitals due to a purported shortage of available medical facilities. Interpreting the right to medical treatment as forming part of the right to life under article 21, the Court held that *in casu* there had indeed been a violation of a fundamental right. The Court ordered compensation for the injured petitioner. Moreover, the Supreme Court ordered the upgrade of medical facilities, increased specialist treatment facilities, and the provision of adequately equipped ambulances throughout the City.[257] The Court recognised that financial resources would be required to comply with these far reaching directions but nevertheless held:

> "It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. *Whatever is necessary for this purpose has to be done*... In the matter of *allocation of funds* for medical services the said constitutional obligation of the State has to be kept in view."[258]

The robust nature of the above statement is commendable to the extent that it recognises the importance of the right at stake. It is similarly to be welcomed from a capabilities perspective to the extent that the content of the right should influence the level of resources made available for its realisation. Likewise, the importance of the capabilities that form the content of the right should influence the intensity of review to which such resource allocation decision is subjected.[259] However, the Indian Supreme

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[255] V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 1 26. Baxi asserts in this regard that the Court's failure to take steps to have its orders implemented by means of, for example, contempt proceedings, creates the impression that the Court acquiesces to unconstitutional government conduct. He goes on to forcefully argue that the future of constitutional democracy hangs in the balance. U Baxi "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in U Baxi (ed) *Law and Poverty: Critical Essays* (1988) 387 413-414.

[256] (1996) 4 SCC 37.

[257] The South African Constitutional Court in *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC), discussed in chapter four part 4 2 2 below, failed to acknowledge this component of the Indian Supreme Court's order.

[258] *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37 para 16.

[259] See further chapter two part 2 3 2 2 1 above.

Court did not probe what resources were in fact available or could be made available, and thus failed to recognise the reality of limited resources.

Whereas the first interpretative stage of the two-stage analysis required by a capabilities approach to adjudication was therefore observed, no second, justificatory stage in the weighting process took place. The standard of scrutiny identified as appropriate given the content of the right at stake was not applied to evidence presented by the State regarding limited resources. As a result, the capabilities-based weighting exercise was not completed.[260] This risks non-compliance with unrealistic court orders.

The judgment could have been improved if closer scrutiny of available resources occurred, and some recognition had been given to the fact that compliance would entail the procurement of additional resources. The need to procure additional resources could have prompted the Court to establish what a reasonable resource allocation would be in the case at hand. Moreover, explicit, substantive reasoning and informational broadening in respect of possible resource constraints would have conformed to a capabilities-based approach to review. By explicitly considering whether resources were limited, and requesting information in this regard from government, the Court could have anticipated the potential ramifications of its order to some degree.

3 3 3 3 A recent move to unprincipled deference

A further line of criticism regularly levelled against the Court is that its far-reaching remedies breach the separation of powers doctrine by encroaching on the terrain of the legislature and administration.[261] The adjudication of socio-economic rights will often entail orders with budgetary implications even when the adjudication of budgetary allocations is not directly called for. A strict adherence to the traditional separation of powers doctrine in this novel context is therefore neither practical nor desirable.[262]

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[260] See further chapter two part 2 3 2 2 3 above.

[261] SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003) 250-251; J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495 509; S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 134.

[262] For the need to reconceive the traditional separation of powers doctrine, see the incisive discussion in S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 66-71. See further for a discussion of the arguably outdated nature of the

When a court is called upon to adjudicate a resource allocation decision in the context of socio-economic rights, the State's economic policy will more often than not be implicated. It would therefore be desirable for courts to acknowledge that they are often called upon to adjudicate policy matters. Clearly articulated criteria as to how policies should be adjudicated in the light of the socio-economic capabilities at stake would be infinitely more useful than obfuscating resorts to deference.

One would expect transparency in judicial reasoning from the Indian Supreme Court when it adjudicates policy matters given its activist record. Such transparency, through explicit reasoning, similarly constitutes a hallmark of capabilities-based adjudication. Incongruously, the Court has vacillated between prescribing policy and refusing to engage with State policy choices. Disappointingly, the inconsistency of the Court in the field of policy related matters makes it difficult to elucidate a coherent judicial framework for the adjudication of State resource allocation decisions affecting socio-economic capabilities.

3 3 3 3 1 An aversion to adjudicating economic policy

In *BALCO Employees Union v Union of India*[263] ("*BALCO*") government had embarked on the implementation of a new economic policy to disinvest from several State-owned enterprises. Employees of one such disinvested company challenged the decision to make the disinvestment, contending that they should have been consulted throughout the process.[264] The employees brought a writ petition for judicial review in terms of article 32 of the Indian Constitution, relying on their loss of protection by articles 14 (equality before the law) and 16 (equality of opportunity in matters of public employment) due to the disinvestment.[265]

In addition, the State of Chhattisgarh alleged that whereas it was not challenging the policy itself, the implementation of the policy was constitutionally unsound for various reasons, including the failure to give due consideration to the workers'

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doctrine as traditionally conceived of, PJH Maree *Investigating an Alternative Administrative-law System in South Africa* LLD dissertation Stellenbosch (2013) 47-53 and in particular 51. The author argues that the doctrine, if conceptualised as normative, dynamic and flexible, remains useful (263, 264).

[263] (2002) 2 SCC 333 *Indian Kanoon*.

[264] 8.

[265] 8.

interests.[266] Ultimately, the court held that the government had sufficiently informed and engaged with employees regarding the disinvestment process but that it would be impossible to provide everyone affected by policy decisions with a formal hearing each time such a decision was made.[267]

Although the direct implication of workers' socio-economic capabilities in this case may be open to debate,[268] the Court in *BALCO* ostensibly supported some contentious positions that are worth scrutinising. For example, it cited with approval a judgment that held that in economic matters, the government was entitled to more leeway than in matters involving civil and political rights. Since economic policy will likely affect socio-economic capabilities, this statement reinforces a rigid distinction between socio-economic rights and civil and political rights. The tenability of this distinction is questionable.[269]

Furthermore, the Court appears to have endorsed a rigid conception of the separation of powers doctrine that focuses on the limited role of judicial review.[270] For transformative constitutionalism to make a real impact in transforming society, the doctrine should be reconceptualised as a collaborative interaction among the various

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[266] 9.

[267] 19.

[268] For reports of the deteriorating socio-economic conditions of workers following the disinvestment, see, for example S Kumar "BALCO after Privatisation" (26-09-2004) *People's Democracy* <http://pd.cpim.org/2004/0926/09262004_balco.htm> (accessed 07-01-2014).

[269] For an insightful argument in favour of recognising the interdependence of all rights, see S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 51-54. See further 67 regarding the need for the judiciary to scrutinise and even order changes to economic policy in the context of adjudicating socio-economic rights. For the need to develop a capabilities approach to adjudication that recognises the interdependence of all rights and capabilities, see chapter two part 2 3 3 3 1 above.

[270] The Court referred to *MP Oil Extraction Pvt Ltd v State of Madhya Pradesh* AIR 1982 MP 1 para 41 in which it was stated:

> "The supremacy of each of three organs of the State i.e. legislature, executive and judiciary in their respective field of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional schemes so that there may not be any occasion to entertain misgivings about the role of judiciary [*sic*] in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate [*sic*] the need for mutual respect and supremacy in their respective field."

The Court referred to a similar sentiment expressed in *Fertilizer Corporation Kamgar v Union of India* 1981 2 SCR 52 71.

branches of government with the purpose of attaining common, constitutionally defined goals.[271] Having emphasised that it was not for the Court to judge the wisdom of a policy or whether a better policy choice could have been made, the Court held:

> "The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be *so violative of constitutional or legal limits on power or so abhorrent to reason*, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to 'trial and error' as long as both trial and error are *bona fide and within limits of authority*. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed."[272]

The Court thus clearly envisaged a high threshold of unreasonableness, reminiscent of *Wednesbury* unreasonableness,[273] for it to "interfere" with or adjudicate a government policy choice. The *dictum* in *BALCO* should not be followed without circumspection in cases where important capabilities may be more directly implicated, in so far as it allows for an overly broad margin of discretion to government based on the fact that questions of economic policy are involved. Such a broad discretionary margin might lead to the adoption of a "manifestly without reasonable justification" test as used by the European Court of Human Rights and the UK Supreme Court where matters of general socio-economic policy are at issue. This can lead to undesirable outcomes that seriously impinge upon important socio-economic capabilities.[274] The capabilities at issue, and not the nature of the policy as economic or otherwise, should determine the level of scrutiny to which government conduct is subjected.[275] Having had the option of simply determining what procedural fairness required in the

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[271] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 66-71. For the normative nature of the separation of powers doctrine, see PJH Maree *Investigating an Alternative Administrative-law System in South Africa* LLD dissertation Stellenbosch (2013) 38. It follows that the nature of the doctrine should evolve as the normative landscape of a given jurisdiction changes.

[272] *BALCO Employees Union v Union of India* (2002) 2 SCC 333 *Indian Kanoon* 14 (emphasis added).

[273] See part 3 2 3 1 above.

[274] See further the case evaluation in part 3 2 3 3 3 above.

[275] See further *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) (discussed in chapter four part 4 2 2 below), in which the South Africa Constitutional Court applied a thin standard of rationality to a rationing policy and similarly merely required good faith on the part of government.

circumstances of the case, the need for the Court's various pronouncements regarding the non-justiciability of economic policy is dubious.

3 3 3 3 2 A refusal to become embroiled in developmental projects

The Court has also unequivocally indicated that decisions to undertake infrastructure-related development projects constitute policy decisions that lie outside the domain of what can ordinarily be considered justiciable. In *Narmada Bachao Andolan v Union of India*[276] (the "*Narmada Dam* case") the Court held that where government has put a system in place which is not arbitrary, the Court's circumscribed function is to ensure that the system operates in accordance with government's vision thereof.[277]

In casu, the petitioners relied on article 21 of the Indian Constitution as well as an international convention and sought comprehensive judicial review of a developmental project to build a large dam.[278] It was alleged that the project should not be allowed to continue until the environmental impact assessment had been completed. Moreover, the project would result in the large-scale eviction and displacement of thousands of people. As a result, the capabilities related to shelter and to earning a livelihood as contained in the DPSP and read into the right to life were imperilled.[279] Furthermore, it was argued that satisfactory rehabilitation of displaced inhabitants was not possible and that article 21 of the Indian Constitution would therefore be violated.[280]

The Court responded by surmising that displaced persons would enjoy better amenities once relocated and that displacement was therefore not tantamount to a violation of fundamental rights. Adopting a paternalistic tone,[281] the Court held that the "gradual assimilation in the main stream of the society will lead to betterment and

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[276] (2000) 10 SCC 664 *Indian Kanoon* <http://indiankanoon.org/doc/1938608/> (accessed 26-11-2012).

[277] 69.

[278] In addition to art 21 of the Indian Constitution, the petitioners relied on ILO Convention 107 (1957).

[279] *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630, interpreting the right to life to include reasonable forms of shelter. *Olga Tellis v Bombay Municipal Corporation* 1985 2 SCR Supl 51, interpreting the right to life to include the right to a livelihood with reference to the DPSP in art 39(a).

[280] *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 *Indian Kanoon* 13.

[281] P O'Connell *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (2012) 101 describes this passage as a "mix of paternalism and utilitarianism".

progress".[282] The Court asserted that it was the petitioners – and not government as alleged – who were acting contrary to the public interest by challenging the policy decisions after an unreasonable lapse of time "during which period public money has been spent in the execution of the project".[283] Where rights are threatened or infringed this line of reasoning becomes indefensible, even more so in a jurisdiction where the judiciary has recognised that rigid procedure cannot be allowed to thwart the vindication of fundamental rights. The Court went on to severely restrict its own role where developmental projects involving policy decisions are concerned:

> "It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision [*sic*]. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken."[284]

In a passage that is difficult to fathom given the Court's unprecedented activism in the past, the Court elevated compliance with civil procedure and the expenditure of costs in the execution of policy above the protection and vindication of fundamental rights:

> "The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. *Even then any challenge to such a policy decision must be before the execution of the project is undertaken*. *Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of latches*[285] [*sic*] if the petitioner had the knowledge of such a decision and could have approached the Court at that time. *Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply*."[286]

PIL was evidently designed with the very purpose of rendering "ordinary principles" of litigation inapplicable where poverty and voicelessness threatened the realisation of

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[282] *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 *Indian Kanoon* 19.

[283] 14. The Court went on to emphasise the critical importance of water and the important duty that thus rested on government to provide the same. *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 *Indian Kanoon* 18, 68, 73.

[284] 69.

[285] A defence of laches is available to a defendant where there has been an unreasonable delay by the party seeking to enforce her or his rights.

[286] 69 (emphasis added).

fundamental rights. Moreover, to dismiss a tardy claim forthright without entertaining it even where fundamental rights are threatened is to elevate form above substance to an unacceptable degree.

3 3 3 3 3 A thin conception of administrative law

ND Jayal v Union of India[287] similarly concerned the construction of a dam. The petition was brought in terms of article 32 of the Indian Constitution, given the implication of constitutional rights in the matter.[288] *In casu*, the Court noted that the right to sustainable development formed part of the right to life guaranteed in article 21 of the Indian Constitution. It was contended that by granting clearance for the project to continue, government had not properly applied its mind to the matter.[289]

Although referring to Sen's concept of development as freedom,[290] the Court approved of and applied the *dicta* from the *Narmada Dam* case, thus limiting the Court's power to interfere to cases where government had acted with "*mala fides*, arbitrariness or irrationality".[291] The Court underscored its own institutional incompetence to adjudicate matters that require scientific knowledge, instead leaving such matters to the judgment of government. Where judicial interference was called for, the Court held that "well-settled principles of administrative law" should guide any review.[292] Regrettably, the Court appears to have envisaged a thin, procedural conception of administrative law – as opposed to a more robust, substance infused application thereof – so as to minimise any encroachment on the terrain of the executive.[293]

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[287] (2004) 9 SCC 362.

[288] Art 32(1) states that "[t]he right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [the Indian Constitution] is guaranteed". Administrative law claims are consequently often framed as rights issues in order to invoke the jurisdiction of the Supreme Court, to escape the strictures of *Wednesbury* unreasonableness (see parts 3 2 3 1 above and 3 3 3 4 below) and, in certain instances, to take advantage of the relaxed procedures of PIL.

[289] *ND Jayal v Union of India* (2004) 9 SCC 362 para 7.

[290] Para 23. See chapter two part 2 2 for a comprehensive discussion of development as freedom in the context of adjudicating State resource allocation decisions.

[291] *ND Jayal v Union of India* (2004) 9 SCC 362 para 18.

[292] Para 19.

[293] Para 19:

"The consideration in such cases is in the process of decision and not in its merits."

In contrast to the majority judgment, the dissenting judgment of Dharmadhikari J displayed a greater sensitivity to the plight of displaced persons. The judge noted that the social costs of dam projects could be "too heavy" and that the economically weaker position of displaced persons was an important factor to be taken into consideration.[294] Importantly, Dharmadhikari J recognised that conflicts about natural resources often masked conflicts between the haves and have nots of society.[295] It is submitted that an approach that takes cognisance of the needs of the vulnerable will always be preferable to an automatic retreat to deference where courts are called upon to adjudicate resource allocation decisions in cases where important capabilities are implicated.[296]

3 3 3 4 Scope for greater development and integration of administrative law review

Given administrative law's reach and potential for the advancement of rights, the powerful judiciary in India is well situated to contribute to the rule of law by substantively developing administrative law. Through explicit, substantive reasoning, administrative law review can contribute to a capabilities-based approach to adjudication by stimulating further debate regarding the weighting of diverse capabilities.[297] Massey commends the Indian judiciary for contributing to the establishment of the rule of law in India by developing principles of administrative law. The author goes on to opine that the courts' application of administrative law has improved the quality of life of many citizens by furthering the attainment of social and economic justice. Moreover, Massey emphasises the crucial socio-economic function that administrative law fulfils in any society.[298] Sathe likewise notes that administrative law plays a significant role in channelling State efforts to accomplish the "profound social transformation" envisaged

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For the importance of substantive reasoning in terms of a capabilities approach to adjudication, see further chapter two part 2 4 4 above.

[294] *ND Jayal v Union of India* (2004) 9 SCC 362 para 105.

[295] Para 106.

[296] For the importance of context in determining with what level of scrutiny State resource allocation decisions should be reviewed, see further chapter two part 2 3 3 3 3 above.

[297] Chapter two part 2 4 4 above.

[298] IP Massey "Evolving Administrative Law Regime" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 101 104.

by the Indian Constitution.[299] It follows that similar links to those found in South Africa exist between administrative law and socio-economic rights in India.

3 3 3 4 1 A legacy of Wednesbury unreasonableness where fundamental rights are not clearly implicated

However, divorced from the fundamental rights enshrined in the Indian Constitution, certain facets of Indian administrative law have not developed substantively to the extent perceivable in South Africa.[300] This results in the application of varying standards of review based on whether or not an important capability can be read into a fundamental constitutional right in a given case.[301]

In Indian administrative law, which inherits much from its English ancestry, "[t]he principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalized administrative law in recent years".[302] Yet despite this "all-pervasive" presence of reasonableness in Indian administrative law,[303] the test for reasonableness in administrative law as distinguished from the test that prevails where fundamental rights are concerned, is that of *Wednesbury* unreasonableness.[304] The Supreme Court elucidated the position in *Union of India v G Ganayutham*:[305]

> "[I]n administrative law, where no fundamental freedoms… are involved… the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury… principles…"[306]

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[299] SP Sathe *Administrative Law* 5 ed (1991) 11.

[300] See, for example, the test for contextual reasonableness developed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC). A substantively infused test for reasonableness can promote the adjudication of administrative resource allocation decisions that best contribute to the realisation of socio-economic rights in South Africa.

[301] For a discussion of the similarly problematic position in the United Kingdom, see part 3 2 4 above.

[302] OC Reddy *The Court and the Constitution of India: Summits and Shallows* (2010) 238.

[303] CK Takwani & MC Thakker *Lectures on Administrative Law* 4 ed (2008) 320.

[304] See part 3 2 3 1 above.

[305] (1997) 7 SCC 463.

[306] Para 28.

This restrictive test, which sets the bar so high that unreasonableness will only rarely be found to exist, has been relaxed in South Africa in favour of a contextual test for reasonableness.[307] As Hoexter aptly notes, "tests of this sort set such a low standard for administrative decision-making that they are quite worthless except as a ground of last resort".[308] The same problems associated with the *Wednesbury* standard in the United Kingdom[309] therefore persist in Indian law where fundamental rights are not explicitly implicated. This results in the incoherent position, as is the case in the United Kingdom, that where a socio-economic capability cannot be read into a justiciable right in a certain instance, a much more restrictive standard of review will be applied to an impugned allocative decision.[310]

3 3 3 4 2 Reading the requirement for reasonableness into articles 14 and 21

This restricted approach to reasonableness can be distinguished from the administrative law principles that apply where fundamental rights are clearly implicated. The duty on administrators to act lawfully, reasonably and in a procedurally fair manner is often inextricably linked to articles 14 and 21 of the Indian Constitution.[311] Article 14 has precipitated the principle that government action "must be informed by reason".[312] Moreover, owing to the close relationship between article 14 and article 21, the requirement for reasonableness can be said to extend to both these articles. In *Maneka Gandhi* the Court per Bhagwati J stated:

> "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding

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[307] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 44.

[308] C Hoexter *Administrative Law in South Africa* 2 ed (2012) 346.

[309] See part 3 2 3 1 above.

[310] For a discussion of why a constitutionally more coherent approach requires the application of proportionality as a standard head of review, see the analysis of the position in the United Kingdom in part 3 2 4 above.

[311] Art 14 of the Indian Constitution states that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" whereas art 21 states that the deprivation of life or liberty can only occur in terms of "procedure established by law".

[312] MP Jain "The Supreme Court and Fundamental Rights" in SK Verma & Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 1 40.

> omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14."[313]

A decision regarding what resources to allocate, as well as the subsequent application of such allocative decision, should both be reasonable.

3 3 3 4 3 The need to apply proportionality review as a standard head of review

However, the circumstances in which reasonableness review in Indian administrative law will require a *proportionality* analysis remain obscured by rigid distinctions between constitutional review and administrative law review. In *Om Kumar v Union of India*[314] the Supreme Court embarked on an analysis of various jurisdictions including the United Kingdom and India in an effort to establish what role the doctrine of proportionality played in administrative law. The Court elucidated its conception of proportionality:

> "By 'proportionality', we mean the question whether, while regulating exercise [*sic*] of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are however given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality."[315]

The administrator's range of available choices is therefore circumscribed by the Court's power to adjudicate any "excess" infringement of rights. Put differently, the impact of the administrative action and the importance of the right at stake demarcate the options available to the administrator. Having analysed the emergence of proportionality in UK law and its implied use in Indian case law, the Court concluded:

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[313] *Maneka Gandhi v Union of India* 1978 2 SCR 621 674. SP Sathe *Administrative Law* 5 ed (1991) 103 states in this regard that "cases of unreasonableness have been covered under [article 14 of the Constitution] under which unreasonableness is arbitrary and therefore violates the right to equality …".

[314] 2000 Supp 4 SCR 693.

[315] Para 28.

> "[I]n administrative action affecting fundamental freedoms, proportionality has always been applied in our country though the word 'proportionality' has not been specifically used."[316]

However, the Court was careful to limit the use of proportionality to cases where fundamental freedoms were implicated and, in the context of article 14, only where discriminatory conduct as opposed to arbitrary conduct was at issue.[317] Massey observes that whereas the doctrine of proportionality is wholly applicable in constitutional adjudication where fundamental rights are concerned, it is still evolving in the general sphere of administrative law. The author argues:

> "For the present the doctrine is not available in administrative law in the sense that the court cannot go into the question of choice made and priority fixed by the administrator… In an action for review of an administrative action the court cannot act as a court of appeal. Even in cases where the validity of a restriction imposed on the fundamental right is involved the court must exercise self-restraint and allow [a] greater margin of appreciation to the administrator…"[318]

Ajoy criticises this distinction as overly complicated and artificial, arguing instead for an approach whereby a flexible construction of proportionality can accommodate variable levels of scrutiny depending on the factual and normative context of the case at hand. He rightly notes that given the broad construction of the fundamental rights by the Supreme Court, much time spent on determining what *type* of right has been violated could instead be used for evaluating whether competing rights and interests were properly balanced by the administrator.[319]

In the context of resource allocation decisions, competing goals and rights will often need to be balanced. A flexible application of the test for proportionality in the sense that various rights and interests should be appropriately balanced may be well suited to ensuring reasonable, administratively just and efficient resource allocation

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[316] Para 55.

[317] Paras 66-67.

[318] IP Massey *Administrative Law* 7 ed (2008) 389.

[319] PB Ajoy "Administrative Action and the Doctrine of Proportionality in India" (2012) 1 *Journal of Humanities and Social Science* 16 21. See also A Chugh "Is the Supreme Court Disproportionately Applying the Principle of Proportionality?" (2004) 8 *SCCJ* 33 who similarly calls for the uniform application of proportionality and further charges the Court with conflating the doctrine of proportionality and "strict scrutiny" in its analysis of UK administrative law. Moreover, both authors argue that the doctrine of proportionality has not been developed in administrative law by the Supreme Court since the Court's pronouncements in *Om Kumar v Union of India* 2000 Supp 4 SCR 693.

decisions. However, for such a flexible test to be available across a broad spectrum of cases where socio-economic capabilities may be affected through administrative action, administrative law stands to be developed to encompass proportionality review in all cases – and not only where specific fundamental rights are at issue. This would include cases where particular DPSP are at issue and have not yet been interpreted as forming part of justiciable, fundamental rights by the Indian courts.

Ultimately, a more coherent development of administrative law will better promote a uniform, capabilities-based standard of review for the adjudication of government resource allocation decisions. By consolidating the currently fragmented approach to reasonableness review in India to encompass a single head of review, courts can engage in weighting exercises of variable intensity depending on the capabilities at stake in a given case. Proportionality review can therefore be adopted to unify review over different (artificially) demarcated areas of law. This will prevent unnecessary compartmentalisation of the law. Moreover, it will ensure that the development of administrative justice is not neglected by trying to frame administrative law claims in the guise of specific article 14 or 21 claims in order to trigger constitutional adjudication rather than administrative law review. In this way, the advantages of the Indian judiciary's innovative approach to rights-based claims can be imported into the existent body of administrative law.

3 3 3 5 A lack of coherence

Rajagopol, Iyer and Dickson argue that the Court's activist jurisprudence constitutes "substantive ad hocism".[320] Similarly, Khosla argues that the Court has not interpreted socio-economic guarantees as *systematic* rights, but has instead narrowly focused its substantive interpretation on the facts of the cases at hand.[321] Iyer goes further in his scathing criticism of the PIL era of judicial activism:

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[320] B Rajagopal "Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective" (2007) 18 *Human Rights Review* 157 160. The author goes on to state that the "Court's record on economic, social, and cultural rights remains deeply unsatisfactory" (160). V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 1 4; P O'Connell *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (2012) 104, agreeing with Rajagopal.

[321] See, in general, the distinction made between conditional and systematic rights in M Khosla "Making Social Rights Conditional: Lessons from India" (2010) 8 *I Con* 739. It is submitted that

> "[T]he jurisprudence generated by such activism suffered from a visible lack of doctrinal coherence, insufficiently rigorous reasoning, a disconcerting unpredictability of approach, and a reliance on unquestioning presumption and reiteration rather than empirical evidence for many of the highly controversial conclusions reached by the Court. Much of the activism has… been characterized by ad hoc-ism and cheap populism..."[322]

The Court's incoherent vacillation between a *willingness* to encroach on policy matters in the name of social justice and an *aversion* to adjudicating policy-related matters,[323] is not an ideal setting for the adjudication of resource allocation decisions. Well-reasoned guidelines for such adjudication are necessary. Although such guidelines would need to be flexible and cater for differing circumstances in which resource allocation decisions are made, they must be capable of coherent application. The alternative would be arbitrary adjudication of resource allocation decisions that does nothing to aid policy-makers, administrators or prospective litigants.

Moreover, arbitrary decision-making can alienate other branches of government instead of including them in a collaborative partnership. A lack of coherence thus flouts the explicit reasoning and participation espoused by a capabilities approach to adjudication.[324] Courts should explicitly justify the judgments they arrive at, in order for their evaluative judgments regarding resource allocation to be susceptible to public scrutiny. Explicit, substantive reasoning thus makes subsequent participatory processes meaningful. Where courts eschew the tenet of explicit reasoning, important constitutional objectives such as accountability and participation are hampered.

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systematic socio-economic guarantees have indeed been recognised by the Supreme Court in certain judgments, for example in *Miss Mohini Jain v State of Karnataka* 1992 3 SCR 658; *Unni Krishnan JP v State of Andhra Pradesh* 1993 1 SCR 594; and *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37.

[322] V Iyer "The Supreme Court of India" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 1 4.

[323] See part 3 3 3 3 above.

[324] For the importance of participation and explicit reasoning according to a capabilities approach to adjudication, see further chapter two parts 2 4 3 and 2 4 4 above.

3 3 4 Conclusion

The constitutional framework prevalent in India brings a variety of socio-economic capabilities into focus. Although many of these are enshrined as DPSP and are thus non-justiciable, the Supreme Court has interpreted fundamental, justiciable rights to include socio-economic capabilities. Expansive interpretation holds the potential to accord content and weight to socio-economic rights. The Court's interpretative approach can therefore support a capabilities approach to the adjudication of State resource allocation decisions if pursued in a coherent and consistent manner.

The Supreme Court's activist approach in introducing PIL to facilitate access for the poor constitutes a radical judicial innovation. PIL harbours the potential to promote true participation amongst the Court, government, vulnerable litigants and a wider pool of similarly placed persons who may be affected by a particular judgment. PIL can thereby serve to enhance the deliberative nature of litigation while broadening the information available to the Court. In this way, a capabilities-congruent approach to the adjudication of State resource allocation decisions can be allowed to flourish.

In many instances, the Court's approach to the adjudication of resource allocation decisions is equally commendable. The Court has used the vital socio-economic capabilities detrimentally affected by State resource allocation decisions to justify a robust approach when scrutinising resource-based justifications proffered by the State. In certain cases where the Court may have been too eager to enforce a capability, resulting in unrealistic orders, it has subsequently adopted a more moderate position that strikes a balance between the vital capability at stake and the reality of limited resources to achieve it.

However, the Supreme Court jurisprudence suffers from a marked doctrinal incoherence. An unprincipled resort to deference fails to take the deprivation of socio-economic capabilities seriously. In declining to review such matters for possible violation of fundamental rights, the Court has sought refuge in an overly procedural conception of administrative law. Furthermore, certain characteristics and developments in PIL potentially threaten true participation by shutting out the input of the executive and – more importantly – that of truly vulnerable prospective litigants.

The Court's robust approach to the adjudication of State resource allocation decisions has also at times failed to pay sufficient attention to the second, justificatory

stage in a proposed two-stage rights analysis. As discussed in the previous chapter,[325] this process entails the interpretation of the relevant right *followed* by the review of the resource allocation decision at issue.[326] By not engaging with what resources are realistically available to realise the relevant capability, the Court undermines its own credibility, fails to broaden its informational base and hinders participation by government. Finally, reasonableness review in Indian administrative law remains underdeveloped and fragmented. Instead of distinguishing between rights-based claims and other administrative law cases where socio-economic capabilities may nevertheless be implicated, proportionality should be applied as a uniform head of review.

The approach of the Indian Supreme Court is therefore instructive. Its strength in terms of a normative methodology lies in its activist interpretative approach in bringing socio-economic capabilities to the fore where resource allocation decisions are at issue and its innovations in respect of the participatory mechanism of Public Interest Litigation. The Court's weaknesses are equally instructive from a comparative methodological perspective, in that it illustrates the judicial tendencies to be avoided by other common-law jurisdictions grappling with questions of how to sufficiently advance socio-economic capabilities in complex, polycentric cases of resource allocation.

3 4 Conclusion

This chapter has sought to critically analyse the adjudication of State resource allocation decisions that impact on socio-economic capabilities in the United Kingdom and India. The judicial review of allocative decisions constitutes the shared problem according to the functionalist aspect of the methodological approach adopted in this dissertation.[327] By evaluating the strengths and weaknesses of the constitutional framework and judicial approach in these two jurisdictions, capabilities-enhancing aspects can be incorporated into South African law whereas capabilities-eschewing

[325] Chapter two part 2 3 2 2 3.

[326] For the critical importance of following a two-stage analysis when adjudicating State resource allocation decisions so as to promote and enhance capability realisation, see chapter two part 2 3 2 2 3 above.

[327] For an explanation of the methodological approach adopted in respect of the preceding comparative analysis, see chapter one part 1 6 4 3 above.

elements can be noted and avoided by the South African judiciary. This evaluative exercise, set against the standards implied by a capabilities approach to adjudication, thus contributes to the normative methodological project undertaken in this study.

According to the normative-dialogical approach to comparative analysis, South African courts should consider the normative assumptions that underlie the judicial approach in the United Kingdom to determine whether the incorporation of certain UK doctrines in our own jurisprudence remains appropriate. The overarching normative assumption that underlies the institution of judicial review in the United Kingdom, as reflected in the *ultra vires* doctrine, is that the will of the legislature is supreme. This assumption has led to the application of restrictive standards of *Wednesbury* review and the application of the doctrine of non-justiciability. This assumption further supports the operation of the doctrine of deference in the United Kingdom, in that courts regard themselves as constitutionally and institutionally incompetent to adjudicate socio-economic matters, generally, and government's allocative decisions, in particular. In addition, the overarching normative assumption reinforces the rigid distinction between socio-economic rights and civil and political rights, since courts only regard rights recognised by the legislature as such, as legitimate.

A similar normative assumption is not plausible in the South African context, given our system of constitutional supremacy. A tendency by South African courts to defer can be explained with reference to our strong tradition of parliamentary sovereignty as inherited from Britain, but cannot be easily justified in the light of our judiciary's constitutional obligation to promote the rights enshrined in our Bill of Rights. In South Africa, the normative assumption that should inform the judicial review of State resource allocation decisions that impact on socio-economic rights is that of a collaborative partnership between all branches of government and other stakeholders with a common purpose of advancing a project of transformative constitutionalism. Restrictive standards of review and overzealous resort to deference thus constitute pitfalls of the UK approach to review that should be acknowledged and avoided by our courts.

A rights-based approach to judicial review has gained momentum since the enactment of the HRA. A rights-based justification for judicial review is much more congruent with the normative assumption that underlies our own project of transformative constitutionalism. It is to be hoped that this trend towards substantive review, which gained momentum with the introduction of the HRA and was previously espoused by academic scholarship, will continue. Wide-spread judicial reform can be

attempted within the promising framework posited by proportionality review, which provides an ideal structure for the weighting and prioritising exercise inherent in a capabilities approach to the adjudication of government resource allocation decisions. The South African legal system can benefit from considering the advantages of proportionality as a uniform head of review in its own reasonableness review jurisprudence – and thereby strengthen its own capabilities approach to adjudication.

India's transformative constitutional framework and activist judicial approach that seeks to protect fundamental capabilities, constitute positive guidance for South African courts. The normative assumption that supports the Indian Supreme Court's approach reflects that which underlies our own constitutional design. The broad interpretation of rights has empowered the Supreme Court to adopt a robust approach to the adjudication of State resource allocation decisions. Moreover, the judge-created Public Interest Litigation movement demonstrates that the structure of courts and litigation need not remain fixed. Where capabilities are allowed to form the centre of the judicial function, innovative development that relaxes rigid procedural rules is possible. Explicit, transparent reasoning and meaningful participation are thereby allowed to triumph.

Relaxation of procedure as well as adaptions to a strictly adversarial model can partially overcome objections that courts are illegitimate and institutionally incompetent *fora* to adjudicate State resource allocation decisions. Furthermore, the separation of powers doctrine is reconceived in India as a more collaborative partnership that sets the realisation of capabilities as its common goal. The crucial importance of capabilities as instrumental to the leading of autonomous, dignified lives justifies all such innovations, aspects of which could be fruitfully incorporated by the South African judiciary.

It is therefore regrettable that the Supreme Court has recently succumbed to a posture of deference in policy matters – even at the expense of vital capabilities. The normative assumption that underlies the application of this doctrine in the UK is equally inappropriate in India, which also boasts a transformative, supreme constitution. South African law would also benefit from continuing to develop a unified standard of substantive reasonableness review in socio-economic and administrative law cases, whereas administrative law review in India remains fragmented and underdeveloped.

The following chapter will critically evaluate the need for development of a capabilities-based standard of review with reference to relevant South African

Constitutional Court jurisprudence. Furthermore, judicial competence to adjudicate State resource allocation decisions as evinced from jurisprudence will be illustrated.

Chapter 4: The need for development of a capabilities-based standard of review

4 1 Introduction

In this chapter, the need for development of a capabilities-based standard of review for the adjudication of State resource allocation decisions will be elucidated through the critical analysis of relevant Constitutional Court jurisprudence. This chapter therefore lays the basis for the development of a capabilities-based standard of review in the following chapter. Attention will be devoted to jurisprudence where the rights enshrined in sections 26, 27 and 33[1] of the Constitution of the Republic of South Africa (the "Constitution") were implicated. Although resources are necessary for the realisation of any right, the relevance of resources is magnified where the State's obligations under sections 26(2) and 27(2) are concerned.[2] Furthermore, given the importance of administrative law in realising socio-economic rights and the desirability of developing a unified standard of review across these two fields of law, developments with regard to the standard of reasonableness review applied in administrative justice cases are included in the following analysis.

First, certain trends apparent in Constitutional Court jurisprudence that are in need of judicial reform will be evaluated. In this regard, the Constitutional Court's insufficient focus on the content of socio-economic rights will be illustrated and critically analysed. Next, the Court's adoption of a narrow definition of "available resources" will be discussed. The problems inherent in the undue resort to judicial deference will be expounded, and the rigid distinction drawn between the State's positive and negative obligations in respect of socio-economic rights will be questioned.

Thereafter, aspects of relevant Constitutional Court jurisprudence that evince the judicial competence to adjudicate State resource allocation decisions will be highlighted. These include the requirement for reasonable resource allocation, and the

[1] S 33(1) states that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair".

[2] This is due to the fact that courts will always have to consider the availability of resources in assessing the reasonableness of the measures adopted by the State to fulfil the rights set out in the first subsection of ss 26 and 27. Ss 26 and 27 constitute qualified socio-economic rights in that the State "must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of [the rights enshrined in s 26(1) and 27(1)]" (emphasis added).

role of the judiciary in terms of the separation of powers doctrine under a transformative constitution. Moreover, the Court's ability to adjudicate highly complex policy matters will be analysed for its potential to be analogously extended to the review of allocative decisions. Finally, the Court's robust review of justificatory arguments based on resource constraints will be evaluated.

4 2 Aspects in need of reform

4 2 1 An insufficient focus on the content of rights

As has been argued throughout this dissertation, a capabilities approach to the adjudication of State resource allocation decisions requires that a two-stage process be followed, according to which the normative content of the socio-economic rights at stake determines the standard of scrutiny applied to any justificatory arguments raised by the State.[3] Where the interpretative and justificatory stages of this process are collapsed, an inappropriate intensity of review may be applied and disproportionate weight may be assigned to the State's justificatory arguments based on resource constraints.[4] Furthermore, by failing to engage in normative interpretation, a court eschews the explicitness and substantive reasoning demanded by the application of a capabilities approach to adjudication under a transformative constitution.[5] Explicit, substantive reasoning promotes a culture of justification, elucidates the State's constitutional obligations and makes meaningful public scrutiny of the evaluative judgments arrived at by courts possible.

The Constitutional Court's approach to the adjudication of socio-economic rights claims has largely been characterised by an overwhelming focus on the reasonableness of the State's actions. This has led to a failure to adequately develop flexible interpretations of the normative content and purposes of the rights at stake. As pointed out by Liebenberg:

> "The reasonableness model of review offers no clear distinction between determining the scope of the right, whether it has been breached, and justifications for possible infringements. This allows the courts to elide an initial principled engagement with the purpose and underlying values of the relevant rights and the impact of the deprivations on

[3] See further chapter two part 2 3 2 2 above.

[4] See chapter two part 2 3 2 above.

[5] See chapter two part 2 4 4 above.

> the claimant groups. The focus of the inquiry... is on the justifiability of the State's policy choices without a sustained analysis of the substantive values and purposes which the relevant rights protect under South Africa's transformative constitution."[6]

Liebenberg's argument can be developed further by conceptualising the "substantive purposes" that socio-economic rights seek to protect as the capabilities necessary to achieve the overarching functioning outcome of living an autonomous and dignified life in a position of substantive equality with others.[7] In this sense, the fundamental values of freedom, dignity and equality can identify which more basic capabilities must be realised for the functioning outcome to be achieved.[8] The social, historical and factual context[9] of the case at hand will further identify what capabilities form part of the content of the relevant socio-economic right.

For example, the purpose of the right of access to adequate housing can be said to be the achievement of the functioning outcome described above. However, in order to attain this functioning outcome, many more basic capabilities must first be realised. Depending on the position of the claimant group in the historical and social context of South Africa, considered along with the factual context or "lived reality" of the litigants, these capabilities may include the capabilities to enjoy adequate shelter, access to infrastructure and access to basic services. These capabilities are in turn necessary to realise other capabilities such as being able to enjoy a sufficient state of nourishment or an adequate state of health. As will be demonstrated below, insufficient attention has been devoted to the recognition and expansion of the vital capabilities that socio-economic rights represent and should foster.

4 2 1 1 Soobramoney

Soobramoney v Minister of Health (KwaZulu-Natal)[10] ("*Soobramoney*") serves as an exemplar of the pitfalls that can occur when a court fails to engage with the normative

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[6] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 175-176, see further 173-179.

[7] This overarching functioning outcome thus gives expression to the fundamental values of freedom, dignity and equality that inform the capabilities approach and our Constitution. See further chapter two part 2 4 1.

[8] See further chapter two part 2 4 1 above.

[9] See further chapter two parts 2 3 3 3 3 and 2 4 1 above.

[10] 1998 1 SA 765 (CC).

substance of the right at stake. In *Soobramoney* – a case that centred on the allocation of scarce medical resources – the appellant was denied dialysis treatment for chronic renal failure owing to the scarcity of resources in the provincial Health Department and, by extension, the public hospital to which he turned.[11] The appellant relied on the constitutional right to life (section 11 of the Constitution) and the right not to be refused emergency medical treatment (section 27(3)) to argue that the public hospital should continue to provide on-going renal dialysis treatment to him. The provision of on-going treatment would require the allocation of additional resources by the State to the provincial Health Department and hospital in question.[12]

The Constitutional Court held that sections 11 and 27(3) were of no avail to the appellant in this case. In addition, the Court made several statements regarding resources in the context of section 27(1)(a)[13] and (2). Relief was ultimately denied on the basis that the allocation of scarce resources was *rational* in this case and that the granting of relief would result in manifold detrimental impacts on wider areas of resource allocation.

The thin standard of rationality[14] review adopted by the Constitutional Court can be ascribed to a number of factors.[15] However, the Court's failure to engage in explicit reasoning or to elaborate on the normative purposes of the socio-economic right of access to health care[16] indubitably contributed thereto. By first grappling with the

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[11] Due to the scarcity of resources experienced by the public hospital, only patients with curable, acute renal failure gain automatic access to dialysis treatment. Patients with irreversible, chronic renal failure must meet certain criteria to access dialysis treatment. Owing to the appellant's heart disease, he was ineligible for dialysis treatment in the public sector. He had sought treatment from the private sector but eventually depleted his finances. *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 3-5.

[12] Para 12.

[13] "Everyone has the right to have access to health care services…".

[14] Rationality review can connote a minimum, "catch-all" standard of review, as well as a thin, highly deferential standard of review. This dissertation adopts the latter meaning in referring to rationality review. A Price "The Content and Justification of Rationality Review" (2010) 25 *SAPL* 346 350, 356-359.

[15] For instance, the polycentric effect that the reallocation and prioritisation of resources would entail (*Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 28, 31), the existence of rational rationing criteria (para 25), consistent overspending by the provincial Health Department (para 24), and the nature and identity of the decision-maker (para 29: the provincial authority charged with making "difficult decisions at the political level", para 45: the health authority that enjoys expertise).

[16] S 27(1)(a) of the Constitution.

content of the right of access to adequate health care, a more intense level of scrutiny might have been appropriately applied to the State's resource allocation decisions. An application of a more robust intensity of review might have yielded the same outcome, yet the importance of the capabilities at stake would have necessitated closer scrutiny of the resource allocation decisions at issue. Such an approach would have been more in harmony with adjudication under a transformative constitution that seeks to advance basic capabilities through their incorporation as socio-economic rights.

The Court failed to embrace a commitment to explicit, substantive reasoning as is required in a culture of justification[17] when it wholly subsumed the content of the right of access to health care services as set out in section 27(1) of the Constitution into its assessment of the State's obligations set out in section 27(2). Section 27(1) was thereby consigned a "definitional function only",[18] in that it merely served to categorise those claims which are in fact protected and which therefore trigger the imposition of the State obligations set out in the second subsection of section 27.

Instead of clearly articulating what it considered as worthy of protection under section 27 (for example, curative or preventative treatment) and then distinguishing the appellant's claim from the important capabilities encompassed by the right of access to health care, the Court resorted to implicit reasoning that obfuscates the normative content of the right at issue. Indeed, "the only substantive references to the ends that government is required to pursue [in terms of section 27(1)] are oblique and indirect"[19] – thus highlighting the deficiency of the Court's approach when assessed in terms of the requirements of a capabilities-based model of review.

4 2 1 2 Grootboom

Following the disappointing judgment in *Soobramoney*, the Court subsequently developed a more nuanced reasonableness review approach to socio-economic rights

[17] See further chapter two part 2 4 4 above; E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

[18] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 239.

[19] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45.

cases in *Government of the Republic of South Africa v Grootboom*[20] ("*Grootboom*"). In terms of this approach, the State's obligations under sections 26(2) and 27(2) are adjudicated by asking whether the measures adopted are capable of facilitating the realisation of the right in question and whether such measures are reasonable.

The Court fared somewhat better in recognising that the right of access to adequate housing[21] "entails more than bricks and mortar".[22] However, after enumerating a brief list of what the right additionally encompasses,[23] the Court did little further by way of engaging with the normative purposes and substance of the right with reference to the capabilities that it signifies.[24] Where the Court did invoke the fundamental values of freedom, dignity and equality that inform socio-economic rights, it did so during its assessment of the reasonableness of State measures.[25] In contrast to the Court's approach, normative considerations should, as a first step, extend the partial ordering of values set by the right at stake. Normative considerations should thus be used to help identify which capabilities are implicated, and determine what weights should be assigned to these capabilities. Once the importance and weights of the relevant capabilities are determined, proportionate weights can then be ascribed to resource availability or constraints and other competing factors at the second stage of the rights analysis.

Significantly, the Court did demand a means-end analysis in that the measures adopted by the State "must be capable of facilitating the realisation of the right".[26]

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[20] 2001 1 SA 46 (CC).

[21] S 26 of the Constitution.

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

[23] Para 35:

> "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 in section 26."

[24] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177; D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45-46.

[25] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177.

[26] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

However, in order to determine whether the means can achieve the constitutionally mandated ends, those ends must be substantively interpreted.[27] The Court failed to do so. Instead it again focused almost exclusively on the obligations imposed upon the State by the second subsection of the right.[28]

4 2 1 3 TAC

Similarly, in *Minister of Health v Treatment Action Campaign (No 2)*[29] ("*TAC*"), the Constitutional Court did not *explicitly* engage with the normative content of the right of access to health care services. Although there is implicit recognition that the administration of Nevirapine to mothers and their children forms part of this right, the normative justification for this conclusion was left unexplored. The ability of such treatment to achieve the overarching functioning outcome of living an autonomous, dignified life in a position of substantive equality with others was therefore left unexamined.[30] Consequently, the weighting exercise inherent in a capabilities approach to the adjudication of State resource allocation decisions was once again eschewed.

4 2 1 4 Mazibuko

The Constitutional Court came close to a complete abdication of its interpretative duties in *Mazibuko v City of Johannesburg*[31] ("*Mazibuko*"). The Court reverted to a standard of rationality review in holding that the provision of 25 litres of water per person per day to poor residents of Phiri, Johannesburg (the "applicants") was reasonable and did not breach section 27(1)(b)[32] of the Constitution.

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[27] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 143.

[28] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45-46; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177.

[29] 2002 5 SA 721 (CC).

[30] D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1 8-10; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 178.

[31] 2010 4 SA 1 (CC).

[32] S 27(1)(b) states that "[e]veryone has the right to have access to… sufficient food and water".

Whereas the Supreme Court of Appeal had previously held that the right of access to "sufficient" water[33] could not constitute "anything less than a right of access to that quantity of water that is required for *dignified* human existence",[34] the Constitutional Court declined to examine the substantive implications of the value of dignity for the normative content of the right. By refusing to interpret the normative substance of the right at issue, the Court conflated a two-stage enquiry into one that focused exclusively on the obligations of the State set out in the second subsection of section 27. The Court justified its failure to accord any significance to the content of the right with reference to the textual exposition of the right, the suggestion that interpreting content could have the "rigid" effect of preventing contextual analysis, and the Court's own institutional limitations.[35]

In the Constitutional Court, the applicants argued that the Court should quantify the right of access to sufficient water in order to facilitate the leading of a dignified life. However, the Constitutional Court rejected the argument that it was obliged or empowered to give quantitative content to section 27(1)(b).[36] The Court misconstrued the applicants' argument as one for the minimum core approach,[37] whereby the minimum content of the right is what the State works *from* to progressively realise the right in its entirety. The applicants in fact argued for the quantification of the right in the sense of what the State should be working *towards*. In the latter sense, the reasonableness of the State's conduct could then be evaluated against such constitutional goalpost as opposed to being assessed in a normative void. By failing to earnestly consider this distinction, the Court in effect failed to evaluate the State's evidence with a view towards establishing whether it was in fact reasonably possible to provide "sufficient water" necessary for the leading of dignified lives.[38]

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[33] S 27(1) of the Constitution.

[34] *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA) para 17 (emphasis added).

[35] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 57-61.

[36] Para 56.

[37] For a discussion of what the minimum core entails, and problematic aspects inherent in the minimum core approach and Nussbaum's list of central capabilities (MC Nussbaum *Creating Capabilities* (2011) 33-34), see chapter two part 2 2 2 1 2 above.

[38] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 469 and see for further criticism 466-480.

4 2 1 4 1 A proceduralised conception of progressive realisation

The Court *a priori* assumed that the provision of "sufficient" water, on the applicants' account, was not "immediately" possible.[39] Yet the Court failed to acknowledge that, at the time of judgment, fifteen years during which the right should have been "progressively" realised had elapsed. The Court eschewed a substantive conceptualisation of progressive realisation as requiring the State to progressively improve the quality of access to socio-economic rights.[40] According to the Court's approach, progressive realisation only requires flexibility in the sense that the State should continually review its policies and adapt them in the light of changing circumstances.[41] Without a substantive conceptualisation of what the right ultimately requires, it becomes difficult, if not impossible, to truly assess the reasonableness of the State's progress.[42]

4 2 1 4 2 Disregarding context

Context – both normative and factual – is a key consideration within a capabilities approach to adjudication.[43] Without taking heed of the normative purpose of the right at issue in the context of the lived reality of those who allege a right-infringement, the important capabilities at stake cannot be identified. Where content cannot be ascribed to the relevant right with reference to the capabilities it represents in a given case, an

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[39] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 56-59. In misconstruing the applicants' argument as one for the "minimum core" approach, the Court accepted, without much evidence, the impossibility of even achieving a minimum standard. The Court previously made similar statements in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC). For criticism of the vague, unsubstantiated statements previously made by the Court in this regard, see D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1 16-17.

[40] A capabilities approach supports a substantive conceptualisation of progressive realisation. Capability realisation can lead to the achievement of a spectrum of functioning outcomes, ranging from basic to complex functionings. See further chapter two parts 2 2 2 1 and 2 3 2 3 3 above.

[41] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 40, 67.

[42] The Court adopted an inverse approach to content when it stated:

> "By adopting [reasonable measures], the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness." *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 66.

[43] A Sen *The Idea of Justice* (2009) 377; chapter two part 2 3 3 3 3 above.

appropriate intensity of scrutiny cannot be determined.[44] The Court was therefore *prima facie* correct when it stated that "[t]he concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable".[45]

Incongruously, by failing to recognise that the normative values of freedom, dignity and equality necessitated a certain quantity of water,[46] the Court failed to take seriously the lived reality of the applicants who lacked such quantity of water.[47] The applicants were therefore deprived of the basic capabilities necessary to choose to lead an autonomous, dignified life in a position of substantive equality with others. "Context" as it pertains to implicated capabilities and the circumstances of the applicants played little role in the Court's assessment of the State's conduct.[48] Furthermore, the Court's suggestion that "[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context" cannot be supported. As previously argued, the capabilities approach leaves room for flexibility in defining the content of rights and for the adjudication of State resource allocation decisions.[49] The content of rights may change in correspondence to changing contexts.

Thus, in a certain factual context the normative values of freedom and dignity may identify the capability to realise an adequate state of health as forming part of the content of the right of access to sufficient water. "Sufficient water" would therefore constitute the quantity of water necessary to realise the capability of enjoying an adequate state of health. In a different social and historical context, the value of equality may indicate that the capability to enjoy a greater quantity of water constitutes the content of the same right. Where this capability is not realised, disparities in access to water may exacerbate entrenched class-based patterns of disadvantage. The more complex capability of enjoying the freedom to live life in a position of substantive

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[44] See chapter two above, and in particular parts 2 3 2 2, 2 3 2 3 and 2 3 3 3 3.

[45] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 60.

[46] The normative context.

[47] The factual context. See in this regard Applicants' Heads of Argument paras 323-331 in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

[48] For further criticism of the Court's general approach that fails to place sufficient focus on the interests, needs and lived reality of litigants, see D Bilchitz "Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence" (2003) 4 *ESR Review* 2. See also S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights" (2011) 22 *Stell LR* 664 673-678.

[49] See chapter two part 2 3 2 3 4 above. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 471.

equality with others will thus be negated. “Sufficient water” in this case would constitute the quantity of water necessary to bring the relevant group’s access to water roughly in line with the access enjoyed by groups who do not suffer from structural patterns of race- or class-based disadvantage. One right can accordingly represent varying capabilities depending on the normative and social, historical and factual context at hand.

The Court in *Mazibuko* therefore eschewed at least two central tenets of the capabilities approach in that it failed to *explicitly* grapple with the normative and factual *content* of the right at issue. As was the case in *Soobramoney*, these factors contributed to the Court’s application of a thin, highly deferential standard of rationality review. This standard is incommensurate with the importance of basic capability fulfilment for the achievement of the functioning outcome of living a free, dignified life as a substantively equal member of society.

4 2 1 5 Blue Moonlight

Even in those judgments where State resource allocation decisions were subjected to a sufficiently robust standard of review given the capabilities at issue,[50] the Court could still do more to explicitly grapple with the content of the rights at stake. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[51] (“*Blue Moonlight*”), the Constitutional Court was called upon to decide whether local government (the “City”) was constitutionally obliged to provide temporary, emergency housing to occupiers who were evicted from their homes by private landlords and who would be rendered homeless as a result of such eviction.

The Court’s willingness to closely interrogate the State’s insufficient resource allocation could be explained by its *implicit* recognition of the effects of homelessness on the capabilities necessary to live a life characterised by freedom, dignity and equality. However, the Court did not justify its selected standard of scrutiny by way of explicit elaboration of the capabilities that must be realised in order for the overarching functioning outcome to be achieved. Besides some general observations regarding the impact of homelessness on dignity[52] and a factual survey of the occupiers’

[50] See part 4 3 4 below.

[51] 2012 2 SA 104 (CC).

[52] Para 2.

circumstances,[53] the Court only gave fleeting recognition to the intersection of the normative and factual context of the case at hand.[54]

4 2 1 6 Implications of the Constitutional Court's approach

An insufficient focus on the content of socio-economic rights can cause reasonableness review to collapse into a predominantly procedural model of review that merely enforces "good governance standards".[55] This has led to comparisons between reasonableness review in socio-economic jurisprudence and an administrative law model of reasonableness.[56] However, the comparisons made generally conceive of reasonableness review in administrative law as an impoverished standard of review akin to rationality review – devoid of substance and marred by formalism and undue deference to administrators.

Yet administrative law review has undergone significant development since the advent of constitutional democracy in South Africa. Prior to the adoption of a supreme constitution, administrative law laboured under the influence of English law's restrictive

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[53] Paras 6-7.

[54] N 88 (emphasis added):

> "[In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC)] … this Court noted that when determining whether an exclusion is reasonable regard must be had to: the purpose of the right in question; the impact of the exclusion on those excluded; the relevance of the ground of exclusion to the purpose of the right in question; and the potential impact the exclusion has on other intersecting rights. From the foregoing, it is evident that the Occupiers are disproportionately impacted by the exclusion. *The effect that this exclusion has on their rights to life and dignity is significant*."

See also C McConnachie & C McConnachie "Concretising the Right to a Basic Education" (2012) 129 *SALJ* 554 579.

[55] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 49, see also 44-48.

[56] CR Sunstein "Social and Economic Rights? Lessons from South Africa" (2001) 11 *Constitutional Forum* 123 130-131; D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33; D Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301 314, 317, 318, 323. Steinberg distinguishes socio-economic rights reasonableness review from an administrative law model: C Steinberg "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence" (2006) 123 *SALJ* 264.

standards of scrutiny and undue resort to deference.[57] Moving from a pre-constitutional position where reasonableness as a ground for review was severely restricted,[58] administrative law review has gradually evolved to encompass a flexible, substantive conception of reasonableness.[59]

Disparaging comparisons between reasonableness across these two spheres of law should therefore instead be replaced by comprehensive development of this model of review in order to benefit both socio-economic rights and administrative justice jurisprudence. By reconceiving reasonableness review as a nuanced, substantive standard that focuses on capabilities, the symbiotic relationship between socio-economic rights and the right to administrative justice can be further strengthened.

A unified capabilities-based standard of review that can be applied to State resource allocation decisions holds the potential to benefit litigants and prospective litigants, the State, and jurisprudence as a whole. By interpreting the content of rights with reference to the capabilities they aim to foster in a given normative and factual context, litigants and those similarly placed can expect courts to focus on their needs. Without focusing on socio-economic capability realisation, the overarching functioning outcome of having the freedom to choose a life lived with dignity in a position of substantive equality with others will never be possible. The formulation of a unified capabilities-based standard of review can also clarify the constitutional obligations of the State, thereby allowing the State to formulate and implement its socio-economic programmes accordingly. Finally, a coherent body of jurisprudence allows for meaningful public scrutiny of the evaluative judgments made by courts. Public scrutiny can in turn lead

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[57] For a critical analysis of the position in the United Kingdom, see chapter three part 3 2 3 above.

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

[59] Early development of substantive reasonableness review in judgments such as *Carephone (Pty) Ltd v Marcus NO* 1999 3 SA 304 (LAC) and *Roman v Williams NO* 1998 1 SA 270 (C) was initially thwarted by the Constitutional Court in *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC). *In casu*, the majority reverted to rationality as standard of review whereas, in contrast, the minority advocated a substantive conception of reasonableness review similar to proportionality review. In *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC), the Constitutional Court confirmed that a higher level of scrutiny, namely reasonableness review, was necessitated by the Constitution. Despite a *Wednesbury* unreasonableness (see chapter three part 3 2 3 1 above) formulation in s 6(2)(h) of PAJA, the Constitutional Court further developed a test for *substantive* reasonableness in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

to the contestation of initial judgments, and the formation of new evaluative judgments in the light of evolving reality.

4 2 2 A narrow definition of "available resources"

Resources are central to the realisation of socio-economic rights and for the transformation of a society marred by a profoundly unequal distribution of capabilities.[60] The State's constitutional obligation to adopt reasonable measures "within available resources" to realise the socio-economic rights enshrined in sections 26 and 27 of the Constitution can be interpreted narrowly or broadly.[61] The question thus arises as to whether a court is bound to evaluate only the "resource envelope"[62] already allocated to the specific State department or socio-economic policy. Another interpretative possibility posits that the judiciary is under a constitutional obligation to assess a wider resource pool that is, or has the potential to be, at the State's disposal. "Available resources" thus stands to be construed in a broad or a narrow sense.[63]

The Constitutional Court has often displayed a distinct discomfort with the prioritising dimensions of socio-economic rights.[64] The Court has therefore favoured a narrow interpretation of "available resources" in its attempt not to exacerbate institutional tensions between it and the legislative and executive branches of government.

4 2 2 1 Allowing available resources to define the content of rights

Thus, in *Soobramoney*, the Constitutional Court interpreted "available resources" narrowly when it was called upon to look beyond existing budgetary allocations. The Court noted at the outset that the obligations imposed on the State by both sections

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[60] RE Robertson "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights" (1994) 15 *HRQ* 693 694; C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence on Equality" (1998) 14 *SAJHR* 248 249.

[61] Ss 26(2) and 27(2) of the Constitution.

[62] C Barberton "Paper Tigers? Resources for Socio-Economic Rights" (1999) 2 *ESR Review* 6 7.

[63] D Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327 330.

[64] See C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 252 quoted and discussed in the context of rationing scarce resources in chapter two part 2 3 4 4.

26 and 27 are dependent on resources "available *for such purposes*"[65] and that the rights themselves are limited and defined by reason of a lack of resources.[66] In a separate judgment, Madala J likewise adopted a narrow construction of "available resources" when stating that constitutional rights could be limited for certain reasons, one such reason being the scarcity of resources.[67]

The availability or scarcity of resources therefore defined the content of the right. Conversely, according to a capabilities approach to the adjudication of resource allocation decisions, the normative content of the right in question should determine what resources are made available for the fulfilment of the right and its corresponding obligations. Justificatory arguments regarding scarcity of resources should then only be evaluated in the light of the importance of the content and purposes of the right at stake.

The Court also effectively limited the section 27(3) right not to be refused emergency medical treatment to the provision of resources that are existing and available when it stated:

> "A person who suffers a sudden catastrophe which calls for immediate medical attention… should not be refused… emergency services which are *available* and should not be turned away from a hospital which is *able* to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and *available* be given immediately to avert that harm."[68]

This suggests that the State is not under a positive duty to procure additional resources to ensure that emergency treatment is in fact available to everyone.[69]

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[65] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 11 (emphasis added).

[66] Para 11.

[67] Para 43.

[68] Para 20 (emphasis added). But compare the separate judgment of Sachs J where he states that s 27(3) "provides reassurance to all members of society that accident and emergency departments *will be available*", thereby suggesting that the State is in fact obliged to take positive measures to ensure the availability of emergency medical resources. Para 51 (emphasis added).

[69] Scott and Alston charge that the Court's purely negative interpretation of the right amounts to a misinterpretation of the Indian jurisprudence referred to by the Court and that such a reading renders the right redundant (C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 247). The Court relied on *Paschim Banga Khet Majoor Samity v State*

4 2 2 2 Leaving allocative decisions unquestioned

Having not disputed the court *a quo*'s finding that the provincial Health Department had insufficient funds to treat patients in the appellant's position, the appellant in *Soobramoney* argued that the State should allocate *additional* funds so as to make the treatment in question more widely available.[70] The Court ultimately disagreed.

The Court pointed out that the provincial Health Department had significantly overspent its budget in the past and was set to continue this trend in the future. If the facts of the case had been different and the national government had been joined as a party,[71] the Court could have been expected to scrutinise allocations to the provincial Health Department from the overall budget in the light of the obligations placed on the State by section 27. However, rather than seeking to give content or relative weight to the right of access to health care and thereby assess the sufficiency of the health budget, the Court simply accepted that resources were significantly inadequate.

The Court went on to focus on several manifestations of the polycentric impact that an order in favour of the appellant would have.[72] If an increased allocation of resources for the treatment of patients with chronic renal failure were to be ordered, such an order would possibly need to be accommodated within *existing* budgetary allocations. This would necessitate a reprioritisation within the available provincial health budget. If such an order mandated an increase of the *overall* health budget, the national budget would be detrimentally affected in at least two ways: First, treatment would have to be extended to all similarly placed persons (ie all patients suffering from chronic renal failure), thereby impacting on the health budget and prejudicing other health care programmes. Second, other patients requiring expensive tertiary care would also have to be accommodated. Extending treatment to those similarly placed would necessitate

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of West Bengal (1996) 4 SCC 37 (discussed in chapter three part 3 3 3 2) but failed to account for the positive remedial measures (including the remedy's impact on resource allocation) imposed by the Indian Supreme Court.

[70] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 23.

[71] For example, had tertiary health care not been at issue or, alternatively, had more compelling evidence been presented to justify the allocation of additional funds. S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 140-142. *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 24 states that the provincial Health Department "does not have sufficient funds to cover the cost of the services which are being provided to the public" and that the scarcity of dialysis resources "is a nation-wide problem and resources are stretched in all renal clinics throughout the land".

[72] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 28, 31.

a dramatic increase of the health budget, which would in turn affect the State's obligations with regards to the provision of other socio-economic goods.[73]

Having outlined the "hugely radical consequence of this one judgment",[74] the Court proceeded to make the following controversial statement:[75]

> "The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with *rational* decisions taken in *good faith* by the political organs and medical authorities whose responsibility it is to deal with such matters."[76]

The effect of the above quoted and preceding passages was thus to limit the section 27(2) phrase "within available resources" to those resources already allocated to the particular right or socio-economic purpose. Political decisions aimed at fixing the health budget were left unexamined for compliance with the obligations imposed by the constitutional right of access to health care (and even, arguably, for compliance with the requirement of *substantive* rationality).[77] The Court failed to require proof that the State had taken any steps to procure additional funding to ameliorate the obviously inadequate budget[78] and lessen the need for significant over-expenditure.

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[73] Paras 28, 31.

[74] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 241.

[75] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 241 state that this passage "has been read by many to signal a deference bordering on abdication of a review role in assessing the constitutional adequacy of existing state resources".

[76] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 29 (emphasis added).

[77] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 532. For a comprehensive discussion of the development and content of the requirement that, at a minimum, all instances of public power must be rational, see generally A Price "The Content and Justification of Rationality Review" (2010) 25 *SAPL* 346.

[78] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 23, where the Court noted that the court *a quo* had found that a lack of funds had been conclusively proven and was not disputed and para 24, where the Court set out the significant over-expenditure by the provincial Health Department, noting that stretched resources was a nation-wide problem.

4 2 2 3 Implications of the Constitutional Court's approach

According to Sen, health is of paramount importance in a capabilities approach[79] according to which government should strive to enable all persons to be or do that which they have reason to value. He notes in this regard that "some of the most important policy issues in the promotion of health care are deeply dependent on the *overall allocation of resources* to health, rather than only on distributive arrangements *within* health care".[80] The Court's focus in *Soobramoney* on "distributive arrangements within health care" and the possible polycentric impact that an increase in the budget would have instead of first scrutinising how the content of the right at stake should influence budgetary allocations is therefore regrettable.[81]

The Court unquestioningly accepted the wisdom of the myriad political choices that led to the current – admittedly insufficient[82] – allocation of resources. Pieterse forcefully argues this point in the context of health care rationing:

> "[T]he 'inevitability' of financial constraints is a fallacy that has long frustrated legal responses to the social 'realities' of poverty and deprivation. Meaningful engagement with the dilemmas of health-related resource rationing requires an acknowledgment that budgets and the accompanying resource limitations that shape the context of rationing decisions are political, rather than natural, phenomena."[83]

Political decisions foreshadow budgetary allocations for all socio-economic rights. Liebenberg[84] and Mbazira[85] separately note that the Court's approach to resource allocation in *Soobramoney* fails to promote a rights-conscious budgeting process on

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[79] A Sen "Why Health Equity?" (2002) 11 *Health Econ* 659 659. Nussbaum similarly includes health in her list of central capabilities. MC Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 78.

[80] A Sen "Why Health Equity?" (2002) 11 *Health Econ* 659 661.

[81] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 139, 141, 142.

[82] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 23-24.

[83] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 526. Pieterse repeats this point with particular reference to *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) at 528.

[84] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 142.

[85] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 96.

the part of the State. Moellendorf's warning that "[a] broader sense of 'available resources' must be employed if socio-economic rights are to guide policy rather than depend upon it" is thus apposite.[86] Pieterse similarly argues that the content of the right at stake should influence the budgeting process,[87] but that the Court in *Soobramoney* regarded resource scarcity as a "natural, rather than political fact".[88] By failing to interrogate these choices for compliance with a capabilities-centred budgeting process,[89] courts in effect allow government to minimise its constitutional obligations by allocating minimal resources for the realisation of crucial socio-economic rights. This, in turn, potentially renders socio-economic rights devoid of meaning, substance or remedial force.[90]

In order to prevent this, the content of the relevant socio-economic right must be defined independently of resource constraints.[91] By substantively interpreting the socio-economic right, the importance of the capabilities forming the content of the right is allowed to determine what resources are allocated to socio-economic policies. For example, where people lack access to "sufficient" food,[92] their capabilities to be adequately nourished and enjoy an adequate state of health are negated. The more complex capability set required to live an autonomous, dignified life as an equal member of society cannot be realised in such conditions. This type of scenario calls for effective, prioritised resource allocation. If that means declaring a current budgetary allocation to be constitutionally inadequate, it is a judgment that is mandated by the Constitution and the transformative, capabilities-enhancing purposes it seeks to achieve.

However, a decade after *Soobramoney*, the Court in *Mazibuko* again displayed its unwillingness to let the normative purposes underpinning a socio-economic right dictate budgetary allocation, and not *vice versa*. In declining to determine the content

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[86] D Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327 332.

[87] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 521.

[88] 532.

[89] See chapter five part 5 4 2 3 below.

[90] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 528; C Barberton "Paper Tigers? Resources for Socio-Economic Rights" (1999) 2 *ESR Review* 6 7.

[91] D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1 19-23. See part 4 2 1 above.

[92] S 27(1)(b) of the Constitution.

of the right of access to sufficient water, the Court held that it is for the legislative and executive branches "to investigate social conditions *in the light of available budgets* and to determine what targets are achievable in relation to social and economic rights".[93] As argued above,[94] social conditions and the normative content of socio-economic rights must be permitted to inform what resources are allocated and made "available". A narrow definition of "available resources" may wholly deprive socio-economic rights of their normative force.[95]

4 2 3 Undue deference to other branches of government

The Constitutional Court has recognised the need for deference to other branches of government in the context of formulating a substantive test for reasonableness review in administrative law cases.[96] The Court characterised deference as "respect" for the decisions of government based on the character of the decision and the expertise of the decision-maker.[97] However, the Court explicitly held that the nature of the decision and the identity of the decision-maker do not absolve a court from

[93] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61 (emphasis added). See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 469 who criticises the Court for avoiding its special responsibilities "to interpret the normative standards underpinning socio-economic rights".

[94] Part 4 2 1 above.

[95] D Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327 332. See also K Chetty "The Public Finance Implications of Recent Socio-Economic Rights Judgments" (2002) 6 *LDD* 231 250.

[96] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45. Given the similarity of reasonableness review as developed across the fields of administrative law and socio-economic rights jurisprudence, the Court's reasoning is also apposite for claims framed purely in terms of socio-economic rights. The Court's conceptualisation of deference is thus relevant for administrative law and socio-economic rights reasonableness review. For a discussion of the contextual test for reasonableness developed by the Court, see chapter five part 5 2 2 below.

[97] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48. In doing so, the Court referred to a dubious *dictum* by Lord Hoffman in the UK judgment of *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 para 76. For criticism of Lord Hoffman's conceptualisation of deference, see chapter three part 3 2 3 2 2 (b) above. For a conceptualisation of deference as respect, see further C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 501.

reviewing the decision.[98] It therefore remains uncertain under which exact circumstances resort to deference will be appropriate. However, in this dissertation it is argued that concerns of constitutional and institutional competence should preferably be accommodated at the remedial – and not the review – stage of adjudication.

4 2 3 1 Double counting deference

The perceived need for deference should not be allowed to determine the level of scrutiny applied to a State resource allocation decision. As argued in the analysis of the position in the United Kingdom, if deference influences the level of scrutiny adopted, and deference is again shown when such scrutiny is applied to the State resource allocation decision, the potential to "double count" deference arises.[99] Nonetheless, it emerges that in certain judgments, deference was in fact allowed to influence the judicial choice to adopt a thin standard of rationality review.[100] Whereas this tendency is somewhat understandable in the United Kingdom given that jurisdiction's system of parliamentary sovereignty, it is inappropriate to resort to deference so easily in a system of constitutional supremacy.

4 2 3 2 Impeding the development of substantive review in administrative law

Given the vast influence of English law on our own system of administrative law, undue deference to administrators coupled with restrictive formalism have plagued administrative law for over a century. This tendency threatens the continued

[98] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48 (emphasis added).

[99] See chapter three part 3 2 3 2 2 (d) above.

[100] For example, in *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC); arguably in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) and in the majority judgment of *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC). Rationality review is not appropriate in cases where important capabilities are at stake. The importance of the capabilities (that form the content of the socio-economic right) for the achievement of the functioning outcome of living a life characterised by freedom, dignity and equality justifies the adoption of a more intense level of scrutiny. M du Plessis & S Scott "The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" (2013) 130 *SALJ* 597 616.

development of a substantive test for reasonableness in administrative law.[101] The formalistic, restrictive legacy left by English law renders swift reform particularly welcome.[102] Where a State resource allocation decision implicates a capability that underlies both the right to administrative justice and a socio-economic right, cases may arise where claims are framed exclusively in terms of administrative law. Since just administrative action is often essential for the realisation of socio-economic rights, it is therefore important to ensure that reasonableness review develops substantively across both spheres of law.

It is thus to be hoped that the judiciary will not revert to the formalistic, unduly deferential approach apparent from the majority judgment in *Bel Porto School Governing Body v Premier, Western Cape*[103] ("*Bel Porto*"). The Court applied a thin standard of rationality in reviewing the failure by the Western Cape Education Department ("WCED") to employ general assistants working at certain applicant schools, which had been previously advantaged under the apartheid regime's educational system. These schools received a subsidy from the Department of Education, which could be spent at the schools' discretion. Citing financial pressure and near-bankruptcy, the schools urged the WCED to employ their general assistants and accordingly to carry the cost of retrenchment should that become necessary. When the WCED refused to do so, the schools claimed that this decision infringed, *inter alia*, their right to equality enshrined in section 9 of the Constitution and their right to just administrative action as set out in the Constitution of the Republic of South Africa Act 200 of 1993 ("interim Constitution").[104]

The majority of the Court drew a rigid distinction between procedural and substantive fairness, and denied that substantive fairness formed part of the right to just administrative action. The Court therefore rejected the approach previously

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[101] For a discussion of the formulation of a substantive test for reasonableness, see chapter five parts 5 2 1 and 5 2 2 below.

[102] C Hoexter "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" (2008) 24 *SAJHR* 281 293. For the traditionally close relationship between deference and administrative law, see further D Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301 319-320.

[103] 2002 3 SA 265 (CC).

[104] *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 84. This judgment was decided on the basis of item 23(2)(b) of Sch 6 of the Constitution, according to which s 24 of the interim Constitution was retained until the enactment of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

espoused by the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO*[105] ("*Carephone*") regarding the change brought about to the common-law position by the constitutional provision that administrative action must be "justifiable" in relation to the reasons given for it. In *Carephone*, Froneman DJP had held that the constitutional provision required rationality of outcome or merit of the administrative action under review and not rationality as merely indicative of procedural impropriety.[106] Such *substantive* rationality[107] was informed by the normative values of accountability, responsiveness and openness.[108]

Opting instead for an interpretation of the right to just administrative action which continued to severely restrict administrative law review for reasonableness, the majority in *Bel Porto* stated that to recognise the requirement for substantive fairness "would drag courts into matters which according to the separation of powers should be dealt with at a political or administrative level and not at a judicial level".[109] Instead, the Court held that for a decision to be justifiable, it merely needed to be rational and lawful.[110]

The Court took note of the variable levels of intensity with which reasonableness review was applied in the United Kingdom depending on the implication of a human right.[111] Distinguishing the present case as involving an important policy that did not infringe constitutional or other rights,[112] the Court declined to express an opinion on the justifiability of varying levels of intensity of review.[113] A substantive approach to review that recognises that the capabilities at stake may justify variability of scrutiny[114] is commensurate with adjudication under a transformative constitution.[115]

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[105] 1999 3 SA 304 (LAC).

[106] Para 31.

[107] Para 37.

[108] Para 35.

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

[110] Para 89.

[111] See chapter three part 3 2 4 above.

[112] Cf the discussion of the minority judgment in chapter five part 5 2 1 below, in which Mokgoro and Sachs JJ found that the right to just administrative action had in fact been infringed. *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 150.

[113] Para 127.

[114] C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 504.

[115] G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *CCR* 111 113.

Moreover, substantive review cannot be said to breach the separation of powers since all exercises of public power should be consistent with the Constitution "and it is the *duty* of courts"[116] to ensure that such power is exercised in harmony with the tenets of the Constitution. It is this crucial difference between our constitutional system, and the system of parliamentary sovereignty prevalent in the United Kingdom, that merits a decisive break from a tradition of judicial deference still apparent in UK jurisprudence and academic debates.[117]

4 2 3 3 Depriving socio-economic rights of their normative force

Turning to socio-economic rights claims, in *Soobramoney* the identity of the decision-maker and the polycentricity of the rationing decisions at issue led directly to the adoption of a standard of rationality review.[118] The Court rightly acknowledged the identity and expertise of the medical authority responsible for devising the rationing criteria for admission to kidney dialysis treatment. However, the same cannot be said with regard to the identity of the political authorities responsible for setting the budget that resulted in the need for rationing. If the political identity of those responsible for setting budgets calls for automatic deference, then socio-economic rights will be rendered meaningless as all such rights centre upon the allocation of resources.[119]

Similarly, since most resource allocation decisions are complex and polycentric, the nature of the decision cannot justify reflexive resort to a deferential level of scrutiny. Instead, a level of scrutiny that is congruent with the capabilities at issue can be applied. When applying such level of scrutiny and evaluating the cogency of any justificatory resource-based arguments proffered by the State, the reviewing court may find that the technicality and persuasive force of the evidence warrants deference as respect. However, where the reviewing court carefully considers such evidence and still finds the State's resource allocation decisions constitutionally wanting, such issues may be best resolved at the remedial stage.[120]

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[116] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 313 (emphasis added); see further part 4 3 3 below.
[117] See chapter three part 3 2 3 2 above.
[118] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 29, 45.
[119] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 528, 531.
[120] See generally chapter six.

Mazibuko serves as a sobering example of the dangers that hiding behind a shield of deference can pose for the exercise of capabilities-enhancing adjudication. The Court's rigid conceptualisation of the separation of powers doctrine in effect absolved it of any meaningful judicial responsibility to take capabilities seriously, or to hold the State to account for its socio-economic policy choices. As Williams appositely explains, the separation of powers doctrine is too abstract and vague to provide any useful guidelines regarding a reviewing court's role in the quantitative implementation of socio-economic rights.[121] It therefore falls to a court to decide what the separation of powers doctrine, viewed in the context of a transformative constitution, demands in a given case. Given the fact that, on the evidence presented,[122] the applicants' ability to achieve the functioning outcome of living an autonomous, dignified life as equal members of society was clearly threatened by their inability to access sufficient water, the Court displayed undue deference.

Furthermore, the Court purported to espouse a conception of reasonableness review that fosters accountability. However, it proceeded to accord "presumptive validity"[123] to the State's evidence. This evinces an approach that elevates deference above the need to apply robust scrutiny to State actions that have the potential to cause basic capability deprivation. Finally, the Court failed to acknowledge that separation of powers concerns could be accommodated by innovative, dialogic remedial approaches.[124]

4 2 4 A rigid distinction between positive and negative duties

In *Grootboom*, the Constitutional Court recognised that section 26 of the Constitution encompasses a negative obligation "placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[125] In *TAC*, it was stated that section 27 contains a similar negative

[121] LA Williams "The Role of the Courts in the Quantitative Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 141 141-143.

[122] See in this regard Applicants' Heads of Argument paras 323-331 in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

[123] LA Williams "The Role of the Courts in the Quantitative Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 141 189.

[124] 195-196; see further chapter six especially part 6 3 below.

[125] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34.

duty.[126] Whereas the positive obligations incumbent upon the State in terms of sections 26(2) and 27(2) are defined and limited by considerations of reasonableness, progressive realisation and available resources, these qualifications do not pertain to negative obligations.

4 2 4 1 A more robust standard of review

The widened scope of these negative obligations as well as a traditional aversion to the enforcement of positive duties, have triggered a notably different mode of review in cases where negative obligations to refrain from impairing access to socio-economic rights are at issue. Instead of the State's obligations being circumscribed by resource constraints as is the case where positive duties are concerned, a presumptive infringement of a negative right triggers the application of the stringent proportionality analysis required by the section 36 general limitations clause.[127]

Although the State's latitude to rely on resource constraints is reduced where negative obligations are adjudicated, judgments in such cases have nevertheless resulted in orders with manifest implications for State resource allocation. For example, in *Jaftha v Schoeman; Van Rooyen v Stoltz*[128] ("*Jaftha*"), the Constitutional Court closely examined certain provisions of the Magistrates' Courts Act 32 of 1944 that allowed for the sale in execution of people's homes in order to satisfy even trifling debts. Having established that this procedure *prima facie* infringed the applicants' negative right not to be deprived of their existing access to adequate housing,[129] the Court subjected the Act to stringent review under the general limitations clause.[130] The Court held that the violation of the negative obligation could not be justified, and proceeded to issue a remedy of judicial oversight of future sales in execution under the Act.[131] This remedy clearly necessitates additional (time-, human- and ultimately

[126] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 46.
[127] S Liebenberg "*Grootboom* and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 41. For a discussion of the proportionality analysis required by s 36 of the Constitution, including the text of the provision, see chapter five part 5 3 1 2 1 below.
[128] 2005 2 SA 140 (CC).
[129] Para 34.
[130] Paras 35-49.
[131] Paras 54-55.

budgetary) resources;[132] yet this result was seemingly not considered in the light of the negative duty at stake.

4 2 4 2 A false premise regarding resource allocation

One of the reasons why courts regard themselves as more institutionally competent to adjudicate negative rights and duties is that negative rights are traditionally regarded as entailing less far-reaching resource implications.[133] As observed by Young, "negative obligations are easier for a court to deal with"[134] and the prioritising dimensions of socio-economic rights can purportedly be avoided.[135]

However, as Liebenberg persuasively argues, all human rights obligations demand significant positive action and concomitant resource allocation by the State.[136] As the author points out, the crucial difference in the scope of resource allocation for the realisation of socio-economic rights and traditionally recognised civil and political rights is that the State has already invested vast resources in the infrastructure necessary to realise the latter category of rights:[137]

> "The fact that socio-economic rights require a greater commitment to institutional reforms and are thus more resource intensive in many contexts than civil and political rights is due to historical and political choices rather than any intrinsic feature of the rights themselves."[138]

It is consequently unsound to allow a false dichotomy between positive and negative duties to influence the level of scrutiny adopted for the adjudication of State resource allocation decisions. Instead of resorting to typologies that focus on the nature of rights or the duties they give rise to,[139] it should be borne in mind that "the ideological lens

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[132] S Liebenberg "*Grootboom* and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 51.

[133] 48.

[134] KG Young *Constituting Economic and Social Rights* (2012) 177.

[135] See part 4 2 2 above regarding the Court's aversion to the prioritising aspects of socio-economic rights in relation to the need to define "available resources" broadly.

[136] S Liebenberg "*Grootboom* and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 49.

[137] 51.

[138] 51-52.

[139] As originally devised by H Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980).

through which a right is viewed determines which kind of duties are in focus".[140] Where resource allocation decisions fall to be adjudicated, the vital capabilities at issue should dictate what level of scrutiny is appropriate. Capabilities thus constitute the "ideological lens" through which the State's obligations should subsequently be assessed.

4 2 4 3 The implication of identical capabilities

Identical capabilities may be implicated in a case which can be framed in terms of the positive duties of the State under section 26(2), or its negative duties under section 26(1) or 26(3).[141] For example, where occupiers are evicted from a privately owned building and no provision for temporary accommodation is made, the capabilities imperilled will include those related to enjoying shelter from the elements, access to infrastructure, proximity to places of work, and access to services such as water, electricity and sanitation. The deprivation of these elementary capabilities may negate the capability to live itself, in other words it could result in absolute capability deprivation.

By framing a claim in terms of section 26(1) or 26(3), the duty of the State in this type of situation could be characterised as "negative". This may lead to the application of the stringent section 36 limitations analysis to determine whether the State has failed to discharge its negative obligation by failing to prevent interference with existing access to the socio-economic right.[142] This claim could also be framed so as to require the state to adopt "positive" reasonable measures to make provision in its housing

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[140] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 67.

[141] S 26 states:

"Housing

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

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

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

[142] The "existing access test" was developed in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34. M Dafel "The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect" (2013) 29 *SAJHR* 591 600 states in this regard:

"[T]he *existing access test* entails that a claimant must institute his socio-economic rights claim as a negative obligation if he already has access to the socio-economic resources and there is a measure or the threat of a measure that seeks to erode the current enjoyment of the resource." (Original emphasis).

policy for temporary accommodation. In the latter case, a limitations analysis will not follow and the State's omission may be judged against a much lighter level of scrutiny. Dafel states in this regard:

> "A claimant that can characterise his case as one where the state has breached the negative obligation will in all likelihood have a stronger case for the vindication of his socio-economic right than a claimant that only invokes the state's positive obligations to act."[143]

The fact that a stronger claim may exist where a case is characterised as the breach of a negative obligation – even though the same capabilities are implicated regardless of how the claim is framed – proves the falseness of the dichotomy between positive and negative obligations. Moreover, it shows that a continued adherence to this dichotomy can have serious detrimental consequences for the realisation of critical socio-economic capabilities.

4 3 Evidence of judicial competence to review resource allocation decisions

Despite the analysis above of the shortcomings of the Constitutional Court's approach, reasonableness review has developed in socio-economic rights and administrative justice jurisprudence to encompass many characteristics required for the evolution of a capabilities-centred approach to the adjudication of State resource allocation decisions. The capabilities-congruent elements of reasonableness review can be extracted from the jurisprudence in both these spheres of law, and further developed to enhance capabilities to the greatest extent possible. The following part will evaluate judgments in which the Constitutional Court evinced its competence to adjudicate resource allocation decisions.

4 3 1 "Reasonable" resource allocation?

In *Grootboom* the Constitutional Court stressed that the reasonableness approach does not query "whether public money could be better spent",[144] but instead questions whether the elected measures (which should include allocative choices) are reasonable. At the outset it is noteworthy that the Court acknowledged that the housing

[143] M Dafel "The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect" (2013) 29 *SAJHR* 591 594-595.

[144] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

budget allocated by national government appeared to be "substantial".[145] The Court's assessment of resource allocation therefore took place in circumstances where substantial additional expenditure would not be necessary. In contrast to the position in *Soobramoney*, the minimal impact that a court order would have on resource allocation therefore diffused concerns based on polycentricity.

Yet there is some ambiguity in the Court's approach to the justiciability of resource allocation decisions. On the one hand, the Court appears to have adopted a narrow interpretation of "available resources", in terms of which resources act solely as a limiting device. Limited resources accordingly widen the scope of the State's margin of discretion to select "reasonable measures" to achieve the right in question while simultaneously circumscribing the State's obligations under section 26(2):

> "[B]oth the *content of the obligation* in 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. Section 26 does not expect more of the state than is achievable within its available resources."[146]

Although the State's chosen measures "must be calculated to attain the goal expeditiously and effectively",[147] the availability of resources will play an important role in determining what is reasonable. Whether this approach is sustainable given that it arguably elevates the influence of "available resources" over the influence that the content of the right exerts on a determination of reasonableness,[148] has been elaborated upon above.[149]

On the other hand, the Court intimated that resource allocation itself, in other words, what resources are made "available" to a particular socio-economic purpose, must be reasonable. For example, the Court stated that a "reasonable" part of the national budget must be allocated for the socio-economic purpose at issue, although the precise allocation was "in the first instance" for government to decide.[150] The latter qualification does not, however, restrict a court's power and duty to subsequently

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[145] Para 47.

[146] Para 46 (emphasis added).

[147] Para 46.

[148] For example, the Court states that "the goal" must be achieved effectively but does not embark on an in-depth analysis of the right of access to adequate housing (para 46).

[149] Part 4 2 2 above.

[150] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 66.

enquire as to the reasonableness of resource allocation.[151] In addition, the Court held that a reasonable programme must "ensure that the *appropriate* financial and human resources are available".[152] It follows that the resource allocation "appropriate" to a reasonable programme is a reasonable allocation of resources.

The Court went on to highlight that national government plays an important role in allocating revenue to the provincial and local spheres of government[153] and that effective implementation of socio-economic policy requires "adequate" budgetary support by the national sphere.[154] Furthermore, the Court's statement that "every step at every level of government must be consistent with the constitutional obligation"[155] to achieve the socio-economic right in question should logically be interpreted as also pertaining to the budgeting process. Consequently, the budgeting process itself must be informed by the State's socio-economic obligations and, by implication, the content of the particular socio-economic right.

Finally, the Court concluded by noting that the achievement of socio-economic rights is undoubtedly a difficult task in the light of, *inter alia*, limited available resources. Nonetheless, the Court held that the State is obliged to fulfil its constitutional obligations and that "courts can and in appropriate circumstances, must enforce"[156] these obligations.

4 3 2 Positioning the judiciary under the separation of powers

In *TAC*, the Constitutional Court engaged with the implications that the separation of powers doctrine has for the adjudication of socio-economic rights. As previously noted in chapter two, the adjudication of resource allocation decisions brings to the

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[151] See M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 408 where he argues that "courts are not ill-equipped to *scrutinise or evaluate* budgets or policies just because they are ill equipped to *engage in* budgeting or policy making" (original emphasis). See also D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 104 who argues that courts do not overstep separation of powers boundaries by simply reviewing decisions already taken by the elected branch.

[152] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 39 (emphasis added).

[153] Para 40.

[154] Para 68.

[155] Para 82.

[156] Para 94.

fore tensions inherent in the separation of powers doctrine.[157] Concerns arise that the judiciary is an illegitimate and incompetent forum for the adjudication of matters such as resource allocation. The Court proceeded from the position that deference regarding the adjudication of policy decisions as well as deference at the remedial level of adjudication may affect the *manner* in which such issues are adjudicated, but does not negate the justiciability of policy-laden issues.[158]

4 3 2 1 Institutional competence and polycentricity

In its discussion of and refusal to apply the so-called minimum core approach,[159] the Court reiterated statements in *Grootboom* to the effect that the State is not obliged to provide more than its available resources allow.[160] The Court *a priori* assumed, without citing cogent budgetary or economic evidence, that "[i]t is impossible to give everyone access to even a 'core' service immediately".[161] The Court highlighted both the problems of institutional competence and polycentricity when it stated that "courts are not institutionally equipped… for deciding how public revenues should most effectively be spent" in the light of multiple pressing demands on the public *fiscus*. This line of reasoning thus mirrors the emphasis placed on polycentricity in the *Soobramoney* judgment. However, *in casu*, the severity of the threat to the right of access to health care ultimately trumped concerns related to polycentricity.[162]

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[157] Chapter two part 2 4 2 above.

[158] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 22; K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 127-128.

[159] For a discussion of the problems inherent in a minimum core approach to the adjudication of socio-economic rights, and the ability of Sen's theory to circumvent these problems, see chapter two part 2 2 2 1 2 above.

[160] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 32; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 46, 94.

[161] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 35. See also D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1 17 who questions whether this is merely "a pessimistic expression of despair at the severity of the problems facing the country" rather than a fact.

[162] See, for example, the acknowledgement of the various demands on the State but the conclusion that the State nevertheless bears this "difficult" burden in terms of the Constitution. *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 94.

The Court went on to delineate its role in the adjudication of resource allocation decisions within reasonableness review and the separation of powers doctrine as a restrained one:

> "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 focused 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. *Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets*. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."[163]

Given that socio-economic rights require the prioritisation of resources,[164] a court order resulting in a "rearrangement" of budgets will be constitutionally mandated where government policy falls short of the obligations placed on the State by sections 26(2) and 27(2).

In so far as the Court noted that it would not draft budgets as a forum of first instance, it is correct. However, given the basic capabilities protected by socio-economic rights and the centrality of resource allocation decisions to the realisation of these rights, courts should not shy away from closely examining budgets and resource allocation decisions. Simultaneously, the above quoted statement also reflects a wider understanding of reasonableness review. According to this reading, reasonableness informs "available resources" as opposed to a more restrictive approach in terms of which State obligations are simply limited or defined by the resources made "available" to socio-economic purposes.

4 3 2 2 Circumventing the need to perform a cost-benefit analysis

The Court's decision in *TAC* was ultimately an easy one given the importance of the interests at stake coupled with the minor cost implications of its order. Questions of institutional competence and polycentricity were thus not as prominent as they were in the case of *Soobramoney*, where resources were scarce. In *TAC*, assertions of budgetary constraints and incapacity[165] were outweighed by the nature of the interests

[163] Para 38 (emphasis added).

[164] See further chapter five part 5 3 3 1 below.

[165] See, for example, *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 54, 65, 89.

at stake and the serious consequences that a violation of the right would have.[166] *In casu*, failure to provide anti-retroviral treatment to pregnant, HIV-infected women posed the risk that their infants would subsequently die. The consequences of infringing the right of access to health care in this case would thus be absolute capability deprivation.

However, budgetary constraints were not in reality a concern in this case since substantial additional funds had been made available to health departments before the judgment was handed down.[167] For the State to continue with its non-inclusive policy in such circumstances would thus appear to be patently *irrational*, and would only require a thin or weak standard of rationality review to be applied in order to find the policy constitutionally wanting.[168]

If resource constraints had been of greater concern, a more difficult proportionality analysis that assigned different weights to real resource constraints *vis-à-vis* the nature of the interests at stake may have been required. Such a weighting exercise could have resulted in more meaningful guidelines regarding the justiciability of resource allocation decisions in the context of a proportionality enquiry. Furthermore, the allocation of additional funds relieved the Court of the task of performing a cost-benefit analysis involving the merits of expenditure forthwith on a right to secure savings in the future.[169] Liebenberg notes that engagement with this issue "would have drawn the Court into a much more direct evaluation of resource allocation priorities".[170] The question as to whether similar infringements could in future be trumped by *prima facie* proof of budgetary constraints or whether the Court would be willing to find that the

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[166] See, for example, paras 68, 93, 94.

[167] Para 120.

[168] See D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha , A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 41, 50-51 who acknowledges that the level of scrutiny in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) is stricter than that applied in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), but goes on to argue that on closer inspection the standard of "rational coherence" – or a finding of "simple irrationality" – constituted an important element in the Court's decision.

[169] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 116, 120.

[170] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 193.

State is obliged to solicit additional resources to secure vital socio-economic capabilities was therefore left unanswered.

4 3 2 3 Asserting the judicial competence to formulate resource-intensive remedies

The Court espoused a robust approach to the formulation of remedies with budgetary impacts that may require the State to look further afield for resources. In contextualising the Court's powers to issue remedies – including mandatory remedies – within the separation of powers doctrine, the Court stated:

> "Government is constitutionally bound to give effect to such orders whether or not they affect its policy and *has to find the resources to do so*."[171]

It is noteworthy that the availability of additional, sufficient budgetary resources was considered crucial in the Court's discussion of "circumstances relevant to the order to be made".[172]

Whereas the Court may have ultimately shied away from issuing a structural interdict,[173] an approach whereby a deferential attitude toward the adjudication of resource allocation is considered at the remedial stage rather than at the review stage is to be welcomed.[174] Such an approach creates a space in the review stage for the substantive interpretation of socio-economic rights, followed by a proportionality-as-weighting exercise.[175] If, during this stage, resource constraints emerge as a serious concern, a participatory remedy can open up dialogue between the court, the litigants, the State and other stakeholders. This could facilitate a co-operative solution as to how additional resources can be procured and most efficiently deployed. By requiring the active involvement of the State in this process, the reviewing court can ensure that it does not itself usurp the functions of the other branches of government.

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[171] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 98 (emphasis added).

[172] This discussion can be found at paras 115-120, with the absence of resource constraints emphasised at para 120.

[173] Para 129.

[174] The use of participatory yet strongly managerial remedies to circumvent concerns regarding possible infractions of the separation of powers doctrine will be more fully canvassed in chapter six, especially in part 6 3.

[175] See further chapter five part 5 3 below.

4 3 3 Engagement with complex evidence

The Court's assessment of technical evidence in *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)*[176] ("*New Clicks*") provides a useful illustration of courts' institutional competence and ability to deal with intricate policy issues. *In casu*, reasonableness review was definitively developed in administrative law to encompass more than a thin, highly deferential standard of rationality review. Although not pertinently dealing with the adjudication of State resource allocation decisions, the judgment is nevertheless valuable for the light it sheds on how complex and technical evidence can be reviewed under administrative law where socio-economic rights are implicated. *New Clicks* therefore illustrates the substantive evolution of administrative law reasonableness review, it demonstrates the synergy between administrative justice and socio-economic rights and it lays the foundation for overcoming objections that courts do not possess the expertise to adjudicate complex, polycentric budgetary evidence.

In casu, the Constitutional Court had to decide on the validity of certain regulations made to give effect to a new pricing system for medicines. The Minister of Health had made the regulations on the recommendation of the Pricing Committee.[177] Although the Court was called upon to decide numerous issues regarding the validity of the regulatory scheme as a whole, it is noteworthy that in evaluating whether the regulations set an "appropriate" dispensing fee[178] that pharmacists could charge when selling medicines, the Court was compelled to engage with wide-ranging technical evidence by juxtaposed experts.[179]

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[176] 2006 2 SA 311 (CC).

[177] *In casu*, five judgments concluded that PAJA was applicable to the making of the regulations, one judgment concluded that PAJA was only applicable to the fixing of a dispensing fee that pharmacists could charge and five judgments decided that it was not necessary to decide the issue. *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 13.

[178] Instead of pharmacists being permitted to charge a mark-up over the purchase price as well as a small dispensing fee, the Medicines and Related Substances Act 101 of 1965 as amended by the Medicines and Related Substances Amendment Act 59 of 2002 now shifted pharmacists' revenue from such mark-up to a prescribed dispensing fee. Para 319.

[179] See, for example, paras 320-388. The complex nature of the issue that fell to be adjudicated was aptly captured by Yacoob J when he described introduction of the new, transparent pricing system as "as difficult to achieve as it is vital to our democracy" (para 799).

4 3 3 1 Judicial competence to review socio-economic matters

Prior to turning to an evaluation of evidence, Chaskalson CJ stated that although the choice to introduce pricing regulation was a policy decision, it had to be borne in mind that the Court was not concerned with "better" ways of achieving the same purpose.[180] Rather, the Court was fulfilling its role in democracy by determining whether the pricing scheme was implemented in accordance with the law.[181] Moreover, the Court was not barred from adjudicating what an "appropriate" fee would entail, despite the absence of an "absolute standard" for determining thus:

> "I do not agree that a court should refrain from examining the lawfulness of the dispensing fee simply because the decision as to what it should be involves *economic and political considerations*. The exercise of all public power is subject to constitutional control and it is the *duty* of courts if called upon to do so to determine whether or not power has been exercised consistently with the requirements of the Constitution and the law."[182]

Chaskalson CJ contextualised his evaluation of the complex evidence by noting at the outset that courts must be sensitive to the "special role" that the executive has in making regulations. In addition, the Chief Justice highlighted the "special expertise" possessed by the Pricing Committee. Nevertheless, although "[w]hat is or is not relevant, and what is appropriate, were in the first instance matters for the Pricing Committee and the Minister to decide",[183] the Court could not rubber-stamp a decision based solely on the identity of the decision-maker.[184] What is reasonable or not will entail a balancing of different interests. Similarly, the decision as to what level of deference should be accorded to the expertise of the decision-maker should be made after carefully balancing different considerations.[185] The Court – while mindful of factors that arguably called for a measure of deference – did not shy away from

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[180] Para 236.

[181] Para 33.

[182] Para 313 (emphasis added). Compare the Court's reluctance to adjudicate issues that could have *economic* consequences in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 38.

[183] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 390.

[184] Citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48.

[185] Cf the critical analysis of automatic resort to deference in the United Kingdom in chapter three part 3 2 3 2 above.

scrutinising how the Pricing Committee arrived at the establishment of the dispensing fee.

4 3 3 2 Placing the justificatory onus on the primary decision-maker

The majority of the Court (which held that the fee set was not "appropriate") did not purport to establish what an "appropriate" dispensing fee was.[186] Nevertheless, it required the Pricing Committee to have considered all relevant factors that emerged from the expert evidence presented,[187] to clarify what weight was assigned to certain considerations[188] as well as to produce positive evidence proving any assumptions relied on in determining the fee.[189] Significantly, the *onus* was thus placed on the Minister and Pricing Committee to explain the "appropriateness" of the prescribed fee:

> "Absent such explanation, there is sufficient evidence on record to show that the dispensing fee is not appropriate."[190]

In this regard, Sachs J stated that the "*novelty* and the *uncertainty* of [the matter at hand's] potential impact, requires *persuasive* evidence to indicate that the measure

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[186] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 316. See also the judgment of Ngcobo J where he acknowledged that what is "appropriate" or not does not constitute a precise criterion but rather a range of possible outcomes. Moreover, the determination of such a fee involved economic and other policy considerations which in turn called for expertise and understanding of a complex market. Consequently, the Court should only interfere with an established fee if it fell outside the "range" of what was appropriate (paras 521-522). See further the judgment of Moseneke J at para 713.

[187] Paras 391, 399.

[188] Para 392. Compare the Court's seeming presumption that the State's evidence was correct without probing what factors were taken into account or what weight was assigned to different considerations in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 89.

[189] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) paras 400, 404.

[190] Para 404. See also paras 531, 535-541. With regards to the question of *onus* in respect of justification for socio-economic policy choices, cf the position in UK jurisprudence regarding discrimination in matters of general socio-economic strategy discussed in chapter three part 3 2 3 3 3 above.

falls within the bounds of what is reasonable".[191] The *onus* may thus be heavier where a matter is novel and its impact is therefore uncertain.

4 3 3 3 The interaction between administrative justice and socio-economic rights

The robust engagement with complex and technical evidence was justified given that the socio-economic right of access to health care services was implicated. Conversely, the fact that administrative law review, which is familiar to our courts, was involved may have instilled confidence in the members of Court applying administrative-law principles to pronounce on complex matters and even interpret the right of access to health care services substantively. It was held that the provision in the Medicines Act that gave rise to the regulation setting an "appropriate" dispensing fee was aimed at giving effect to the right of access to health care services as enshrined in section 27(1) and (2) of the Constitution:

> "The right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable."[192]

Sachs J, while accepting the evaluations of the appropriateness or reasonableness of the fee by Chaskalson CJ and Ngcobo J in "broad terms", sought to give even greater weight to the influence that the right of access to health care services should have exercised on the enquiry.[193] Sachs J held that section 27 of the Constitution was "a major element informing the reasonableness of the work of the Pricing Committee" and that the "determination of the appropriate dispensing fee had accordingly to be evaluated as a measure undertaken to achieve the realisation of access to health care services".[194] Moreover, Sachs J went on to emphasise that "[t]he importance of this

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[191] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 664 (emphasis added), where what is appropriate is equated with what is reasonable.

[192] Para 514 per Ngcobo J. See also the judgment of Chaskalson CJ at para 314.

[193] Moseneke J similarly emphasised the urgency in realising this and other socio-economic rights and proposed that the State should "accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation afflicting millions of our people and in particular inadequate health care". In addition, access to affordable medicines constitutes "an important component of any scheme directed at poverty reduction and the physical well-being of all our people". Para 705.

[194] Para 650.

objective cannot be overestimated"[195] within the socio-economic context of South Africa. The impact that the right at stake has on conduct by the State and subsequent review by the courts was well illustrated when he stated:

> "When reasonableness is considered it becomes particularly important to ensure that vulnerable sections of the population are protected. The discretion of the rulemakers becomes attenuated to the degree that the fundamental rights of the people who are most disadvantaged are affected."[196]

Set within the normative paradigm of the constitutional right at stake, arriving at an "appropriate" dispensing fee should entail a careful balancing of diverse, conflicting interests. On the one hand, the objective of promoting access to medicines "at the lowest cost possible"[197] is congruent with the right of access to health care services and the obligation on the State to take reasonable measures, within available resources, to progressively realise this right. On the other hand, the interests of the pharmacists to remain in business would be threatened by a dispensing fee that was set too low. However, this latter interest could be outweighed by the "interests of the general public".[198] At the same time, the economic viability of pharmacies is essential for the supply of medicines and thus for the right of access to health care services.[199] Moseneke J pertinently stated with regard to this balancing process:

> "The ultimate question must be whether the determination of appropriateness falls within a range of what may be reasonably regarded as proper, well-suited and fair. That determination falls to be made by balancing out the relevant but often competing factors and thereafter striking equilibrium amongst all factors. The competing factors would include the factual context, the purpose of the power, the nature of the measures impugned and its impact on affected parties and on the public interest."[200]

[195] Para 651.
[196] Para 653.
[197] Para 519.
[198] Para 519.
[199] Para 518.
[200] Para 713.

4 3 3 4 The role of explicit reasoning in evaluating an initial weighting exercise

The Minister and Pricing Committee were thus obliged to strike this delicate balance in the first instance.[201] In a crucial passage, Chaskalson CJ, in identifying the factors that need to be considered and balanced, acknowledged the difficulty that arose when courts are called upon to review the weight assigned to different values by the primary decision-maker. The obligation to consider all relevant circumstances encompasses the duty to "attach such weight… as the degree of importance [of the relevant consideration] requires".[202] The difficulty of reviewing such a weighting exercise renders a full explanation by the decision-maker crucial.[203]

This approach is congruent with Sen's postulation that once a focal space for evaluation of competing interests or capabilities is established (in this case by reference to the right of access to health care services), a "partial ordering" of differently weighted capabilities can be achieved.[204] Through informational broadening and explicit reasoning (*in casu*, a comprehensive explanation as to how the fee was arrived at and what weights were assigned in making such decision), courts can further prioritise capabilities and develop "coherent and consistent criteria for social and economic assessment" through a process of reasoned evaluation.[205] Whereas this is true for engagement with complex evidence in general, it is submitted that it is equally valid for the adjudication of polycentric and complex resource allocation decisions in particular. The adjudication of resource allocation decisions can thus be practically accomplished and theoretically justified.

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[201] The polycentric nature of the setting of the fee was recognised in paras 527-531.

[202] Para 530.

[203] Para 531.

[204] A Sen *Development as Freedom* (1999) 78.

[205] 253. Besides placing the *onus* on the State to explain and present evidence regarding its resource allocation decisions, further remedial mechanisms to facilitate informational broadening will be explored in chapter six. Such remedial mechanisms can arguably overcome objections to the justiciability of resource allocation decisions based on concerns regarding polycentricity, institutional competence and legitimacy.

4 3 4 Robust review of justificatory arguments

In *Blue Moonlight*,[206] the Constitutional Court was compelled to scrutinise the State's defence based on limited resources in the context of the City of Johannesburg's obligation to provide alternative accommodation to persons evicted from privately-owned buildings. Such enquiry was necessary due to the fact that, firstly, the City's assertion that it did not have a duty to provide alternative accommodation in these circumstances was closely linked to its interpretation of its own powers to raise funds and budget for this purpose. Secondly "it would be quite inappropriate for a court to order an organ of state to do something that is *impossible*, the more so in a young constitutional democracy".[207]

4 3 4 1 The Supreme Court of Appeal's judgment in Blue Moonlight

The Supreme Court of Appeal had previously held that a duty to provide temporary accommodation in such circumstances was in fact incumbent on local government. As far as limited "available resources" were concerned, the Supreme Court of Appeal emphasised the need for proportionality. The Court noted that in the light of the need for cautious judicial intervention, the realities of limited resources and the import of socio-economic rights, "a court's role can rightly be described as 'the art of the possible'".[208]

The Supreme Court of Appeal held in this regard that the City, working within a budget surplus, had not shown that it was *not* possible to reallocate funds or meet its obligations, and that its papers had not "grappled with" or sought to inform the Court as to what was in fact possible.[209] In addition, the City had argued its defence of resource constraints in "the vaguest terms" and had not categorically averred that it did not have the funds to meet its obligations.[210] Moreover, the Supreme Court of Appeal pointed out that the City was itself to blame for any resource constraints it experienced

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[206] See part 4 2 1 5 above.

[207] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 69 (emphasis added).

[208] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 54.

[209] Para 49.

[210] Para 50.

as "it *could have* adopted a long-term strategy, which *ought to have* included financial planning, to deal with such exigencies".[211]

The Supreme Court of Appeal thus evidently employed a wide interpretation of "available resources". According to this definition, not only already allocated resources are considered, but resources that could have and should have been marshalled by the State to fulfil its constitutional obligations are also taken into account. Fault on the part of the City was exacerbated by the fact that it had been aware of the occupier's situation for three financial years but had failed to procure the necessary funds. The Supreme Court of Appeal therefore concluded:

> "As a result, the City has, through its *general* reports, *vague* responses to its budget *surplus* and *denial of any obligations* towards the occupiers, failed to make out a case that it does not have the resources to provide temporary accommodation for the occupiers if they are to be evicted."[212]

4 3 4 2 The Constitutional Court's judgment in Blue Moonlight

The Constitutional Court commended the Supreme Court of Appeal for delivering a "strongly reasoned" judgment and confirmed its conclusions in all material respects.[213]

4 3 4 2 1 Inter-governmental allocative responsibility

The Court dismissed the City's argument that, on its purported interpretation of Chapter 12 of the National Housing Code of 2000 (revised in 2009) ("Chapter 12") and the judgment in *Grootboom*,[214] it was not "entitled"[215] to nor obliged to fund emergency housing.[216] In its discussion of *Grootboom* – and in an effort to determine to what extent the Constitutional Court in that case had delineated the roles of the three spheres of

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[211] Para 51.

[212] Para 52 (emphasis added).

[213] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 102.

[214] The City argued that *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 39-40 and 47 did not use any "funding" language in relation to local government, and that any implementation of obligations on the part of government could only be fulfilled pursuant to legislation. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 48-50.

[215] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 48.

[216] Paras 48-50, 52, 54.

government to provide access to adequate housing – the Court stated that "[w]ithout a national policy to get the ball rolling from a legislative and budgetary perspective, it would be impossible for the other spheres of government to do anything meaningful".[217] Nevertheless, the Court noted that whereas national policy and budgetary support were essential to facilitate the fulfilment of local government's obligations regarding the provision of emergency housing, the decision in *Grootboom* was not authority for the proposition that local government was not entitled to self-fund. In contrast, local government was best placed to react to and prospectively plan for emergency housing situations.[218]

The City further sought to rely on its own policy document and its interpretation of Chapter 12 to argue that its capacity to provide emergency accommodation was directly dependent on provincial government's provision of funding. According to the City, its own responsibilities were thus limited to submitting an application to provincial government for emergency assistance and to subsequently implement emergency measures funded by the province. The Court, however, expressed scepticism at the City's implied submission that Chapter 12 should be interpreted in accordance with its own policy document, since that policy document was itself based on an interpretation of Chapter 12.[219]

The City attempted to bolster its argument by submitting that it could not budget for unforeseeable items, outside the scope of its current need, such as the provision of emergency accommodation. All it could do in such instances was to identify emergency situations and apply to provincial government for funding.[220] The Court rejected the City's arguments in this regard and pointed out that the wording of Chapter 12 did not explicitly render the City's obligation to provide emergency housing wholly dependent on funding by provincial government. The Court went on to state that budgetary demands resulting from emergency situations were at least relatively foreseeable, and that the City could make predictions based on available information gleaned from the use of, for example, surveys.[221] The Court further scrutinised Chapter 12 and concluded that the City was duty-bound to "plan and budget proactively" in its yearly application for funds for emergency situations such as that before the Court in this

[217] Para 56.
[218] Paras 54-57.
[219] Para 61.
[220] Para 62.
[221] Para 63.

case.[222] The Court therefor concluded that "the City has both the power and the duty to finance its own emergency housing scheme".[223]

4 3 4 2 2 Adjudicating a defence of limited resources

The Court went on to deal pertinently with the City's defence based on limited resources, in terms of which the City argued that it was "not obliged to go beyond its available budgeted resources to secure housing for homeless people" and that "[r]esources not budgeted for are not available".[224] The City thus advocated a narrow interpretation of "available resources" that focused exclusively on already-allocated, existing resources.

The Court noted that although the City objected to the use of financial projections that predicted a budget surplus, it failed to substantiate claims that such projections were unreliable and that it was now predicted that a budget deficit would allegedly occur. Moreover, the Court appears to have been prepared to analyse the adequacy of the City's housing budget within the context of its overall budget. However, relevant evidence in this regard had not been placed before the Court by the City.[225] The Court ostensibly attempted to draw a link between resource allocation and the model of reasonableness review applied in socio-economic rights jurisprudence when it stated:

> "This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a *mistaken understanding of constitutional or statutory obligations*. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."[226]

The Court concluded that the Supreme Court of Appeal's finding that the City had not sufficiently proved that it did not possess adequate resources to provide emergency housing had not been impugned and therefore had to stand.[227]

In determining whether a lack of resources relieved the State of its constitutional responsibilities, the Court *prima facie* appears to have applied a standard of

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[222] Paras 65-67.
[223] Para 67.
[224] Para 72.
[225] Para 74.
[226] Para 74 (emphasis added).
[227] Para 75.

reasonableness. The Court linked the correct interpretation of the State's constitutional duties to resource allocation when it stated that its determination of reasonableness could not be circumscribed by budgetary decisions based on a misapprehension by the City of its constitutional or statutory obligations.[228] Consequently, an accurate budgeting or allocation process will affect a determination of whether the State's measures to fulfil a socio-economic right in section 26 or 27 are reasonable.[229]

However, the question that arises is whether reasonableness review will still be applied to resource allocation where the government has understood its obligations correctly and has rationally allocated resources accordingly. In the absence of a mistaken apprehension of its duties, does a rational (as opposed to reasonable) link between the State's obligations (properly understood) and its resultant resource allocation suffice? It is argued in this dissertation that a more robust standard of reasonableness should be applied consistently both to the measures adopted by the State to fulfil the rights in sections 26 and 27 and likewise to the allocation and use of resources for this purpose.[230] A reading of the Court's *dicta* in this case that supports a direct link between reasonableness review and reasonable resource allocation is therefore preferable to an approach that advocates reasonable measures while paradoxically only requiring rational resource allocation decisions.

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[228] Para 74 (emphasis added).

[229] See further chapter five part 5 4 2 1 below.

[230] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 94-95 ostensibly advocates the adjudication of resource allocation in terms of the reasonableness of allocation and use of said resources, while noting that the Constitutional Court has not elaborated what relationship exists between resource allocation and reasonableness review or whether resource allocation should in fact be tested for reasonableness. But compare *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 66 where it was stated that a "reasonable part" of the national housing budget had to be allocated to the purpose relevant in that case, thereby suggesting that reasonableness may in fact be the judicial standard whereby resource allocation should be assessed. See also criteria for reasonableness review in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) regarding reasonable financial and human resources being made available for a particular programme. See in this regard part 4 3 1 above. See also H Kruuse "'The Art of the Possible' in Realising Socio-Economic Rights: The SCA Decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*" (2011) 128 *SALJ* 620 621 who argues that this judgment introduces new insight regarding the development of reasonableness review in that the reasonableness test empowers courts to interrogate management of public resources dedicated to a socio-economic purpose and that the judgment "envisages a much more active role for courts in relation to public resource management than ever before" (621).

4 3 4 2 3 Aspects in need of further judicial attention

The Court's willingness to demand clear and convincing evidence of resource constraints based on a correct interpretation of the State's constitutional obligations is to be welcomed. So too is its apparent preparedness to probe the constitutionality of "available resources" in the broad sense, by determining the relation of specifically allocated resources to the organ of State's overall budget. Moreover, the Court employed a transformative approach to the adjudication of resource allocation decisions by examining the reasonableness of measures aimed at the procurement of additional resources or the lack of any attempt to solicit supplementary funds.

However, the Court's seeming disregard of the polycentric effects that such an order might have on the State's other housing obligations is somewhat puzzling in the light of the approach adopted in *Soobramoney*.[231] The Court might have contributed to a more theoretically sound basis for its approach to the adjudication of resource allocation decisions if it had distinguished this case from *Soobramoney* and stated that any polycentric impact must be proven clearly. The Court instead merely stated that the Supreme Court of Appeal had found that the City had not asserted that funds could not be reallocated and thus skirted over the issue of polycentricity.[232]

Furthermore, the Court could have expanded on the Supreme Court of Appeal's emphasis on proportionality by delineating under what circumstances certain rights and duties that form part of a transformative constitution will trump concerns of polycentricity in particular, and institutional competence in general. Again, by assigning weights to various socio-economic needs in an attempt to strike a balance between competing resource allocations, the Court could have contributed to the development of a capabilities approach to the adjudication of socio-economic rights and resource allocation in the South African context.[233]

Although the roles of the national and provincial spheres of government were discussed in relation to the obligations of local government,[234] joinder of these spheres

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[231] The only reference to the polycentric effect that a diversion of funds might have is embedded in a footnote regarding submissions by the City, which was in any event held to be irrelevant as it had not been argued at the hearing. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) n 67.

[232] Para 71.

[233] A Sen *Development as Freedom* (1999) 78.

[234] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 53-57, noting the need for a coherent national policy framework

of government[235] and an evaluation of the reasonableness of co-operation and resource allocation inter-spheres would also have been desirable. Joinder could have served to further clarify to what extent polycentricity was a noteworthy factor in this case.

4 3 4 3 Factors contributing to robust judicial review of resource-based justificatory arguments

The judgments of both the Supreme Court of Appeal and the Constitutional Court in *Blue Moonlight* offer insight as to what factors may promote a more robust approach to the adjudication of resource allocation decisions. Although many of these discernible factors are couched in negative terms as they form part of the respective courts' criticism of the City's failure to solicit additional resources, it is possible to deduce corresponding positive factors. It must also be borne in mind that the Court did not make an independent enquiry as to the constitutionality of the State's resource allocation decisions in relation to its socio-economic obligations. Rather, it closely examined the State's *defence* based on resource constraints.

In the first place, a correct understanding by the State of its constitutional and statutory duties is imperative for resource allocation decisions to be upheld as reasonable.[236] Next, the foreseeability of future budgetary demands is a factor that can contribute to the rejection of a defence based on resource constraints.[237] Prior knowledge or awareness that the need for additional resources may arise may also result in the conclusion that the State is to blame for the unavailability of resources and

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and budgetary support for local government to be able to fulfil its obligations to provide emergency housing; paras 42-46 regarding the importance of joinder and the conclusion that non-joinder of the provincial government was not fatal in this case.

[235] Rule 5 of the Rules of the Constitutional Court GN R1675 in *GG* 25726 of 31-10-2003 requires the joinder of an organ of state responsible for executive, administrative or legislative conduct that is constitutionally challenged.

[236] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 69, 74 and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 52 where the Supreme Court of Appeal cited the State's denial of its constitutional and statutory obligations as a reason for rejecting its defence based on resource constraints.

[237] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 63.

the concomitant application of a more stringent standard of review.[238] Fault, even if manifested as negligence, is therefore a factor that may lead to a close examination of resource allocation decisions and an ultimate rejection of a defence based on unavailability of resources.

Whereas a budget deficit or overspending was a factor limiting the justiciability of resource allocation decisions in *Soobramoney*, the opposite results where a budget surplus is alleged or not disproved.[239] Furthermore, in *Blue Moonlight* the Constitutional Court emphasised the need to assess a particular instance of resource allocation within the context of the organ of State's overall budgetary position.[240] Such a broader enquiry may therefore be required even where a budget deficit in a particular department has been proved. Vagueness in alleging that additional resource allocation is not affordable or that reallocation from existing resources is not possible will likewise produce judicial reluctance to find that resources are not "available" within the meaning of sections 26 and 27.[241] The burden to prove resource constraints therefore rests on the party alleging such. The production of explicit, transparent budgetary evidence is thus a factor as is the possibility of complying with constitutional obligations.[242]

In addition, an inflexible policy or "entrenched position", as well as the unjustified exclusion of a class of persons (*in casu*, persons evicted by private landowners),[243] are both compelling factors that led the Supreme Court of Appeal to closely scrutinise and ultimately reject the City's arguments with regards to its resource allocation decisions. Both last-mentioned factors centred on the differentiation by the City between persons evicted by the City itself from so-called "bad buildings" and those evicted by private landowners.[244] The Court noted that the City failed to take into

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[238] Para 71; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) paras 51, 52.

[239] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 71, 73; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 49.

[240] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 74.

[241] Para 71; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 50.

[242] See further chapter five part 5 4 2 3 below.

[243] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 51.

[244] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 89.

account the needs of those evicted by private landowners.[245] Moreover, the Court stressed the severity of the deprivation of the right and the serious light in which it views evictions leading to homelessness when it concluded that "[t]o the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner".[246] The extent of deprivation of a right and possible homelessness resulting from eviction are thus two final factors that may enhance the justiciability of resource allocation.

4 4 Conclusion

This chapter has sought to demonstrate that a pressing need exists for the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions. The Constitutional Court's insufficient focus on interpreting the content of socio-economic rights threatens the development of a substantive standard of reasonableness review across the spheres of socio-economic rights and administrative justice jurisprudence. If reasonableness review is allowed to collapse into a thin, proceduralised standard of review, the important capabilities that socio-economic rights aim to give rise to may not be sufficiently protected, while the State will have little guidance as to what would constitute proportionate allocative decisions. A unified, capabilities-based standard of review across both fields of law is therefore required, and will be further elaborated upon in the following chapter.

The need for a capabilities-based standard of review for the adjudication of State resource allocation decisions is further illustrated by the Constitutional Court's narrow definition of available resources in certain cases. Where the availability of resources is permitted to define the content of a socio-economic right, the State can potentially

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[245] Para 92.

[246] Para 95. But compare C McConnachie & C McConnachie "Concretising the Right to a Basic Education" (2012) 129 *SALJ* 554 579 who criticise the judgment for relegating the reasonableness of the exclusion *in the light of the occupiers' circumstances* to a mere footnote. It is submitted, however, that the Court takes at least some notice of the occupiers' circumstances in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 6-9. Although the individual circumstances of the occupiers could have been given greater attention, placing a duty on the State to provide accommodation even where eviction occurs at the instance of private landowners bears testimony to the (albeit implicit) importance the Court places on the impact of eviction leading to homelessness on poor persons. In addition, the Court emphasised that the government policy must take cognisance of the contextual needs of occupiers.

minimise its constitutional obligations by allocating minimal resources for the fulfilment of the particular right. This can drain socio-economic rights of their normative and remedial force.

Furthermore, deference should not be allowed to determine what standard of scrutiny should be applied to a State resource allocation decision. Instead, a standard of review that consigns the consideration of the judiciary's constitutional and institutional competence in matters of resource allocation to the remedial stage of adjudication is more congruent with a two-stage capabilities approach to adjudication.[247] Such an approach circumvents the problem of double-counting deference, while ensuring that the capabilities at stake in a given case remain prominent during the review stage of adjudication.

Finally, the rigid distinction between the positive and negative obligations imposed upon the State by socio-economic rights rests on a false premise and should be discarded. All rights require resource allocation, and identical capabilities may be implicated regardless of how an obligation is characterised. This false distinction should not be allowed to trigger a more robust standard of review. Instead, the capabilities at issue together with the historical, social and factual context of the case at hand should determine the appropriate standard of scrutiny to be applied to an impugned allocative decision.

Despite these aspects of the Constitutional Court's approach to the adjudication of socio-economic rights that call out for reform, the Court has evinced its judicial competence to adjudicate State resource allocation decisions in several cases. There are indications in existing jurisprudence that courts may insist on "reasonable" resource allocation decisions where capabilities are imperilled. A more rigorous standard of review holds the potential to focus the State and the reviewing court's attention on the capabilities at stake, instead of allowing review to be subsumed by questions of deference and the court's institutional limitations.

Positive developments in administrative law reasonableness review have moreover illustrated that courts are able to subject complex, technical evidence to stringent review. Such review calls for the evaluation of weights that the State has assigned to competing considerations and is congruous with the weighting exercise demanded by a capabilities approach to adjudication. Where vital capabilities are at issue, a robust

[247] See chapter six part 6 3 1 below.

interrogation of any resource-related justificatory arguments raised by the State is thus appropriate.

Proportionality as standard of review most closely resembles the weighting exercise inherent in the prioritisation of oft-competing capabilities. Development towards the recognition of proportionality as an appropriate standard of review in socio-economic rights and administrative justice cases will be elucidated in the following chapter. Furthermore, it will be argued that proportionality can be carefully developed for the review of State resource allocation decisions that impact upon socio-economic rights. Finally, general and specific capabilities-based review criteria for the adjudication of State resource allocation decisions will be espoused.

Chapter 5: Developing a capabilities-based standard of review for the adjudication of State resource allocation decisions

5 1 Introduction

In the previous chapter, the need for a capabilities-based standard of review for the adjudication of State resource allocation decisions was demonstrated. It was argued that where insufficient attention is paid to the content of socio-economic rights, and a narrow definition of "available resources" is employed, an overly deferential standard of review may follow. Where the judiciary places undue focus on its own institutional limitations instead of on the capabilities at issue,[1] the overarching purpose of socio-economic rights, conceived of as the ability to achieve the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others, may be insufficiently protected and promoted. It was further postulated that aspects of relevant Constitutional Court jurisprudence in fact evince the judicial competence to adjudicate State resource allocation decisions in a manner that can protect important capabilities.

In this chapter, a capabilities-based standard of review will be developed. In particular, the suitability of proportionality review for serving as a judicial tool to accomplish a capabilities-centred weighting exercise will be scrutinised. The development of a capabilities-based standard of review is an essential component of a theoretical paradigm designed for the adjudication of State resource allocation decisions that impact on socio-economic rights. This standard of review is necessary to ensure that crucial socio-economic capabilities are recognised and protected when courts review allocative decisions. Furthermore, a structured weighting analysis can aid the State and reviewing courts to prioritise different rights and interests in the complex area of resource allocation.

The susceptibility of reasonableness review to further development in order to encompass proportionality review where important capabilities are at stake, will be examined with reference to elements of proportionality review apparent from relevant Constitutional Court jurisprudence. Thereafter, proportionality as weighting will be critically analysed. The extent to which the doctrine of proportionality can be adapted for the adjudication of State resource allocation decisions in particular, will be

[1] The institutional limitations of the judiciary must of course be acknowledged, but can be addressed at the remedial phase of adjudication. See further chapter six part 6 3 below.

investigated. Moreover, the normative nature of the balancing exercise necessitated by proportionality review and its ability to aid the resolution of cases where capabilities vie for scarce resources will be investigated. Finally, the overarching features of a capabilities-based standard of review, as well as specific review criteria that should be observed in its application, will be elucidated.

5 2 Elements of proportionality review in Constitutional Court jurisprudence

Proportionality as a standard of review most accurately reflects the weighting exercise required by a capabilities approach to adjudication. Proportionality review fits comfortably within a two-stage adjudicatory process in which the substantive, normative content of a socio-economic right dictates a priority-setting process. Once weights have been assigned to the capabilities that a socio-economic right represents in a given context, further weight can be assigned to competing factors such as the alleged existence of resource constraints.

Furthermore, as a fully developed reasonableness review standard, proportionality review can give expression to elements of an application of the capabilities approach to adjudication under a transformative constitution. These elements are the recognition of the fundamental values that inform capabilities, the acceptance of judicial responsibility to enhance capabilities, participation and informational broadening, and explicitness and substantive reasoning.[2]

The following part analyses certain Constitutional Court judgments that incorporated elements of a proportionality enquiry in adjudicating administrative law and socio-economic rights claims. Although not all the elements of a capabilities approach to adjudication are apparent from the jurisprudence expounded below, positive aspects can be developed to constitute a capabilities-based standard of review for the adjudication of State resource allocation decisions.

5 2 1 Foreshadowing proportionality: The minority judgment in *Bel Porto*

Socio-economic rights are often realised through the medium of administrative action. In certain cases, a claim to protect an important socio-economic capability may

[2] The application of a capabilities approach to the adjudication of State resource allocation decisions under a transformative constitution is discussed in chapter two part 2 4 above.

be framed in terms of administrative law if it is not recognised as forming part of a justiciable socio-economic right.[3] In other instances, sufficient resources might be allocated to the fulfilment of a socio-economic right such as the right to social security, but the right's realisation may be impeded by unjust administrative action.[4] It is therefore imperative to develop a unified standard of reasonableness review across the spheres of socio-economic rights and administrative justice jurisprudence to ensure that crucial capabilities are protected regardless of how a particular claim is characterised.

In *Bel Porto School Governing Body v Premier, Western Cape*[5] ("*Bel Porto*"), the dissenting judgment of Mokgoro and Sachs JJ focused on the issue of "basic fairness" in administrative law, rather than following the formalistic approach adopted by the majority of the Court, which was analysed in the previous chapter.[6] Whereas the majority had held that the transitional right to administrative justice enshrined in the interim Constitution[7] merely demanded rational administrative action, Mokgoro and Sachs JJ interpreted it as demanding something more,[8] and as being "governed" and "animated" by a "broad concept of fairness".[9] Importantly, the dissenting judgment recognised the close relationship that exists between procedural and substantive fairness.[10]

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[3] See, for example, *Joseph v City of Johannesburg* 2010 4 SA 55 (CC), where access to electricity supply was at issue.

[4] In the context of social security, see for example *Ndevu v The Member for the Executive Council for Welfare, Eastern Cape Provincial Government* 2002 JDR 0621 (SE) 2-3 and *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 3.

[5] 2002 3 SA 265 (CC).

[6] *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 149. See the discussion of the majority judgment in chapter four part 4 2 3 2 above.

[7] For an explanation of why this case was decided in terms of s 24 of the interim Constitution, see chapter four part 4 2 3 2 above.

[8] *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 164.

[9] Para 152: According to the dissent, a different interpretation could result in "a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently".

[10] Para 152.

5 2 1 1 Substantive review incorporating the principle of proportionality

The acknowledgment of the sometimes inseparable nature of procedure and substance cleared the way for the minority to advocate *substantive* review of administrative action. Significantly, it was explicitly recognised that the right to just administrative action included the principle of proportionality.[11] Proportionality allows for varying levels of scrutiny, which can range from rationality to what a court may regard as the "best" possible outcome.[12] The substantive proportionality enquiry espoused included the consideration of 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 ... rights of the persons affected; the broad public interest involved" and "whether or not there are manifestly less restrictive means to achieve the purpose".[13] This flexible test allows the normative substance of the rights at play to influence the level of scrutiny to which resource allocation decisions are subsequently subjected. Furthermore, the normative and factual context is permitted to refine the ordering of capabilities and other competing factors.[14]

In applying a substantive test of reasonableness, the minority judgment nevertheless acknowledged that courts should not intervene in policy without circumspection. The need for fiscal discipline and the "hard choices" that accompany it should be recognised by a reviewing court.[15] Where an administrative decision is wide in ambit and related to policy, judicial intrusion may not be appropriate. A more limited decision with a grave impact on a determinable number of persons could merit intervention. Ultimately, however, the minority stated that where the circumstances so demand, "fairness in implementation must outtop policy".[16]

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[11] Para 162. The minority judgment (para 165) contains a precursor to the test for contextual reasonableness propagated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

[12] *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 164.

[13] Para 165.

[14] Para 166.

[15] Para 154.

[16] Para 156.

5 2 1 2 Requiring constitutional compliance despite scarce resources

In contrast to the majority judgment, which viewed scarce resources as a justification for unequal resource allocation, Mokgoro and Sachs JJ did not regard strained resources as constituting a basis for exemption from other constitutional obligations:

> "There can be no objection to rigorous bookkeeping to ensure that State moneys are effectively used. Yet the bottom line of the constitutional enterprise is not to be found at the foot of a balance-sheet, but rather in respect for human dignity. Fairness in dealings by the government with ordinary citizens is part and parcel of human dignity."[17]

Just as the overarching value of dignity identifies which capabilities form part of the content of socio-economic rights in certain contexts,[18] dignity also informs the right to just administrative action. The review of allocative decisions taken by administrators should therefore be informed by this fundamental value, and not by concerns such as those related to the judiciary's constitutional or institutional competence.

5 2 1 3 Confirming the justiciability of resource allocation decisions

Finally, it serves to note that in refusing to allow averments of scarce resources to trump considerations of administrative justice, Mokgoro and Sachs JJ rejected arguments that considerations of polycentricity should preclude the justiciability of resource allocation. The minority pointed to the adjudication of the educational budget by the Constitutional Court on two occasions in the past.[19] The minority in *Bel Porto*

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[17] Para 170.

[18] See chapter two part 2 4 1 2 above.

[19] In the context of the requirement for procedural fairness, in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) and *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province v Ed-U-College (PE) (Section21) Inc* 2001 2 SA 1 (CC). Cf the later judgment of *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* 2013 4 SA 262 (CC) in which the majority of the Constitutional Court conceptualised the reduction of subsidies to independent schools after the legal payment date had passed as constituting a breach of a "publicly promulgated promise to pay" (para 48). The claim had not been framed in terms of PAJA, and could therefore not be decided in terms of administrative law. The Court emphasised that the State was discharging its obligations in terms of the right to basic education (s 29(1) of the Constitution of the Republic of South Africa, 1996 (the "Constitution")) when it decided to pay subsidies to independent schools (para 45).

thus concluded that in neither case was there the "suggestion that the particular aspect complained of was so interwoven with the general scheme that it could not be detached and dealt with separately, nor that potential budgetary implications ruled out a re-consideration".[20] This statement is to be supported in that considerations of polycentricity should only be decisive at the remedial stage of adjudication[21] rather than be allowed to impact on the question of justiciability.

5 2 2 An authoritative formulation of a substantive test: *Bato Star*

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[22] ("*Bato Star*") the Constitutional Court was called upon to review the allocation of natural resources on the grounds of, *inter alia*, reasonableness. Specifically, a challenge was brought based on the allegedly insufficient allocation of fishing quotas to new entrants in a particular sector of the fishing industry.

In reviewing the reasonableness of the allocative decision, O'Regan J located judicial review for reasonableness in section 6(2)(h) of PAJA,[23] as informed by section 33 of the Constitution. Significantly, O'Regan J refused to construe the provision as

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The Court held that courts should take cognisance of budget cuts, such as the one which led to the reduction of the subsidy *in casu*. However, the Court concluded in this regard that "[i]t can never be acceptable in a democratic constitutional state for budget cuts to be announced to those to whom undertakings have been made after payment has by regulation already fallen due" (para 64). The Court situated the justifiability of enforcing the "publicly promulgated promise to pay" in the reliance on the promise by independent schools, accountability, and rationality (in that it was irrational to revoke payment after its due date had passed) (paras 63-65). This judgment shows that where a resource allocation decision violates a fundamental constitutional right such as the right to basic education, courts may be willing to situate such claims in vaguely defined public duties.

[19] *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 168.

[20] Para 168.

[21] The value of participatory remedies that involve government and can therefore mitigate polycentric effects of orders relating to the allocation of resources is further considered in chapter six and in particular part 6 3 below.

[22] 2004 4 SA 490 (CC).

[23] S 6(2)(h) of PAJA states:

> "6(2) A court or tribunal has the power to judicially review an administrative action if –
> (h) 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."

espousing a highly restrictive, *Wednesbury* formulation of reasonableness.[24] Instead, she held that the test was a "simple" one according to which a decision that a reasonable decision-maker could not reach, was susceptible to review.[25]

Noting that the test for reasonableness is a *contextual* one, O'Regan J went on to list factors that could assist in determining whether a decision was reasonable or not. Reminiscent of the substantive test formulated in the minority judgment in *Bel Porto*, relevant factors include "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".[26] Although purportedly considerations to help determine the actual reasonableness of a decision, these factors can also be applied to determine to what level of scrutiny such decision must be subjected.

The last two enumerated factors, namely "the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected", signal a proportionality analysis that can allow the normative content of the right at stake to determine the level of scrutiny to which a State resource allocation is subsequently subjected.[27] The importance of the "interest" or capabilities at play should therefore narrow the range of weights that could potentially be assigned to competing capabilities and other factors, including the cogency of justificatory arguments raised by the State for making a particular resource allocation decision.[28] The separate judgment of Ngcobo J, although assessing the decision on grounds of lawfulness, illustrates how the foundational constitutional values of freedom, dignity and equality should animate scrutiny of legislation, policy or administrative action.[29] It follows that where a particular State resource allocation decision is adjudicated, the values that

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[24] See chapter three part 3 2 3 1 above.

[25] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 44.

[26] Para 45.

[27] This initial proportionality analysis can therefore indicate that proportionality review as a robust manifestation of reasonableness review should be applied to any resource-related justification proffered by the State.

[28] See chapter two part 2 3 2 2 above.

[29] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 72-73.

inform both the capabilities approach and socio-economic and administrative justice rights must be allowed to influence the standard of scrutiny applied.[30]

Whereas the last two listed factors may invoke a proportionality analysis, the first two factors may require that due weight be accorded to the decision under review. As noted in the previous chapter,[31] O'Regan J stated that where a complex decision required an equilibrium to be struck between competing interests or required particular expertise, judicial respect was appropriate. However, these observations did not detract from the need to ensure that the government conduct was capable of reasonably resulting in the relevant goal, for example the realisation of a socio-economic right:

> "This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. *A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker*."[32]

When conducting a weighting exercise, expertise can therefore be acknowledged but cogent justificatory arguments and evidence should always be required from the State. Where polycentricity or the institutional competence of the reviewing court is of real concern in adjudicating a particular State resource allocation, this should be openly acknowledged. However, for the capabilities at stake to remain the focus of the weighting exercise, such concerns should to the greatest extent possible be mitigated, for example through the creation of innovative remedies.[33]

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[30] See further chapter two part 2 4 1 above.

[31] Chapter four part 4 2 3 above.

[32] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48 (emphasis added).

[33] See generally chapter six below. For a discussion of how concerns regarding the judiciary's constitutional and institutional competence in matters of resource allocation can be addressed at the remedial stage of adjudication, see in particular chapter six part 6 3 1.

5 2 3 Allowing the normative context to trigger robust review: *Khosa*

The foundational constitutional values of freedom, dignity and equality will usually be implicated where socio-economic rights are concerned.[34] These values help identify the important capabilities at stake and trigger a more robust approach to the adjudication of resource allocation or a defence of resource constraints raised by the State. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*[35] ("*Khosa*") the right to equality[36] and the right of access to social security[37] directly intersected.

In casu, the Court applied a robust proportionality analysis to determine whether financial considerations of limiting social security grants to citizens outweighed the impact of such policy on permanent residents, including the impact on their life and dignity.[38] Notably, the Court placed the burden of adducing evidence – including evidence related to resource constraints – on the State. The correct placement of the *onus* is especially important where court orders are likely to have budgetary implications.[39]

Having noted that equality is implicit in socio-economic rights in that the latter are conferred upon "everyone", the Court stated that even in cases where the State can

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[34] See, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83 and *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 40. See also *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21:

> "Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated. The appellants' reliance on section 10 as a self-standing right therefore does not add anything to this matter…"

[35] 2004 6 SA 505 (CC).

[36] S 9 of the Constitution. For the potential pitfalls of allowing equality to inform the content of rights, and how to avoid these, see part 5 4 2 1 2 below.

[37] S 27(1)(c) of the Constitution.

[38] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 82; S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335 359-360; M Wesson "Equality and Social Rights: An Exploration in Light of the South African Constitution" (2007) *PL* 748 757; C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 88.

[39] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 19. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 98.

justify not allocating resources to "everyone", the allocative criteria must be "consistent with the Bill of Rights as a whole".[40] The Court went on to clarify that allocative criteria had to be reasonable under section 27(2).[41] The Court therefore clearly linked the requirement of reasonableness to the determination and subsequent evaluation of resource allocation.

The Court turned to an analysis of the State's defence of its exclusionary allocation, which was based on the "impermissibly high financial burden" that allocation would place on the State. It was argued that social grant expenditure had increased significantly and would continue to do so, that provision had to be made for other socio-economic programmes and that the requested relief would result in provincial budgetary shortfalls.[42] The Court embarked on a close examination of the State's submissions,[43] and concluded that the vague evidence presented was indicative of speculation.[44] The Court concluded that "the cost of including permanent residents in the system will be only a small proportion of the total cost".[45]

The Court held that the financial considerations raised by the State were outweighed by the impact that its current policy had on the life and dignity of permanent residents of South Africa.[46] Resource allocation should always be judged against the normative values enshrined in the Bill of Rights, as the State manifests its commitment to the transformative ideals set out in the Constitution through its allocative and budgetary

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[40] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 44.

[41] Para 53.

[42] Para 60.

[43] See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 159, 193 and S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 *SAJHR* 163 181.

[44] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 62. The State provided a wide range for the possible increase in expenditure that would result from widening the scope of its provision of social security to permanent residents.

[45] Para 62. The Court calculated that the cost of extending the benefits to permanent residents would only constitute 2% of the present costs.

[46] Para 82. In his dissenting judgment, Ngcobo J regarded the State as justified in its concern that widened provision would impact detrimentally on other socio-economic rights (para 127). Moreover, he insisted that unless evidence to the contrary was presented, "courts should be slow to reject reasonable estimates made by policymakers" (para 128). Finally, it is noteworthy that he did not consider the fact that the increase in expenditure would not be substantial as a relevant factor (para 129).

choices.[47] The values of freedom, dignity and equality can therefore inform a weighting exercise whereby a particular resource allocation decision is subjected to robust scrutiny as a second step following normative interpretation.[48]

5 3 Conceptualising a capabilities-based standard of review

It emerges from the discussion in the previous chapter that there is a need for the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions.[49] Furthermore, it has been argued that the Constitutional Court has evinced judicial competence to adjudicate resource allocation decisions,[50] and that it has adopted a robust standard of scrutiny resembling a proportionality analysis in certain cases.[51] In the following parts, the broad contours of proportionality as a capabilities-based standard of review are elucidated.

5 3 1 Proportionality as weighting

5 3 1 1 Weighting

In devising a capabilities-based standard of review, it must be acknowledged that the prioritisation of resource allocation for the attainment of a broad spectrum of capabilities is by no means a simple task. “Difficult decisions”[52] must be made in appropriating the national budget, in dividing revenue among provinces and in allocating limited resources for the administration of particular policies. Sen acknowledges that a capabilities perspective is “inescapably pluralist” and that the prioritisation of capabilities, functionings and concomitant resource allocation can give

[47] In its equality analysis, the Court stated that “decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society” (para 74; footnotes omitted). This statement should be regarded as equally relevant to the adjudication of resource allocation decisions in socio-economic rights adjudication.

[48] Regarding the importance of the fundamental values that underlie the capabilities approach and the Constitution, see further chapter two part 2 4 1 above.

[49] Chapter four part 4 2 above.

[50] Chapter four part 4 3 above.

[51] Part 5 2 above.

[52] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 29.

rise to lasting debate.[53] However, as elaborated upon in chapter two, Sen postulates that a weighting exercise can successfully occur through a process of "reasoned evaluation".[54]

5 3 1 1 1 The focal space in which weighting should occur

As an initial step, the socio-economic rights together with the right to administrative justice enshrined in the Constitution signal that certain functioning outcomes have been identified as significant within our constitutional democracy. Thus, the functioning outcomes of having a basic education, adequate housing, good health, sufficient food and water and the ability to participate meaningfully in the administration of an open, responsive and accountable government have all received constitutional recognition. In turn, the realisation of these functioning outcomes has the potential to result in capability sets that make the attainment of more complex functionings possible.[55]

A focal space for weighting and reasoned evaluation has therefore been created by the inclusion of these rights in the Constitution.[56] The partial ordering thus created indicates that these capability sets merit prioritised resource allocation when compared with expenditure on interests that do not enjoy the status of constitutional rights.[57] However, where different constitutional rights, or expenditure on short term *versus* long term capability realisation, vie for resource allocation, the weighting exercise espoused by the capabilities approach requires careful adaptation for judicial use.

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[53] A Sen *Development as Freedom* (1999) 76-77.

[54] 78. Where consensus needs to be reached on the weights assigned to capabilities and other factors, Sen argues that agreement should be reached through a process of public reasoning (79). See further chapter two part 2 3 2 4 above.

[55] For example, political, economic and social participation becomes possible.

[56] A Sen *Development as Freedom* (1999) 78.

[57] See chapter two part 2 3 2 1 above; N Ferreira "Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution's Promise in Conditions of Scarce Resources" (2012) 129 *SALJ* 274 275.

5 3 1 1 2 The role of the courts

In chapter two it was argued that the judiciary is well placed to perform the weighting exercise required by a capabilities approach to adjudication.[58] To the extent that Sen's emphasis on a process of public reasoning for the valuation of capabilities does not recognise the role that courts can play under a transformative constitution, his theory stands to be developed. Courts are equipped to make evaluative judgments and to contribute to a process of public reasoning by providing substantive reasons for their judgments.[59] Furthermore, courts are experienced in conducting balancing exercises.[60] In order to serve as one amongst many deliberative *fora* as required under a transformative constitution,[61] courts must endeavour to promote participatory processes, consider the widest range of interests practicable in making evaluative judgments, and engage in explicit, substantive interpretation and reasoning. Where these tenets are adhered to, subsequent public scrutiny of judgments is made possible. Where circumstances change, courts must be willing to adapt their initial judgments in the light of evolving reality.

As discussed in chapter two, Nussbaum recognises the valuable role that courts can play in capability realisation. According to her development of the capabilities theory, courts fulfil an indispensable role in enforcing constitutions in a manner that promotes capability realisation. Furthermore, courts bear the responsibility of elaborating on initially abstract capabilities.[62] Thus, for example, if the right of access to adequate housing finds a direct corollary in the capability to have access to adequate housing, interpretative work needs to be done to further specify which basic capability

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[58] For a discussion of Sen's failure to acknowledge the role that the judiciary can play, see further chapter two part 2 3 3 1.

[59] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 122.

[60] For example, in the context of the limitations analysis in terms of s 36 of the Constitution. See H Botha "Rights, Limitations and the (Im)Possibility of Self Government" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 22. See further the discussion of the Constitutional Court's complex balancing exercise in *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) in chapter four part 4 3 3 above.

[61] For the centrality of participation to the project of transformative constitutionalism, see chapter two part 2 4 3 above.

[62] MC Nussbaum *Creating Capabilities* (2011) 40-43, 62. See further chapter two part 2 3 1 2 regarding the role of the courts in a capabilities approach to adjudication.

subsets[63] and overarching, more complex capabilities the right additionally encompasses.[64] It is the role of the courts to interpret rights and to assign weights to the capabilities that rights represent in a particular context.

5 3 1 2 Proportionality

Constitutional adjudication will often require the balancing of different rights and interests. Where the content of the socio-economic right in a given case includes critical capabilities, and resources are diverted for the fulfilment of other important capabilities, balancing will be required. Proportionality analysis holds the potential to be developed specifically for the balancing of competing rights, competing capabilities within the same right, or rights *versus* other resource-intensive interests in the context of limited resources:

> "Proportionality is a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest."[65]

5 3 1 2 1 Proportionality under the Constitution

Various different formulations of the test for proportionality exist.[66] In South Africa, the general limitations clause enshrined in section 36 of the Constitution has been generally accepted by our courts as requiring a proportionality analysis.[67] The general

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[63] For example, the capability to enjoy access to infrastructure, to live in proximity to one's place of work, and to enjoy access to basic services.

[64] For example, the complex capability set required to achieve the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. For a discussion of Nussbaum's recognition of the important role that courts can and should play in promoting capabilities, see chapter two parts 2 3 1 2 and 2 3 3 3.

[65] K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 710.

[66] See, for example, T Hickman "Proportionality: Comparative Law Lessons" (2007) *JR* 31.

[67] See, for example *S v Makwanyane* 1995 3 SA 391 (CC) para 104; *S v Bhulwana* 1996 1 SA 388 (CC) para 18; *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 32. S 36 of the Constitution reads:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

limitations clause is based on the following passage in *S v Makwanyane*,[68] which was decided under the interim Constitution:[69]

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality… Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[70]

(a) A flexible enquiry

The proportionality analysis encapsulated in section 36 implies that "the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and

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(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[68] 1995 3 SA 391 (CC).

[69] S 33 of the Constitution of the Republic of South Africa Act 200 of 1993 contained a different limitations clause, the pertinent part of which reads:

"33 Limitation
(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
(a) shall be permissible only to the extent that it is-
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question, and provided further that any limitation to-
(aa) a right entrenched in section 10, 11, 12, 14 (1) , 21, 25 or 30 (1) (d) or (e) or (2) ; or
(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i) , also be necessary."

[70] *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

not adhere mechanically to a sequential check-list".[71] Rigid adherence to the factors enumerated in section 36 is therefore unnecessary. Furthermore, the factors listed in section 36 do not constitute a closed list.

The limitations analysis is traditionally regarded as applying to positive limiting measures, where the State enacts or applies a law that limits a constitutional right. It may thus not be wholly applicable to State omissions, such as the failure to allocate adequate resources to the fulfilment of a particular socio-economic right. Thus, the exact formulation of the section 36 limitations clause need not be adopted *verbatim* into the internal qualification found in sections 26(2) and 27(2) of the Constitution, or the requirement for reasonable administrative action in section 33(1) of the Constitution.[72] To the extent that formulations of the doctrine of proportionality in other jurisdictions may not exactly track the section 36 enquiry, they are nevertheless instructive.

(b) Accommodating the first stage of a two-stage capabilities-based rights analysis

Constitutional adjudication in South Africa generally follows a two stage rights analysis. In the first stage, the infringement of the constitutional right must be established. If an infringement is thus established, the second stage requires the court to determine whether the limitation of the right is justifiable – this is where the proportionality enquiry becomes relevant.[73] In order to determine whether a right-infringement has occurred as required by the first stage of the right analysis, the right must necessarily be interpreted.

As has been argued throughout this dissertation,[74] it is therefore crucial to substantively interpret the normative purposes of the right at issue,[75] and to fully engage with the capabilities that a given right seeks to promote. For example, the right

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[71] *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 32.

[72] This is apparent from the case law discussed in part 5 2 above that incorporated elements of proportionality without relying on s 36 of the Constitution. See in particular *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 162 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45.

[73] S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-1 (b).

[74] See, *inter alia*, chapter two part 2 3 2 2 3 above.

[75] See generally D Bilchitz "Does Balancing Adequately capture the Nature of Rights?" (2011) 25 *SAPL* 423.

to basic education may include capabilities such as the capability to become educated in safe buildings, the capability to be well nourished and have access to hygienic sanitation facilities while receiving an education so as to realise the capability to enjoy an adequate standard of health, the capability to consult and learn from resources such as textbooks in a position of substantive equality with other learners, and so forth. The content of the socio-economic right will depend on the context of the case at hand. Once right is interpreted in its context, weights should be assigned to the capabilities at issue.

The "nature of the right" constitutes the first enumerated factor which a court should consider in conducting a limitations analysis under section 36 of the Constitution.[76] Woolman and Botha question the placement of this factor, pointing out that the interpretation of the right must occur at the first stage of the analysis prior to the second, justificatory stage.[77] According to the authors, the inclusion of this factor signals that the importance of the right must determine the level of scrutiny to which justificatory arguments are subjected.[78]

Once the socio-economic right has been interpreted, the gravity of the infringement of the right (in other words the detrimental impact on the right's underlying capabilities) should be determined. Thus, where a basic or fertile capability is imperilled, and the infringement impacts gravely on the complex capability to live an autonomous and dignified life in a position of substantive equality with others, the standard of scrutiny applied to the second stage of the analysis should be significantly sharpened. The enquiry as to the gravity of the infringement of the right finds its corollary in section 36(1)(c) of the Constitution, which directs a reviewing court to consider "the nature and extent of the limitation" in conducting its proportionality analysis:

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[76] S 36(1)(a) of the Constitution.

[77] For the argument that the "nature of the right" differs from an enquiry as to the scope of the right, and therefore correctly falls into the second stage of the rights analysis, see K Iles "A Fresh Look at Limitations: Unpacking Section 36" (2007) 23 *SAJHR* 68 81-82.

[78] S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (c)(i). The authors observe that the Constitutional Court has rejected the notion of varying levels of scrutiny for different constitutional rights in the context of the limitations analysis. According to the authors, the Court's view that the more important the right at stake, the more compelling must the justification for its infringement be, amounts to a distinction without a difference.

> "The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be."[79]

The first stage of the rights analysis is therefore commensurate with a capabilities approach to the adjudication of State resource allocation decisions.[80]

5 3 1 2 2 The structure of the proportionality enquiry

The proportionality enquiry that enters the second stage of the rights analysis encompasses four steps that can aid the State, in the first instance, and the reviewing court, subsequently, to ensure that State conduct does not interfere with rights disproportionately. Once the reviewing court has interpreted the socio-economic right at stake and assigned weights to the capabilities represented by the right in a particular context, the second stage of the analysis allows the court to assign weight to competing factors, such as resource constraints. It is at the final step of the proportionality enquiry that the weights assigned to the relevant capabilities are balanced against the weight assigned to competing factors, in order to determine whether an allocative decision is proportionate to the imperilled capabilities.[81]

(a) Legitimacy

First, a legitimate goal or policy aim must be pursued. Legitimacy under our constitutional dispensation requires that the purpose of the limitation must at least be in congruence with an open and democratic society based on human dignity, equality and freedom.[82] While one would expect State goals to be legitimate, no presumptive legitimacy attaches to government aims or policies, which should accordingly be

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[79] *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 69. This factor will have to be considered again at the balancing step of the limitations analysis, in order to determine whether the extent of the infringement is proportionate to the nature of the right. S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (c)(iii).

[80] See chapter two part 2 3 2 2 3 above.

[81] For the application of a capabilities-based proportionality enquiry to State resource allocation decisions in particular, see part 5 3 3 2 below.

[82] S 36(1)(b) lists "the importance of the purpose of the limitation" as a factor to be considered by the court in conducting a limitations analyses.

subjected to scrutiny. If government for instance allocated additional resources to the realisation of basic education or the effective functioning of the court system, but insufficient resources to the provision of access to sufficient water, the former two goals will nevertheless be legitimate. However, should an unconstitutional aim be pursued, it could be rejected at this first step of the enquiry.[83] For example, a law which diverts resources to a project aimed at the criminalisation of homosexual sex in a professed attempt to curb the spread of HIV would be paternalistic, unconstitutional and thus illegitimate. In the context of the proportionality analysis that takes place under section 36 of the Constitution, this step can look beyond the legitimacy of the policy or aim and determine the importance of the purpose of the limitation.

(b) Suitability

Second, the suitability of the measures adopted to reach the legitimate aim must be established.[84] The measures must thus be capable of securing the legitimate objective, or must be rationally related thereto.[85]

[83] K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 712; M Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141 148.

[84] This corresponds to the fourth factor listed in s 36 for the reviewing court's consideration, *viz* "(d) the relation between the limitation and its purpose".

[85] S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (c)(iv); K Iles "A Fresh Look at Limitations: Unpacking Section 36" (2007) 23 *SAJHR* 68 83; K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 713; M Elliot "Proportionality and Deference: The Importance of a Structured Approach" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 264 265. See further, for example, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 56 where it was held that there was no rational connection between the measure of denying benefits to same-sex partners and the objective of protecting family life.

(c) Necessity

Third, the adopted measure must be necessary for the achievement of the aim or objective, in that no less restrictive means of reaching the objective equally well exists.[86] In colloquial terms, one must not use a sledgehammer to crack a nut.[87]

A necessity test is not strictly required by the section 36 proportionality analysis: a reviewing court should merely consider the existence of less restrictive means to achieve the purpose of the limitation.[88] Woolman criticises the deletion of the necessity test from the final Constitution.[89] However, the author convincingly argues that where the importance of the right requires the adoption of a strict level of scrutiny,[90] the requirements encompassed by the listed factors will be correspondingly sharpened. In appropriate cases, the means chosen by government to achieve its objective must be no more restrictive than is "absolutely necessary".[91] In this way, the less restrictive means test can encompass the necessity test where the nature of the right and the gravity of the infringement so demand.

Möller points out in this regard that a difficulty arises where, for example, a less restrictive measure does exist but would require additional resources in order to meet the objective in question. The author goes on to note that this can be resolved structurally either at the necessity step or at the final, balancing step of proportionality.[92] Hickman characterises this question as one of "relative proportionality", but goes on to state that "the precise way the balancing exercise is phrased is less important than that the exercise is carried out, and that it is recognised as different both from the question of overall proportionality and also from identifying

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[86] K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 713; M Elliot "Proportionality and Deference: The Importance of a Structured Approach" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 264 265.

[87] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 333-334.

[88] S 36(1)(e).

[89] S Woolman "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution" (1997) 13 *SAJHR* 102 105.

[90] Woolman (108-109) suggests that some rights can *a priori* be assumed to be more important than others. However, the importance of the right should rather be determined in concrete contexts, by determining what capabilities it protects in particular circumstances.

[91] 108-109.

[92] K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 714.

whether a measure is the 'least injurious'".[93] Ultimately, however, Hickman advocates that the question of relative proportionality should be considered at the necessity step of the proportionality enquiry.[94] If one follows Alexy's argument that the steps of suitability and necessity relate to what is *factually* possible, whereas the balancing step relates to what is *legally* possible,[95] then structural clarity might best be served by confining the consideration of alternative measures that require trade-offs to the normative, balancing step.[96]

(d) Balancing

The final step in the proportionality analysis is that of balancing, or proportionality *stricto sensu*. This crucial step is not explicitly included in the section 36 proportionality analysis and must be inferred from the wording of the section and the Constitutional Court's interpretation thereof.[97] The balancing step is a value-laden enquiry which, rather than dwelling exclusively on the relation between the means adopted and the objective sought to be achieved by the State, returns judicial focus to the rights at issue.[98] This final, balancing step is where a normative, capabilities-based weighting exercise will find its most fulsome expression. Barak elaborates:

> "[Balancing] is an expression of the understanding that the law is not 'all or nothing.' Law is a complex framework of values and principles, which in certain cases are all congruent and lead to one conclusion, while in other situations are in direct conflict and require resolution. The balancing technique reflects this complexity. At the constitutional level, balancing enables the continued existence, within a democracy, of conflicting principles or values, while recognizing their inherent constitutional conflict."[99]

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[93] T Hickman "The Substance and Structure of Proportionality" (2008) *PL* 694 713.

[94] 713, 714.

[95] R Alexy *A Theory of Constitutional Rights* (2002) 67 and in particular 400-401.

[96] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 338-339 also favours this approach.

[97] *S v Makwanyane* 1995 3 SA 391 (CC) para 104; S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (b).

[98] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 342-344.

[99] 345-346; see also H Botha "Rights, Limitations and the (Im)Possibility of Self Government" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 22 quoted in chapter two part 2 3 3 1 above.

According to the balancing test, the marginal benefit or social importance of the limiting measure, and the probability of its realisation, should outweigh the marginal harm and social importance of preventing such harm to the right at issue.[100] Alexy, who conceptualises rights as principles that should be optimised to the greatest extent factually and legally possible,[101] similarly holds that "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".[102]

Although balancing can be characterised as "interest balancing", according to which a cost-benefit analysis is carried out between two weights placed on a set of scales, a conceptualisation of "balancing as reasoning" resonates more strongly with the capabilities approach and is preferable.[103] The focal space created by the inclusion of socio-economic rights and the right to just administrative action in the Constitution was itself the outcome of a "reasoned 'consensus' on... a range of weights".[104] The further narrowing of the range of weights to prioritise capabilities and related resource allocation must likewise take place through a process of public reasoning. Public reasoning should, in the first place, be carried out by the State in consultation with a wide range of stakeholders in its own proportionality analysis of resource allocation decisions.[105] Subsequently, courts should utilise a process of reasoned evaluation in conducting a weighting exercise, and should catalyse subsequent public reasoning through engagement in explicitness and substantive interpretation.[106]

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[100] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 363.

[101] R Alexy *A Theory of Constitutional Rights* (2002) 47-48 (original emphasis):
"*[P]rinciples* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules."

[102] 102.

[103] K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 715.

[104] A Sen *Development as Freedom* (1999) 78. See further for a discussion of the role of reasoning in the capabilities approach, chapter two part 2 3 2 4.

[105] See W Sadurski "Reasonableness and Value Pluralism in Law and Politics" in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 129 138-139 for the argument that the analysis of the relationship between means and ends demanded by the first three steps of the proportionality analysis is primarily a legislative, and not a judicial, function.

[106] See chapter two part 2 3 2 4 above.

5 3 1 3 Proportionality as reasonableness

Reasonableness review in socio-economic rights and administrative justice jurisprudence can be viewed as a continuum that ranges from "weak" reasonableness review, or rationality review, to proportionality review, or reasonableness in the "strong sense".[107] Proportionality is therefore a robust manifestation of reasonableness review that is appropriate where critical capabilities are at stake.[108] Where crucial capabilities are implicated, *proportionate* resources should be allocated for their protection and realisation.

Reasonableness review generally lacks the structured form of proportionality analysis and can benefit from following the stages of proportionality review to enhance analytical clarity. In this way, the substantive interpretation of rights is followed by three steps during which justificatory arguments for insufficient resource allocation are elucidated, and culminates in a final weighting step. Reasonableness review corresponds closely to the first interpretative stage and final balancing step of the proportionality enquiry.

Like the first stage of the rights analysis that precedes proportionality review, reasonableness review is capable of allowing the capabilities at issue coupled with the severity of their deprivation to dictate the intensity of review subsequently applied to an allocative decision. That proportionality is a *genus* of reasonableness is most apparent when one turns to the final, balancing step of the proportionality analysis. Reasonableness is a normative concept that requires the assignment of varying weights to different, oft-competing factors. Indeed, "at the heart of reasonableness lies the notion of balancing".[109]

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[107] W Sadurski "Reasonableness and Value Pluralism in Law and Politics" in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 129 131-132; and see further in general G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639.

[108] G Barrie "The Application of the Doctrine of Proportionality in South African Courts" (2013) 28 *SAPL* 40 40. Conversely, KG Young *Constituting Economic and Social Rights* (2012) 129 views reasonableness as a subset of proportionality analysis.

[109] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 375. See also R Alexy "The Reasonableness of Law" in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 5 14:

A review standard of proportionality that gives primary weight to the capabilities at issue is thus congruent with the model of reasonableness review applied in both socio-economic rights and administrative justice cases. Moreover, it is possible to develop a version of proportionality review specifically for the adjudication of State resource allocation decisions that impact on the capability sets represented by socio-economic rights and the right to just administrative action. This will effectively allow capabilities to set the agenda whenever the appropriate standard of review is in question.

5 3 1 4 Proportionality in socio-economic rights jurisprudence

As demonstrated above, there has been some progress in South African socio-economic rights and administrative justice jurisprudence towards recognising that a robust proportionality analysis is appropriate where fundamental rights are concerned.[110] However, the application of elements of a proportionality enquiry has not always been carried out on the basis of justifiable principles.[111] Furthermore, the application of proportionality as standard of review specifically to the adjudication of State resource allocation decisions has not been fully developed.

A coherent approach to strong-form reasonableness review of resource allocation decisions can advance the unified development of such standard of review where socio-economic rights and the right to just administrative action overlap. Socio-economic rights are often realised through the medium of administrative action. This overlap is apparent where, for example, the right of access to social security is at stake,[112] given that decisions related to grant payments usually constitute administrative action. Where a decision is challenged as being unreasonable, a claim can be framed in terms of the implicated socio-economic right or the right to just administrative action, or both. It is therefore necessary to ensure the coherent development of reasonableness review in socio-economic rights and administrative justice jurisprudence. Unified development of the standard of review can ensure that the capabilities that underlie the socio-economic right and the right to administrative

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"Reasonable application of constitutional rights requires proportionality analysis. Proportionality analysis includes balancing. The incorporation of human rights into a legal system therefore underscores and enhances the role of balancing."

[110] See part 5 2 above.

[111] See in particular chapter four part 4 2 4 above.

[112] S 27(1)(c) of the Constitution.

justice in such a case, receive the same judicial protection regardless of the way in which the claim is framed.

The question arises as to whether it is possible or desirable to apply the general limitations clause found in section 36 of the Constitution, which necessitates a proportionality enquiry, to those socio-economic rights that already contain an internal limitations clause.[113] In *Khosa*,[114] the Constitutional Court acknowledged that an overlap between the internal limitations clause in sections 26(2) and 27(2) and the general limitations clause in section 36 may exist.[115] Furthermore, section 36 would only be applicable if the standard of reasonableness in this provision differed from that in sections 26(2) and 27(2). However, the Court declined to decide the issue in the absence of argumentation on the point. Instead, the majority held that, *in casu*, even if the reasonableness standard in the two provisions differed, the infringement of the right of access to social security would fail the reasonableness test in both sections 36 and 27(2).[116] The minority judgment per Ngcobo J mounted an enquiry in terms of both sections 27 and 36. Ultimately, however, Ngcobo J was of the opinion that "the outcome would be the same even if the enquiry were to begin and end in section 27(2)".[117] It therefore remains uncertain whether and to what extent section 36 can be applied to the positive duties implied by qualified socio-economic rights.[118]

It bears reiteration that section 36 does not explicitly espouse the final, balancing step of the proportionality enquiry. This crucial step, which goes to the heart of

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[113] Ie ss 26(2) and 27(2) of the Constitution.

[114] See part 5 2 3 above.

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

[116] Para 84.

[117] Para 107.

[118] Cf the s 36 analysis in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) and criticism of the application of a robust standard of scrutiny based on the "negative" duty concerned in chapter four part 4 2 4 above. S 36 has also never been applied to an alleged limitation of the right to just administrative action in terms of s 33(1) of the Constitution. K Iles "Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses" (2004) 20 *SAJHR* 448 464 is of the opinion that where access to a socio-economic right, and not the content of the right itself, is limited, a section 36 enquiry should replace the internal limitations clause enquiry. For example, access will be at issue where it is uncontentious that social grants form part of the content of the right of access to social security in terms of s 27(1)(c) of the Constitution, but certain categories of citizens are denied access to the content of the right (ie grant payments). However, he argues that the adjudication of State resource allocation decisions should be confined to the internal limitations clause.

reasonableness, must therefore be inferred from the wording of section 36. Proportionality can likewise be read into the requirement for "reasonable" measures in the socio-economic rights internal limitations clauses – and accordingly into the right to administrative action that is reasonable. The position of Quinot and Liebenberg with regard to the limitation analysis can therefore be supported:

> "'Reasonableness' in the second subsection can in fact incorporate the proportionality inquiry of section 36, making section 36 largely redundant ... 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... [C]rucial to a proper application of the proportionality requirement is a clear understanding of the nature of the right affected, and the impact of the challenged conduct or omissions on the normative purposes and values which the relevant right seeks to promote..."[119]

Reasonableness review in terms of the second subsection of the rights enshrined in sections 26 and 27 can therefore sufficiently accommodate a robust proportionality standard of review. In order to constitute a capabilities-based standard of review, it is imperative that a two-stage analysis is adhered to.

5 3 2 Overcoming the perceived difficulties of applying proportionality review

5 3 2 1 Eroding the normative force of rights?

Despite having evolved into "a central structural feature of rights adjudication in liberal democracies worldwide",[120] proportionality review has not escaped criticism. One pertinent criticism raised by Tsakyrakis is that through balancing rights against other interests, human rights are "eroded" and the priority that they should be accorded is ignored.[121] Put differently, rights should be regarded as "trumps" instead of mere

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[119] G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639 660.
[120] M Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141 142; see also A Stone Sweet & J Mathews "Proportionality, Judicial Review, and Global Constitutionalism" in G Bongiovanni, G Sartor & C Valentini (eds) *Reasonableness and Law* (2009) 173.
[121] S Tsakyrakis "Proportionality: An Assault on Human Rights?" (2009) 7 *I Con* 468 489-490.

principles that can be traded off against other considerations such as the public interest.[122]

The notion of trumping is antithetical to that of balancing or weighting. This exclusionary approach cannot be supported since it fails to leave room for the acknowledgement that socio-economic rights will often come into conflict with each other, with other rights and with different considerations and interests. Different capabilities forming part of the content of a single socio-economic right may also come into conflict with each other. Given the fact that resources are necessary to realise all rights, as well as other government purposes, diverse objectives will inevitably compete for resources in cases that fall to be adjudicated. Balancing therefore becomes indispensable.

The first two suitability steps of the proportionality enquiry ensure that only competing interests of constitutional importance[123] are allowed to enter into a weighting exercise.[124] In this way, the priority and protection that should be accorded to capabilities that have crossed the threshold of importance for recognition as "rights" are acknowledged.[125] The most difficult questions related to the justiciability of State resource allocation decisions will arise when two important socio-economic rights vie for resource allocation. The same difficulty will arise where different capabilities that form part of the content of the same right compete for resources. This will be the case where, for example, provisioning for short-term capability needs in terms of the right of access to adequate housing competes with the resource demands for fulfilling longer-term housing needs. Given the general absence of a hierarchy of rights, weighting becomes essential.

The first stage of the weighting exercise establishes the scope, importance and normative underpinning of the rights with reference to the capabilities that inform their

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[122] R Dworkin *Taking Rights Seriously* (1977); R Dworkin "Rights as Trumps" in J Waldron (ed) *Theories of Rights* (1984) 153. See A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 488-489 for a discussion of this criticism.

[123] This is reflected in s 36(1)(b) of the Constitution, which requires a reviewing court to consider the "the importance of the purpose of the limitation". S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (c)(ii).

[124] M Klatt & M Meister "Proportionality – A Benefit to Human Rights? Remarks on the I CON Controversy" (2012) 10 *I Con* 687 690-691.

[125] A Sen *The Idea of Justice* (2009) 366-367 and see further chapter two part 2 3 2 3 above.

content.[126] It is important to bear in mind that a weighting exercise does not diminish the scope of the rights. Only the extent to which their full realisation is possible within prevailing circumstances is affected.[127] The factual and normative context can therefore aid a reviewing court in assigning *comparative* weights to the rights at issue.[128] A process of reasoned evaluation, weighting and balancing can justly prioritise a plurality of rights in concrete contexts without eroding their normative force.

5 3 2 2 A value-neutral enquiry?

Tsakyrakis has also accused the proportionality enquiry of being "objective, neutral, and totally extraneous to any moral reasoning",[129] thereby constituting an exercise in obfuscation as opposed to transparency. Woolman and Botha echo this concern by noting the scientific language of a cost-benefit analysis that often accompanies balancing enquiries.[130]

However, the opposite is true. Weighting and the balancing component of proportionality are inherently normative. By assigning different weights to the social importance of conflicting rights, their underlying capabilities and other interests, moral

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[126] See generally D Bilchitz "Does Balancing Adequately capture the Nature of Rights?" (2011) 25 *SAPL* 423.

[127] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 87-89. For a discussion of Sen's recognition of this point, see chapter two part 2 3 2 3 3 above.

[128] M Klatt & M Meister "Proportionality – A Benefit to Human Rights? Remarks on the I CON Controversy" (2012) 10 *I Con* 687 690. On the need for comparative assessments, see further A Sen *The Idea of Justice* (2009) 96, 103-104 and the discussion in chapter two part 2 3 2 4 2 above.

[129] S Tsakyrakis "Proportionality: An Assault on Human Rights?" (2009) 7 *I Con* 468 474. This is in fact the conceptualisation of proportionality espoused by DM Beatty *The Ultimate Rule of Law* (2004), but which cannot be supported. Beatty purports to reduce everything, including the constitutionality of insufficient resource allocation to guarantee even survival, to a question of fact:

> "With its focus on the particulars of each act of government, proportionality transforms questions that in moral philosophy are questions of values into questions of fact… Whether a state can legitimately… withhold resources [that people] need to survive, depends entirely on the factual details of each case." (170.)

[130] S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (d)(i)(bb)(z).

and practical reasoning is engaged.[131] The moral perspective[132] adopted for the application of the proportionality analysis will affect the prioritisation of competing interests at the balancing stage. Kumm captures the relationship between value-based, moral reasoning and practical reasoning:

> "If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations. Reasoning about rights means reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning."[133]

A capabilities approach to adjudication can inform the moral perspective necessary to conduct the weighting exercise. Moreover, the capabilities approach does not suggest that the issue of weighting can be resolved through resort to a precise metric or the application of an ideal formula.[134] Rather, the need for reasoning, public scrutiny and evaluative judgments is fully acknowledged and supported.[135]

5 3 2 3 Incommensurability as incomparability?

Related to the inherently moral character of the proportionality analysis is the criticism that values at opposite ends of the hypothetical scale are incommensurable, and thus cannot be balanced against each other. Rights and the capabilities that form their content are neither quantifiable nor susceptible to technical, mathematical calculation and comparison.[136] It is therefore argued that it is not possible to compare diverse capabilities such as education and health care with each other in order to establish priorities. However, commensurability should not be confused with

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[131] M Klatt & M Meister "Proportionality – A Benefit to Human Rights? Remarks on the I CON Controversy" (2012) 10 *I Con* 687 692-695; K Möller "Proportionality: Challenging the Critics" (2012) 10 *I Con* 709 717.

[132] KG Young *Constituting Economic and Social Rights* (2012) 129.

[133] M Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141 147.

[134] A Sen *Development as Freedom* (1999) 79.

[135] 80.

[136] S Woolman "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution" (1997) 13 *SAJHR* 102 114-118; S Woolman & H Botha "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-8 (d)(i)(bb)(w); FJ Urbina "A Critique of Proportionality" (2012) 57 *Am J Juris* 49 54-57.

comparability.[137] The fact that rights, capabilities and values are incommensurable makes weighting and balancing indispensable. Klatt and Meister explicate this point:

> "It is precisely the hard cases which are counting in favor of the model ... [To assume the impossibility of weighting] would amount to denying any possibility of rational moral and legal reasoning, and, thus, not only to a far-reaching skepticism, but also to giving up the idea of constitutional law scholarship as a rational enterprise."[138]

Barak argues that whereas a common denominator may be required, it need not be quantitative, but should merely constitute a shared premise for evaluation.[139] He locates such shared premise within the need to balance the social importance of the limiting measures with the social importance of preventing harm to the right concerned. "Social importance" thus emerges as the shared metric.[140] In order to determine what can be regarded as being of social importance, Barak postulates that the economic and political context and ideology of the relevant legal system, along with its history, should be taken into account. In this way, "[t]he assessment of the social importance of each of the conflicting principles should be conducted against the background of the normative structure of each legal system".[141]

Under our transformative Constitution, this approach leaves room for the social and historical context of South Africa to inform the social importance of conflicting principles. The need to address the structural disadvantage caused by apartheid policies will therefore be an important factor informing the social importance of competing principles. Social importance can also be measured by a relevant principle's ability to contribute to the general project of transformative constitutionalism and to the

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[137] VA da Silva "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31 *OJLS* 273; M Klatt & M Meister "Proportionality – A Benefit to Human Rights? Remarks on the I CON Controversy" (2012) 10 *I Con* 687 696.

[138] M Klatt & M Meister "Proportionality – A Benefit to Human Rights? Remarks on the I CON Controversy" (2012) 10 *I Con* 687 696.

[139] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 483. See further I Currie "Balancing and the Limitation of Rights in the South African Constitution" (2010) 25 *SAPL* 408 419 who argues that the Constitution and its values constitute the "common point of view" against which balancing can take place. See further D Bilchitz "Does Balancing Adequately capture the Nature of Rights?" (2011) 25 *SAPL* 423 444 who states that the foundational values of dignity, freedom and equality should inform Currie's "constitutional perspective".

[140] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 484.

[141] 349.

manifestation of the fundamental values of freedom, dignity and equality in the lived reality of all who reside in South Africa.

Capabilities can be used to identify the overarching normative purpose of socio-economic rights as leading to the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. Socio-economic rights thus enjoy considerable social importance. Competing rights can accordingly be weighted and ordered within a rich normative paradigm informed by the foundational values of freedom, dignity and equality.

5 3 3 Developing a weighting paradigm for the adjudication of State resource allocation decisions

5 3 3 1 The inherently prioritising nature of socio-economic rights

The Constitutional Court has recognised that socio-economic rights will often come into conflict with each other.[142] However, instead of characterising instances where important rights vie for the allocation of limited resources as "tragic choices" that cast an insurmountable, polycentric obstacle to adjudication, such cases can instead be adjudicated through the application of a proportionality-as-weighting standard of review.[143] In balancing the rights of access to housing against the right to property,[144] the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[145] acknowledged the need for balancing as opposed to rigid ordering or the application of a precise formula:

> "The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking

[142] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 31; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 35.

[143] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 515-520; MC Nussbaum *Creating Capabilities* (2011) 37.

[144] S 25 of the Constitution.

[145] 2005 1 SA 217 (CC).

account of all the interests involved and the specific factors relevant in each particular case."[146]

This approach leaves room for a normative process of reasoned evaluation, as espoused by the capabilities approach.[147] Moreover, proportionality as weighting can be fruitfully developed and applied to State resource allocation decisions. The proportionality enquiry can be infused with substance by asking what capabilities need to be realised in order to achieve the complex functioning outcome that constitutes the overarching purpose of socio-economic rights. Courts can then ensure that more basic capabilities, which inform the content of socio-economic rights, will be justly prioritised and optimally protected. Nussbaum's approach, according to which ranking is possible even where all possible orderings will involve some type of capability violation, can therefore be incorporated into Sen's weighting paradigm.[148]

By acknowledging the prioritising function of rights, and especially socio-economic rights, courts can grapple with the expenditure choices faced by government.[149] Although courts will never make these choices directly in the first instance, the subsequent reasoned evaluation of the State's choices within a capabilities framework ensures accountability and transparency in the allocative decisions that government makes.[150] This, in turn, ensures that the "inevitability" of non-realisation of socio-economic rights is not merely assumed, but must be accounted for whenever it is alleged that resource allocation decisions are unreasonable.[151]

5 3 3 2 Application of a proportionality standard of review to State resource allocation decisions

Proportionality has traditionally enjoyed a defensive role in that, when applied to civil and political rights, it sets the boundaries of what limitations are permissible and

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[146] Para 23.

[147] A Sen *Development as Freedom* (1999) 79-80.

[148] MC Nussbaum *Creating Capabilities* (2011) 37; A Sen *Development as Freedom* (1999) 79-80; chapter two part 2 3 4 4 above.

[149] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 252.

[150] E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464 466, 471-472; M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 518.

[151] M Pieterse "Health Care Rights, Resources and Rationing" (2007) 127 *SALJ* 514 516.

thereby restricts government power. In contrast, when applied to State resource allocation decisions, proportionality assumes a creative character in the sense of seeking to establish to what extent proportionate resource allocation for the realisation of socio-economic capabilities is possible given finite resources.[152] The creative or positive nature of the enquiry furthermore pushes the boundaries of the judicial function within the separation of powers – bearing in mind that a fluid demarcation of functions is appropriate under a transformative constitution and within a culture of justification.[153] The Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty)*[154] aptly expressed the essence of the judicial function in this regard:

> "Proportionality is a constitutional watchword. In dealing with the interrelated issues of the limits of judicial intrusion and the reality of available resources, balanced against the assertion of socio-economic rights, a court's role can rightly be described as 'the art of the possible'."[155]

5 3 3 2 1 Establishing the content of the right and the severity of the infringement

As emphasised throughout this dissertation,[156] the first stage of the rights analysis is crucial for the adjudication of State resource allocation decisions. Where the right at stake is not sufficiently interpreted, subsequent adjudication of resource-based justificatory arguments put forth by the State will be forced to take place within a normative vacuum. This poses the risk that "available resources" will be interpreted narrowly, thereby leaving the political choices that led to the allocation of insufficient resources unquestioned.

As a first step, therefore, the reviewing court must determine the substantive, normative scope of the right at stake. Where socio-economic rights overlap with the

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[152] See X Contiades & A Fontiadou "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation" (2012) 10 *I Con* 660 665 for the characterisation of proportionality as "defensive" and "creative", respectively. However, the authors view the creative function of proportionality as determining the content of socio-economic rights. This view cannot be supported. See further the discussion in part 5 3 3 2 1 below.

[153] For the role of the judiciary under a reconceptualised separation of powers doctrine, see chapter two part 2 4 2 above.

[154] 2011 4 SA 337 (SCA).

[155] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 54.

[156] See especially chapter two part 2 3 2 2 3.

right to just administrative action, the normative purposes that inform the latter right must also be explicitly elaborated upon. In order to substantively interpret the rights at issue, the court can ask what capabilities are necessary in the relevant context[157] to achieve the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The important nature of the capabilities at issue may justify a strict level of scrutiny and demand proportionate resource allocation. Thus, for example, where a fertile capability that can promote and enhance the attainment of greater capability sets is imperilled, a much more intense level of scrutiny will be warranted. Where basic capabilities are negated and severe infringement of freedom, dignity and equality occurs, scrutiny must likewise be sharpened.[158] The weight accorded to the fulfilment of vital capabilities will therefore be significant. Only justificatory arguments for insufficient resource allocation of greater weight will render such resource allocation decisions "reasonable".

In addition, the court must consider the normative, historical, social and factual context of the case at hand when establishing the severity of the alleged capability deprivation. Thus, for example, where the right of access to social security is limited, the court will ask what would constitute a sufficient social grant in order to make the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others possible. The court will need to "dig into the history and social reality"[159] of the litigants in order to establish the gravity of the impact that the allocation of insufficient social grants has on their capability sets.[160] The historical and social context may indicate that insufficient access to social assistance will exacerbate class- and race-based patterns of disadvantage. The factual context might indicate that several more basic capabilities must be realised in order to render the complex functioning outcome feasible. Thus, in the absence of adequate social security, the claimants may lack the capability to access food, water, shelter, health care services and so forth. The process by which the current allocation was arrived at and the payment of social grants itself would also need to be administratively just, thus adding a further dimension to the scope of capabilities concerned. Where these capability sets

[157] The broader social and historical context of South Africa, as well as the factual context or "lived reality" of the given case.

[158] MC Nussbaum *Creating Capabilities* (2011) 99. See further chapter two part 2 3 2 2 1 above.

[159] MC Nussbaum *Creating Capabilities* (2011) 176.

[160] For the importance of context in adjudicating State resource allocation decisions in terms of a capabilities approach, see further chapter two part 2 3 3 3 3 above.

are negated, the negative impact of an insufficient resource allocation decision on the achievement of the complex, overarching functioning outcome will be severe.

Whereas Contiades and Fontiadou argue that the second stage of the rights analysis determines the content of the right,[161] the inverse should be supported: the interpretation of the content of the rights at issue must necessarily precede the application of the proportionality enquiry at the second stage of the rights analysis. Due weight must accordingly be apportioned to the relevant rights. Only the extent of the current possibility of the right's realisation, and not its scope, can subsequently be limited if the justificatory arguments for not allocating sufficient resources outweigh the importance of the capabilities concerned.

5 3 3 2 2 Establishing the purpose for which resources are diverted

During the second stage of the rights analysis, the justificatory arguments for not allocating proportionate resources to the rights at issue are extracted. The purpose for which resources have been diverted from the socio-economic rights in question should be identified. Additionally, a rational connection between the measures adopted by the State and such purpose should be established. Where litigants allege, for example, that their right of access to health care services has been infringed by an insufficient allocation of resources, the State will need to demonstrate why it did not allocate adequate resources for the fulfilment of the relevant aspect of the right. In *TAC*, few resources were required and the State's omission to provide Nevirapine could not be justified by reference to a legitimate purpose. As Barak argues, the State would therefore fail the "rational connection" hurdle and the Court could have found the insufficient allocation of resources unreasonable at this phase of its analysis.[162]

The discretion of the State to pursue a wide range of legitimate goals is recognised at this step of proportionality.[163] Whether such purposes are of sufficient constitutional

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[161] X Contiades & A Fontiadou "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation" (2012) 10 *I Con* 660 667.

[162] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 432. Nevertheless, the Constitutional Court proceeded to the final, balancing step of proportionality and ultimately found the State's conduct unreasonable and unconstitutional despite failing to apply a structured proportionality enquiry. See chapter four part 4 3 2 above.

[163] The range of weights or band of options is therefore wide at this point. See A Sen *Development as Freedom* (1999) 78-80 and generally G Quinot & S Liebenberg "Narrowing

weight to justify the deprivation of important capabilities, is an assessment that will only be made at the proportionality *stricto sensu* step of the analysis. Nevertheless, where the State points to a legitimate purpose, cases may arise where the litigants or an *amicus curiae* point to wasteful or irregular expenditure. If, for example, a Head of State were to spend a significant amount to effect luxury upgrades to his private residence,[164] no legitimate purpose could be said to exist. However, whether the equivalent of such expenditure should be directed to the realisation of the socio-economic capabilities at issue or to different purposes entirely, is a question that a court can only decide with reference to normative considerations. Although wasteful or irregular expenditure can therefore be raised at this point of the enquiry, it may only be susceptible to judicial resolution at the final, balancing step of the analysis.

Thus, although a court may be reluctant to order the redirection of such resources to the socio-economic right at issue, fruitless expenditure could be a factor contributing to the decision that the State's resource allocation decisions were unreasonable, thereby violating a socio-economic right. Following such a conclusion, the court could make use of innovative remedies in order to compel the State to devise a feasible plan to allocate additional, proportionate resources to the realisation of the right concerned.[165]

5 3 3 2 3 Establishing the necessity of the omission

The necessity step of proportionality similarly questions whether the omission by the State to allocate sufficient resources to a particular capability or capability set was necessary to achieve the legitimate purpose identified in the preceding step. Necessity entails a means-ends test whereby the court asks whether other, equally effective measures could have been adopted that would be less harmful to the rights affected thereby.[166] In terms of section 36 of the Constitution, the necessity step is not explicitly included in the proportionality enquiry. However, the importance of the right and the severity of its infringement may sharpen the justificatory requirements set out in section

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the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 *Stell LR* 639.

[164] Public Protector *Secure in Comfort* Report No 25 of 2013/14 (2014).

[165] See generally chapter six below.

[166] J Gerards "How to Improve the Necessity Test of the European Court of Human Rights" (2013) 11 *I Con* 466.

36(1). Thus, the injunction for the court to consider whether "less restrictive means" of achieving its purpose were available to the State, may be sharpened to require that the means chosen were *necessary* for the achievement of the purpose.[167]

When applied to State resource allocation decisions, the State will often be able to show that it can only achieve its purpose as effectively – while simultaneously allocating sufficient resources to the right at stake – through the procurement of additional resources. In such cases, the assessment of the options available to the State in the light of the normative content of the infringed right will necessitate reasoned evaluation and weighting that should rather be embarked upon at the final step of the proportionality enquiry.[168]

However, there are many cases where the State will be called upon to justify its inadequate resource allocation but will be unable to do so. In *Mazibuko*, the Court held that the provision of a higher quantity of water would be "expensive".[169] Yet there is no indication of whether it was necessary for the City to allocate resources to a different purpose to the detriment of the capabilities of the residents of Phiri. The Court should have required the State to allege and prove that inadequate allocation to the residents of Phiri was necessary in order to meet the needs of the "worst off" in society.[170] Put differently, where government is unable to show that it was unaffordable within available resources to allocate sufficient resources to both the capabilities at stake and a different legitimate purpose, it will fail to satisfy the necessity test. In failing to adduce sufficient evidence, the State will in fact conversely show that "public money could be better spent".[171] However, given the factual nature of the suitability and necessity

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[167] S Woolman "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution" (1997) 13 *SAJHR* 102 108-109.

[168] See part 5 3 1 2 above.

[169] See, for example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 84, 88, 89 and 143 and see further chapter four part 4 2 3 3 above.

[170] The Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) observed that the residents in Phiri were not the "worst-off" (paras 7, 14). For the importance of promoting resource allocation beyond the minimum, see chapter two part 2 2 2 1 2 above.

[171] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 where the Court explicitly stated that a court is not tasked with asking "whether public money could be better spent". However, to the extent that the importance of the capabilities at issue and the severity of the capability deprivation justify a proportionality analysis, it must be asked whether public money could be better spent. To hold that a State resource allocation is unreasonable is to admit that public money could have and should be better – or more reasonably – spent. See further chapter four part 4 3 1 above.

phases of the proportionality enquiry, justification should be demanded but contentious disputes can be resolved at the balancing step of the analysis. Nevertheless, the necessity step constitutes a crucial justificatory component of the proportionality enquiry.[172]

5 3 3 2 4 Balancing

Finally, the proportionality *stricto sensu* or balancing step of the proportionality enquiry should be applied to the impugned resource allocation decision. It is during this step that the weights accorded to the normative factors elucidated during the first stage of the enquiry will be balanced *vis-à-vis* the importance and necessity of the reasons that the State has proffered for not allocating sufficient resources to secure the capabilities in question. The social importance of preventing capability deprivation will thus be weighed against the social importance of whatever purpose the State has instead allocated resources to.

The social importance of both ends of the scale must be evaluated with reference to the overarching, complex capability that socio-economic rights aim to realise, namely the ability to lead an autonomous, dignified life in a position of substantive equality with others. This complex capability must be considered in the light of the social and historical context of South Africa, and the need to address the structural disadvantage caused by apartheid policies. Furthermore, the factual context or "lived reality" of the litigants and similarly placed persons will help to identify the more basic capabilities that must be realised in order to make the achievement of the complex capability possible. The factual context will also indicate the gravity of the capability deprivation resulting from the State's omission. The weight assigned to these factors must be balanced against the weight assigned to the purpose for which the State diverted resources from the right at issue.

In discussing the application of the proportionality test to "positive" rights, Barak conceptualises the test, which can be adapted for a capabilities approach to the adjudication of State resource allocation decisions in particular, as follows:

> "[T]he basic balancing rule requires that the more important the marginal protection of the [capability] and the greater the chances of fulfilling that [capability], then the requirement

[172] For the application of this step to "positive" rights, see A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 433.

> that the marginal benefits to the public interest or to another constitutional right [or capability] by avoiding the [allocation of resources to the first capability] should be more socially important and more urgent, and the probability of their occurrence greater."[173]

This is an unmistakably normative exercise that will require value judgments to be made. However, the task is facilitated by the factual evidence that has been presented during the previous steps of the enquiry. By adhering to a process of reasoned evaluation that complies with the ethos and review standards demanded by a capabilities approach to adjudication,[174] the task of balancing is not insurmountable. Comparative judgments can therefore be made in the light of the nature of, for example, competing capabilities and the urgency with which a particular capability deprivation should be remedied.[175]

This is also in line with the "proportionality plus test" espoused by Vandenhole for the resolution of conflicts between socio-economic rights.[176] According to the author, additional criteria should be incorporated when the proportionality test is applied to socio-economic rights. Vandenhole argues that the vulnerability of the groups in question as well as the need to protect the essential level of the rights at stake should be taken into account.[177] Considerations regarding the urgency of remedying capability deprivation and the vulnerability of those affected are accommodated within the first, interpretative stage of the rights analysis. The protection of the "essential levels" of socio-economic rights can also be considered, since the minimum core approach remains relevant to a determination of reasonableness.[178]

The capabilities approach likewise takes cognisance of the existence of "non-eliminable principles",[179] the violation of which would result in injustice. Severe infringement of, for example, human dignity therefore cannot be tolerated and will rarely if ever be outweighed by a competing right, capability informing the content of the same right or government purpose.

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[173] 433-434 as adapted for a capabilities approach to the adjudication of State resource allocation decisions in particular.

[174] See part 5 4 below.

[175] A Sen *The Idea of Justice* (2009) 106; see further chapter two part 2 3 2 4 2 above.

[176] W Vandenhole "Conflicting Economic and Social Rights: The Proportionality Plus Test" in E Brems (ed) *Conflicts between Fundamental Rights* (2008) 559.

[177] 565-571.

[178] See chapter two part 2 2 2 1 2 above.

[179] A Sen *The Idea of Justice* (2009) 106.

The resources allocated by the State must be proportionate to the importance of the capabilities concerned and the severity of their deprivation. The normative and social, historical and factual context of both ends of the dispute must thus be carefully considered by the court, and weights must accordingly be assigned and balanced. The fact that the weighting exercise might involve difficult decisions does not absolve the judiciary from its constitutional obligation to adjudicate conflicts between rights and other interests.

5 4 Capabilities-based review criteria

The following part will explore the overarching features of a capabilities-based standard of review. This is important in order to clarify the role and competence of the judiciary to adjudicate complex State resource allocation decisions. Furthermore, certain specific review criteria will be elucidated. These criteria can guide a court to ask the right questions to ensure that State resource allocation decisions are proportionate to the capabilities they impact upon.

5 4 1 Overarching features of capabilities-based review

5 4 1 1 A culture of justification

The application of a capabilities-based standard of proportionality review to State resource allocation decisions promotes a shift from a culture of authority to a culture of justification.[180] Where capabilities are permitted to guide State action and subsequent adjudication, resource allocation decisions can no longer be left unexamined due to their potentially complex and polycentric nature. Instead, courts must demand "substantive justification"[181] for the deprivation of crucial capabilities and the consequent infringement of the rights that protect them. A culture of justification is therefore harmonious with a capabilities approach to adjudication under a

[180] E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32.

[181] M Cohen-Eliya & I Porat "Proportionality and the Culture of Justification" (2011) 59 *Am J Comp L* 463 466.

transformative constitution – and with proportionality review conceptualised as a capabilities-centred weighting exercise.[182]

According to the overarching requirement for justification, every allocative decision – from the appropriation of revenue nationally to particular allocations for the implementation of specific policies – must be reasonable.[183] Where capabilities demand the application of a robust standard of scrutiny, but the need for justification is waived based on the identity of the decision-maker, the danger of lapsing into a judicial method appropriate to a culture of authority arises.[184] This can lead to restrictive standards of review that are developed incoherently, and unprincipled resort to judicial deference.[185] Where such an approach to judicial review is adopted, it is unlikely that the crucial capabilities that underlie socio-economic rights and the right to administrative justice will be realised.

The State must therefore be compelled to provide explicit evidence of its focus on the substantive content and purposes of socio-economic rights throughout the entire budgeting and allocative process. Where socio-economic capabilities compete for resource allocation, the State must demonstrate that it conducted its own proportionality exercise. The interpretation of rights with reference to the capabilities that inform their content should form the core of the justificatory process.[186] For courts, the content and importance of the right that falls to be interpreted will indicate whether the resource allocation decision was proportionate to the capability needs at issue. For the State as primary decision-maker, justification will only be adequate where it can show that a constitutionally compliant interpretation[187] of rights has consistently guided its allocative decisions.

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[182] See further chapter two part 2 4 4 above.

[183] See further *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 82 and chapter four part 4 3 1 above.

[184] M Cohen-Eliya & I Porat "Proportionality and the Culture of Justification" (2011) 59 *Am J Comp L* 463 476. The problems associated with this type of judicial approach were analysed in the context of the United Kingdom in chapter three part 3 2 3 above.

[185] See chapter three part 3 2 3 above.

[186] Cf M Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141 144-152, who conceptualises the rise of proportionality review as signalling a shift from interpretation to justification.

[187] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 74 and further chapter four part 4 3 4 above.

Making evaluative judgments regarding the prioritisation of capabilities and resource allocation must occur through a process of public reasoning.[188] Kumm's elaboration of the role of public reason in eliciting justification for purposes of proportionality review resonates with a capabilities approach to adjudication. Kumm argues that State action can only be justified by reasons of the type that can reasonably be accepted by the public.[189] Where a process of reasoning is conducted by the judiciary, South Africa's constitutional project implies that only constitutionally consistent decisions will merit reasoned acceptance. A State action that cannot reasonably be justified is accordingly not legitimate.[190] Public reason therefore permeates the proportionality or weighting enquiry and likewise constitutes a hallmark of a culture of justification. Congruously, public reasoning forms a crucial component of the capabilities approach.[191]

Finally, transparency in reasoning is a prerequisite for a culture of justification and for successful proportionality analysis. Proportionality review requires the State to follow a capabilities-based process of reasoning in allocating resources for the fulfilment of socio-economic rights and the different capability sets these rights aim to foster. The guidance that the structured approach provides subsequently allows for transparent decision-making. This, in turn, holds the potential to "trigger public debate"[192] about what a proportionate resource allocation decision in the light of vital capabilities would entail.

Transparency finds its correlation in the requirement for explicitness in terms of a capabilities approach to adjudication.[193] Explicitness, or substantive reasoning, renders a State resource allocation decision open to public scrutiny. Where the public can evaluate the State's explicit decisions, the opportunity for public participation in establishing what priorities the State should set is created.[194]

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[188] For the role of reasoning, see further chapter two part 2 3 2 4 above.

[189] M Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4 *Law & Ethics of Human Rights* 141 168-169.

[190] 170.

[191] See further chapter two part 2 3 2 4 above.

[192] X Contiades & A Fontiadou "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation" (2012) 10 *I Con* 660 669.

[193] See further chapter two part 2 4 4 above.

[194] A Sen *Development as Freedom* (1999) 30.

5 4 1 2 The role of deference

One key question that arises in the application of a capabilities-based standard of review is what role, if any, judicial deference should play. It has been argued that the normative assumptions that explain resort to deference in the United Kingdom are inappropriate in South Africa's system of constitutional supremacy.[195] In South Africa, the State enjoys a wide discretion to identify legitimate purposes for resource allocation and to consider and adopt the means necessary to achieve such purposes. However, discretion is not tantamount to deference.[196] Even where the State enjoys leeway to identify diverse priorities and the means to achieve its purposes, a State resource allocation decision will not be reasonable in terms of the final step of the weighting analysis if allocation is disproportionate to vital socio-economic capabilities or the severity of their deprivation.[197] Where important capabilities are imperilled by resource allocation, proportionality review therefore constitutes a robust standard of review and does not accommodate weak standards of scrutiny in its application.

Rivers appositely argues that the seriousness of the relevant right-infringement determines the intensity of review applied to government action.[198] He classifies this as the "substantive principle" of proportionality, which should be distinguished from the "formal principle" of intensity of review. According to the formal principle, the seriousness of any rights infringement should be paralleled by a decreasing level of judicial restraint[199] or deference.[200] Where an inadequate State resource allocation decision impacts severely on socio-economic capabilities and consequently negates the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others, restraint or deference becomes increasingly inappropriate. Instead, courts should adopt a capabilities approach to adjudication, thereby ensuring that all resource allocation decisions are substantively justified. A capabilities-based proportionality analysis leaves room for the recognition that a

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[195] See chapter three in general.

[196] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 431.

[197] M Elliot "Proportionality and Deference: The Importance of a Structured Approach" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 264 280.

[198] J Rivers "Proportionality and Variable Intensity of Review" (2006) 65 *Cambridge LJ* 174 177.

[199] Judicial restraint is based on concerns of legitimacy whereas deference is based on concerns of institutional competence.

[200] J Rivers "Proportionality and Variable Intensity of Review" (2006) 65 *Cambridge LJ* 174 177.

diverse range of important objectives should be pursued by the democratically accountable legislature. It similarly allows a court to acknowledge that the State has a range of policy options available to it in deciding how to fulfil a given socio-economic right.

Questions of institutional competence do not automatically give rise to the need for deference. Where an *amicus curiae* or other party can provide expert evidence refuting the government's claims as to the means chosen to realise its objective, such evidence should be scrutinised and given due weight.[201] Moreover, a court can seek to minimise its institutional shortcomings through the use of innovative remedies.[202] Finally, the balancing step of the weighting enquiry should be informed by the importance of the capabilities at stake and the gravity of their deprivation. Deference should not be permitted to subsume this crucial, capabilities-centred judicial balancing exercise.

Proportionality as weighting creates the opportunity for meaningful dialogue among courts, the State and other stakeholders. By promoting participation among a wide range of stakeholders, a diverse range of interests and perspectives can be brought to the court's and State's attention. This can help to address the participatory deficit associated with the judiciary, and thereby increase the legitimacy of the courts to adjudicate complex, allocative decisions. The need for deference based on the perceived illegitimacy of the judiciary is thereby diminished.

Furthermore, participation can also highlight a range of issues and therefore pre-empt polycentric consequences to a certain extent. The transparency and explicitness demanded throughout the weighting process ensure that State resource allocation decisions and subsequent judgments render allocative choices susceptible to public scrutiny and debate. Initial judgments can thus be adapted in the light of evolving reality. In this way, concerns that the judiciary lacks the constitutional and institutional competence to adjudicate complex State decisions are addressed. This, in turn, obviates the need for automatic resort to deference.

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[201] M Elliot "Proportionality and Deference: The Importance of a Structured Approach" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 264 274.

[202] See further chapter six part 6 3 below; M Elliot "Proportionality and Deference: The Importance of a Structured Approach" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 264 274.

5 4 2 Specific criteria of capabilities-based review

A court that adopts a capabilities approach to the judicial review of State resource allocation decisions can adhere to certain specific review criteria to facilitate adjudication. First, a court should ensure that the State considered the ability of the fundamental values of freedom, dignity and equality to aid the interpretation of the content of socio-economic rights. In particular, it will be demonstrated that the fundamental values can help the court to evaluate the State's prioritisation of competing capabilities with particular reference to the value of substantive equality. Next, a court should take care to interpret "available resources" widely.

Thereafter, a reviewing court must require the State to explicitly demonstrate how it came to its allocative decision, and that such decision was subsequently implemented effectively. The State must show that it considered its socio-economic obligations and capability realisation in its allocative processes. Courts should also require the State to illustrate that it took benchmarks related to capability realisation into account in making its allocative decisions. These benchmarks can thereafter be compared by a reviewing court to the actual priorities of the State as reflected in its budget. Benchmarks can also help a court determine whether the State has effectively implemented its allocative decisions. Finally, the State should bear the onus of showing that participatory processes led to the formulation of its allocative decisions, and that such decisions are themselves aimed at fostering participation.

5 4 2 1 Allowing the content of rights to inform resource allocation

5 4 2 1 1 The role of the fundamental values in identifying important capabilities

A court should adjudicate a given State resource allocation decision in the light of the capabilities such allocative choice seeks to promote or threatens to impinge. The importance of the capabilities constituting the content of the right should guide both the adjudication of State resource allocation decisions and the primary allocative decision made by the State. A reviewing court should thus ensure that the demands posited by the functioning outcome of living an autonomous, dignified and substantively equal life are taken into account by the State when allocating resources.

As was argued in a previous chapter,[203] the fundamental values of freedom, dignity and equality require the allocation of sufficient resources for material conditions that allow people to live autonomous and dignified lives in a position of substantive equality with others. The fundamental values thus enable a conceptualisation of the overarching purpose of socio-economic rights. Thereafter, more specific capabilities that are necessary to achieve the complex functioning outcome can be identified in varying contexts. For example, the ultimate purpose of the right to basic education may be to live an autonomous, dignified life in a position of substantive equality with others. The social and historical context of South Africa might indicate that certain schools were prejudiced by apartheid policies. This may justify increased allocation to these schools to bring them into a position of substantive equality with historically privileged schools. The factual context or lived reality of the learners may furthermore indicate that many more basic capabilities must be realised for the functioning outcome to be feasible. This may include the capabilities to enjoy nutritional programmes to combat hunger while learning, infrastructure to access schools, infrastructure within schools such as furniture, and educational resources such as qualified teachers and textbooks.

Furthermore, once it is recognised that capabilities may entail an amalgamation of substantive and procedural elements,[204] the values of freedom, dignity and equality also require the State to allocate resources that are directed to the process aspect of freedom. The ability to live an autonomous, dignified life calls for participation and agency. Courts should thus ensure that State resource allocation decisions result from participatory processes and are simultaneously aimed at promoting further social, economic and political participation.[205]

5 4 2 1 2 The role of the fundamental values in ranking important capabilities

Although the fundamental values of freedom, dignity and equality will all be involved in most socio-economic rights cases,[206] it is possible that in certain instances

[203] Chapter two part 2 4 1.

[204] For the need to develop Sen's distinction between opportunity and process in order to acknowledge the sometimes inseparable substantive and procedural aspects of capabilities, see chapter two part 2 2 2 2 3 above.

[205] See further chapter two part 2 4 3 above.

[206] See part 5 2 3 above and, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Khosa v Minister of Social Development; Mahlaule v*

competing capabilities will each implicate a particular value to a greater extent. For example, capability sets connected to short-term provisioning of housing and the basic services that accompany that right may implicate dignity, whereas longer-term functioning outcomes dependent on adequate housing will involve freedom and equality. Basic capabilities as well as more complex capabilities, constituting different aspects of the same right, may accordingly vie for resource allocation. In some cases, it is conceivable that one of the values may aid a court in ranking capabilities to establish the proportionality of conflicting State resource allocation decisions.

(a) The interdependence of the fundamental values

However, all three fundamental values are crucial both for purposes of the project of transformative constitutionalism and a capabilities approach to resource allocation and subsequent adjudication. If viewed in isolation, the value of equality presents potential pitfalls that should be noted and avoided.[207] For example, Bilchitz argues that an equality approach to reasonableness review conflates the issues of scope (who the beneficiaries of socio-economic rights are) with that of content (to what such beneficiaries are entitled).[208] This can lead to insufficient attention being paid to the substantive content and meaning of socio-economic rights. Yet by perceiving all three fundamental values as interconnected, sufficient normative content can be attributed to socio-economic rights. By conceptualising the overarching normative purpose of socio-economic rights as the achievement of the functioning outcome of living an autonomous, substantively equal and dignified life, the importance of each value is recognised. These values can furthermore help specify the substantive content of the rights in a given historical, social and factual context.

Minister of Social Development 2004 6 SA 505 (CC) para 40; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21.

[207] S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335 355 state:

> "[T]he temptation to seek to justify socio-economic rights in terms of one overarching value or related right should be resisted. Such an approach is too restrictive and does not do justice to the range of values and fundamental interests which socio-economic rights were intended to promote in different contexts."

[208] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 166-173.

(b) Using the value of equality to prioritise competing capabilities

By way of illustration, the value of equality can facilitate the prioritisation of competing capabilities. Although each value could aid prioritisation in a particular context, the value of equality will be relevant where, for example, two groups both instigate claims for limited resources. One group of poor persons may require short-term housing in order to realise the most elementary capabilities that are required for achieving the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. This would include the basic capability of enjoying shelter from the elements and access to services such as the provision of sufficient water in order to realise the more complex capability of enjoying an adequate state of health. A second group made up of poor, black women may argue that they too require increased resource allocation in respect of their housing needs. This second group may already enjoy basic housing, and may therefore be in a relatively better position than those who have no access to housing at all.

Where a weighting analysis has shown that the State's resources are in fact too limited to realise the capabilities of both groups, the historical and present social context of each disadvantaged group will be of paramount importance.[209] Where a failure to allocate reasonable resources will reinforce patterns of inequality and discrimination, an alternative resource allocation decision may be preferable.[210] This factor may thus support the allocation of additional resources beyond the minimum to the second group consisting of poor, black women. The value of substantive equality can therefore identify the important capabilities that inform the content of the right at issue. It does not merely obfuscate the distinction between content and scope as Bilchitz contends.

(c) Ensuring resource allocation beyond the minimum

Care should be taken that State resource allocation decisions and subsequent adjudication do not equalise important capabilities in all circumstances. Although the capabilities approach fully accommodates the notion of the equal dignity of all persons,

[209] S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335 357.
[210] 359.

this does not mean that the living conditions of all should be identical.[211] Whereas capabilities constitute an appropriate space in which equality can be assessed,[212] the demands of equality are heavily context-dependent and variable.[213] Where relative poverty is sought to be eliminated without recognising the absolute capability deprivation that poverty represents,[214] the danger arises that "levelling down" may occur.[215]

In such a scenario, where two groups vie for State resource allocation, resources will be withheld from the group with the greater capability set so as to ensure that they enjoy no more capabilities than the less advantaged group. This perverse application of "equality of the graveyard"[216] ignores the impact that *all* forms of capability deprivation exert on the possibility of achieving the functioning of living a free and dignified life. Instead of securing equal capability deprivation for all, certain inequalities of capabilities must be tolerated until additional resources can be marshalled to provide equal access to adequate levels of socio-economic goods. This would prevent the further detrimental impact of resource allocation decisions on freedom- and dignity enhancing capabilities in the name of a misconstrued concept of equality. Bilchitz aptly argues in this regard:

> "[Levelling down] implies that everyone should be reduced to the same level of desperation, thus minimising overall well-being in the context of scarce resources... [E]quality in relation to resources can only be achieved as the aspirational end of progressive realisation, where everyone is entitled equally to an adequate level of service-provision. In the interim, some inequalities need to be tolerated in seeking to achieve this long-term goal."[217]

By bearing in mind the essential interaction between all three fundamental values for the achievement of the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others, the State and courts can thus ensure that equality does not become an impediment to full capability realisation. Freedom,

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[211] MC Nussbaum *Creating Capabilities* (2011) 31.

[212] A Sen "Equality of What?" (1979) *The Tanner Lectures on Human Values* 197 218.

[213] 219; A Sen *The Idea of Justice* (2009) 297-298.

[214] A Sen "Poor, Relatively Speaking" (1983) 35 *Oxford Economic Papers* 153 159, 162.

[215] *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 149; A Sen *The Idea of Justice* (2009) 296.

[216] As opposed to "equality of the vineyard": *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 149.

[217] D Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *SALJ* 591 604.

dignity and equality should direct every instance of State resource allocation for meaningful capability realisation to occur.

5 4 2 2 Interpreting "available resources" widely

As demonstrated in the previous chapter,[218] a narrow definition of "available resources" stunts the realisation of capabilities and thus of valuable functionings. The need for expenditure and prioritisation in order to realise the positive duties imposed by all rights was recognised by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*:[219]

> "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. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. 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 upon them by a bill of rights that it results in a breach of the separation of powers."[220]

Moellendorf interprets this passage as signalling that, as is the case with "traditional" civil and political rights, socio-economic rights warrant judicial protection even where such entails a reprioritisation of fiscal resources.[221] When adjudicating State resource allocation decisions through a lens of capabilities, a court must therefore determine how widely "available resources" should be interpreted.

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[222] the Constitutional Court elucidated the relationship between reasonableness review and a wider interpretation of "available resources":

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[218] Chapter four part 4 2 2 above.

[219] 1996 4 SA 744 (CC).

[220] Para 77 (emphasis added).

[221] D Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327 331.

[222] 2005 2 SA 359 (CC).

> "[A]n organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the *overall resourcing* of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."[223]

The Court's statements in *Government of the Republic of South Africa v Grootboom*[224] regarding national government's responsibility to provide "adequate" budgetary support to the provincial and local governmental spheres also indicate that overall allocations to votes in the national budget can be scrutinised.[225] Courts should accordingly be able to evaluate evidence of disproportionate resource allocation between different votes horizontally,[226] or spheres of government vertically,[227] and of wasteful expenditure or under-spending generally.[228] Resources spent inefficiently or wastefully should rather be allocated and efficiently administered for the realisation of the crucial capabilities represented by socio-economic rights. "Available resources" should consequently be interpreted more widely than already allocated resources to prevent the State from allocating inadequate resources in order to minimise its obligations. Bilchitz sums up what the judicial approach under a wide definition of "available resources" should look like:

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[223] Para 88 (emphasis added).

[224] 2001 1 SA 46 (CC). See the discussion of this judgment in chapter four parts 4 2 1 2 and 4 3 1 above.

[225] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 68. See further chapter four part 4 3 4 2 1 above regarding the allocative responsibility of different spheres of government.

[226] In terms of the relevant Appropriation Act.

[227] In terms of the relevant Division of Revenue Act.

[228] See K Lehmann "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core" (2006) 22 *Am Univ Int Law Rev* 163 193-196 who argues that there is no principled reason why courts cannot scrutinise macro-economic budgetary choices. For examples of wasteful expenditure, see Public Protector *Against the Rules* Report No 33 of 2010/11 (2011) and Public Protector *Secure in Comfort* Report No 25 of 2013/14 (2014). With regard to under-spending, see the various reports compiled by the office of the Auditor-General, for example Auditor-General *General Report on the Audit Outcomes of Provincial Government PFMA 2012-13: Eastern Cape* (2013) 51 and Auditor-General *General Report on the Audit Outcomes of Provincial Government PFMA 2012-13: Free State* (2013) 39.

> "The first stage is to consider the current allocation of the government to the specific area under consideration and determine whether the policy in such a department accords with the dictates of fundamental rights. If it does not meet these standards and this defect cannot be corrected within existing budgetary allocations, then a court will be required to consider the overall budgetary allocations of the government."[229]

In determining whether current allocations "[accord] with the dictates of fundamental rights", the capabilities at issue must play a determinative role. Where people are forced to live in conditions that deprive them of their basic capabilities, the reviewing court must look at a wider pool of available resources. Given that such conditions are wholly incongruent with the founding values of the Constitution, a robust standard of scrutiny that requires the State to fully justify disproportionate, wasteful or inefficient expenditure is called for in terms of a capabilities approach to adjudication.[230]

When a court is called upon to look beyond the revenue available for appropriation among votes and division vertically, complex questions are raised. If a court were to make an order that necessitated raising corporate tax, this might have the polycentric effect of discouraging future investment in South Africa. Likewise, an order that compels government to acquire more debt may unnecessarily burden future generations.[231] Simultaneously, such "burden" must be weighed against the benefits that a more equal society would hold for everyone, including future generations.[232]

However, it will be rare for a court applying a robust standard of scrutiny to look beyond the national revenue where disproportionate allocation is blatant, and wasteful expenditure and corruption are rife. Where such exceptional cases arise, a collaborative approach where the State investigates its macro-economic options and reports back to the court may be the only institutionally competent option available to the court.[233] Nevertheless, review of macro-economic choices is justified under the capabilities approach in that *capabilities* – and not the *instrumental* need for macro-

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[229] D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 233.

[230] A Sen *Development as Freedom* (1999) 48-49; see further chapter two part 2 2 3 above.

[231] C Barberton "Paper Tigers? Resources for Socio-Economic Rights" (1999) 2 *ESR Review* 6 7-8.

[232] RG Wilkinson & K Pickett *The Spirit Level: Why Equality is Better for Everyone* (2010) 237.

[233] Regarding the use of collaborative, innovative remedies to overcome concerns based on the institutional competence of the judiciary to adjudicate matters that have macro-economic implications, see generally chapter six below. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 198.

economic stability – form the focus of any judicial enquiry as to the reasonableness of State resource allocation decisions.[234]

5 4 2 3 Explicitness

When adjudicating a State resource allocation decision, a court must require that the State demonstrate an explicit rights-centred allocative process.[235] The court must require that State to show that resource allocation decisions were based on a correct interpretation of constitutional rights and of the State's own constitutional obligations.[236] The State must therefore demonstrate to the reviewing court that it considered the constitutional text, authoritative judgments by the Constitutional Court and lower courts where relevant, and reports by constitutionally mandated institutions[237] and civil society organisations.

5 4 2 3 1 A capabilities-centred allocation process

The State can exhibit its commitment to preventing basic capability deprivation by prioritising expenditure from a capabilities perspective. By marshalling resources to alleviate the plight of those in urgent need, the State should be able to demonstrate proportionate resource allocation in the light of the most serious imperilment of freedom, dignity and equality. An approach whereby basic capability deprivation is met with prioritised expenditure is also in line with established Constitutional Court jurisprudence.[238] Furthermore, the fertile nature of certain capabilities, such as education, should also be explicitly acknowledged.[239]

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[234] A Sen *Development as Freedom* (1999) 141; for a discussion of the adjudication of macro-economic policy see chapter two part 2 2 3 3 above.

[235] For the importance of explicitness in terms of a capabilities approach to adjudication, see further chapter two part 2 4 4 above.

[236] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 74; chapter four part 4 3 4 above.

[237] Such as the Financial and Fiscal Commission established in terms of ss 220-222 of the Constitution. See also the Financial and Fiscal Commission Act 99 of 1997.

[238] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 43.

[239] See further chapter two part 2 3 2 2 above; MC Nussbaum *Creating Capabilities* (2011) 99.

The State should be able to demonstrate to a reviewing court its awareness of the interdependence of rights and the capabilities that inform their content.[240] Trade-offs that result from allocating finite resources should therefore be made after careful consideration of what allocation to one priority will entail for other capabilities.

Moreover, the State must display an awareness of the interlinkages between the opportunity and process aspects of substantive freedom.[241] Thus, for example, where the State allocates resources for the provision of social security, the right to just administrative action in the allocation process must be accommodated. Resources must therefore be allocated for the provision of the substantive socio-economic good itself as well as for an administrative process that is reasonable, procedurally fair and lawful. Whereas a resource allocation decision may appear *prima facie* adequate, it cannot be held to be reasonable where an administratively just process was not followed. In applying a capabilities-based standard of review, courts should therefore require explicit evidence from the State regarding its allocation processes.

5 4 2 3 2 Using capabilities-based benchmarks to determine proportionality

Bearing in mind the interconnectedness of all rights, capabilities-specific benchmarks should be developed through comprehensive and participatory engagement with diverse stakeholders.[242] The State should formulate benchmarks in

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[240] See further chapter two part 2 3 3 3 1 above.

[241] See further chapter two part 2 2 2 2 3 above; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.

[242] Qualitative benchmarks encompass normative standards against which current circumstances are compared, whereas performance benchmarks set specific targets that are usually linked to deadlines. Indicators are measurement units that are used to monitor the extent of change in a particular human rights situation. For comprehensive definitions of these concepts, see further A Würth & FL Seidensticker *Indices, Benchmarks, and Indicators: Planning and Evaluating Human Rights Dialogues* (2005) 23-24. Applying rights-specific benchmarks will require that the content of the right first be interpreted. See R O'Connell, A Nolan, C Harvey, M Dutschke & E Rooney *Applying an International Human Rights Framework to State Budget Allocations* (2014) 61. The Financial and Fiscal Commission has stated that the State has failed to set explicit national minimum norms and standards, which has led to protracted maladministration and misallocation of resources. Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Concluding Remarks and Recommendations. If the State does not remediate this problem in the future, it could constitute a ground for a judicial finding that a given State resource allocation decision is unreasonable.

the first instance. Such benchmarks can subsequently be utilised by a reviewing court in determining whether impugned resource allocation decisions have been effective in realising capabilities. The State should take cognisance of international organisations' interpretation of socio-economic rights and benchmarks that have developed in this regard.[243] Comparative assessments can also be made by determining how similarly placed countries are prioritising expenditure.[244]

A variety of capabilities-based benchmarks should thus be considered by the State in its allocative processes, and by courts in establishing whether State resource allocation decisions are proportionate to capability needs. These diverse benchmarks should not be viewed in isolation but as vital and interrelated components of essential capability sets. Only by considering all of the State's discrete objectives as aiming to achieve the common purpose of capability realisation, can the State show that it has carried out a meaningful proportionality exercise and prioritised its expenditure reasonably.

5 4 2 3 3 Budget analysis

Once capabilities-infused benchmarks have been developed by the State in consultation with other parties, budget analysis becomes especially useful. Budget analysis can aid the State in identifying "blind spots"[245] in its allocative priorities. Furthermore, it can aid courts to subsequently determine whether an actual State resource allocation decision corresponds proportionately to capabilities-based benchmarks.

Whereas benchmarks may appear to be informed by the need to advance critical capabilities, the way in which resources are actually raised and spent attests to the

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[243] For instance, various General Comments of the UN Committee on Economic, Social and Cultural Rights could be considered. See also UN Office of the High Commissioner *Manual on Human Rights Monitoring* (2011) ch 20 regarding the monitoring of the realisation of socio-economic rights. An analysis of the justiciability of State resource allocation decisions in international law falls outside the scope of this dissertation.

[244] SPII *Monitoring the Progressive Realisation of Socio-economic Rights in South Africa* (2011) 7 <http://spii.org.za/wp-content/uploads/2014/01/SER-methodology-paper.pdf> (accessed 12-01-2013).

[245] R Dixon "Creating Dialogue about Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited" (2007) 5 *I Con* 391 394.

true priorities of government.[246] By comparing allocations among various priorities, courts[247] can identify the true priorities of the State and furthermore establish whether rights are being *progressively* realised. Courts can thus compare actual expenditure trends with capabilities-based benchmarks formulated by the State. Where the State fails to fully grasp its constitutional obligations as elaborated upon by the Constitutional Court, its budgets will reflect this shortcoming.[248]

Given the myriad important purposes that explicitness in the allocative process serves, courts should only uphold resource allocation decisions as reasonable where the State has succeeded in clearly demonstrating a consistently transparent and accountable allocative process.

5 4 2 4 Effectiveness

Sen postulates that through skilled implementation of social programmes, capabilities can be realised in countries that have more limited resource pools at their disposal than "wealthy" countries.[249] However, in order to successfully realise valuable capabilities, scarce resources must be effectively allocated. To be reasonable, a State resource allocation decision aimed at capability realisation should thus be both

[246] H Hofbauer, A Blyberg & W Krafchik *Dignity Counts* (2004) 29; SPII *Monitoring the Progressive Realisation of Socio-economic Rights in South Africa* (2011) 6-8 <http://spii.org.za/wp-content/uploads/2014/01/SER-methodology-paper.pdf> (accessed 12-01-2013).

[247] This is of course not solely the judiciary's responsibility. For example, the South African Human Rights Commission is mandated by s 184(3) of the Constitution to obtain information from relevant organs of State pertaining to "the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment".

[248] See SPII *Monitoring the Progressive Realisation of Socio-economic Rights in South Africa* (2011) 26 <http://spii.org.za/wp-content/uploads/2014/01/SER-methodology-paper.pdf> (accessed 12-01-2013) regarding government's misapprehension of its duties related to progressive realisation.

[249] A Sen *Development as Freedom* (1999) 46-49; chapter two part 2 2 3 above.

adequate and effective.[250] An allocation of reasonable scope is not sufficient – such resources must be reasonably implemented.[251]

5 4 2 4 1 Using benchmarks to measure effectiveness

When evaluating the effectiveness of State resource allocation decisions aimed at capability realisation, courts can rely on the explicitness already extracted from the State with regards to a given allocative decision or prioritising process. Thus, a reviewing court can compare the benchmarks elicited from the State with the results actually achieved. Benchmarks, minimum standards and concrete timeframes should be scrutinised by courts to determine the effectiveness of State resource allocation in the light of the duty to progressively realise qualified socio-economic rights.[252]

5 4 2 4 2 Reviewing legislation for "blindspots" or "burdens of inertia"

Effective resource allocation may be impeded at various stages of government operation. The legislature can suffer from various "blindspots" or "burdens of inertia".[253]

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[250] The National Treasury of the Republic of South Africa *Estimates of National Expenditure 2013* (2013) Foreword:

> "[D]epartments and spending agencies do have to learn to do more with less. In the period ahead, improvements in outcomes have to come from qualitative improvements in the use of available budgets and other inputs. All institutions need to increase their efficiency and effectiveness in terms of service delivery..."

See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 46.

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

[252] For criticism of the Constitutional Court's failure to relate socio-economic rights to benchmarks, minimum standards and timeframes, see M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 407.

[253] R Dixon "Creating Dialogue about Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited" (2007) 5 *I Con* 391 402. Effective resource allocation may be impeded at various stages of government operation. The legislature may lack the technical expertise to meaningfully amend money Bills. However, the legislature has been granted the power to amend money Bills, including the Bills which form the budget, in terms of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009. The establishment of a Parliamentary Budget Office to assist the legislature in understanding – and, if necessary amending – the budget is a promising development. Nevertheless, it will take some time for the Budget Office to operate optimally. PMG "Pre-Budget briefing by the Parliamentary Budget

Blind spots may occur where the legislature fails to note that the application of a given law and concomitant resource allocation will infringe a socio-economic right or the right to just administrative action; where a failure to take the perspectives of poor sectors of society into account results in a misapprehension of the impact that legislation and concomitant resource allocation will have on those affected; or where the legislature fails to grasp how a claim to resources can be better accommodated within the legislative scheme.[254] Burdens of inertia may hinder effective resource allocation where the legislature views other expenditure priorities as politically more pressing.[255] Courts should therefore examine relevant legislation to determine whether any such shortcomings are apparent.

5 4 2 4 3 Reviewing policy in the absence of explicit national guidelines

Even where legislation lays the foundation for effective resource allocation, derivative policy or implementation may not be effective. For instance, national government has been criticised for not explicitly defining minimum norms and standards that must be upheld in the provincial sphere.[256] This results in an inability to accurately determine the cost of socio-economic goods and services, which may in turn lead to future unprincipled resource allocation decisions and varying levels of capability realisation among different provinces.[257]

Furthermore, where inefficient spending follows inevitably from a lack of explicit guidelines by national government,[258] accountability is reduced. At provincial level,

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Office" (19-02-2014) *PMG* <http://www.pmg.org.za/report/20140219-pre-budget-briefing-parliamentary-budget-office> (accessed 01-06-2014).

[254] R Dixon "Creating Dialogue about Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited" (2007) 5 *I Con* 391 402.

[255] 403. Furthermore, where the legislative framework for public finance management is unclear, accountability diminishes and effective resource allocation decisions may become extremely difficult. For criticism of the Public Finance Management Act 1 of 1999, see Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Concluding Remarks and Recommendations.

[256] Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Concluding Remarks and Recommendations.

[257] Financial and Fiscal Commission *Briefing to the Standing Committee on the Appropriation Bill* (2013) 8.

[258] Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Causes of Fiscal Stress, Budget Analysis and Accountability.

serious financial mismanagement and inefficient allocative practices have severely threatened service delivery and its intended capability realisation.[259] A lack of transparency and accountability has contributed to this widespread ineffective resource allocation. Oversight must therefore be sharpened, and effective use of budget analysis may aid in overcoming this problem.[260] At local level, municipalities have likewise struggled to effectively allocate and direct resources at capability realisation. Delays and poor planning have also been exacerbated by a lack of accountability mechanisms in this sphere.[261] Courts should thus require the State to show that accountability measures to ensure effective resource expenditure are in place.

5 4 2 4 4 Reviewing irregular spending

In addition to ineffective and wasteful expenditure, courts should be aware of the dangers that corruption and other forms of irregular spending pose for capability realisation. As noted in the minority judgment of *Glenister v President of the Republic of South Africa*,[262] corruption "undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights".[263] Extravagant expenditure by government, coupled

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[259] Inefficiency and maladministration, leading to wasteful expenditure, prompted Cabinet to announce in 2011 that it would place key departments in Limpopo and the Free State under administration and assist the Gauteng Department of Health and Social Development with its financial administration and supply chain management processes in terms of s 100 of the Constitution. Cabinet "Statement on Special Cabinet meeting of 5 December 2011" (05-12-2011) *GCIS* <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-5-december-2011> (accessed 20-12-2011). Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Concluding Remarks and Recommendations. Regarding wasteful spending and under-spending, see also the various reports compiled by the office of the Auditor-General, for example Auditor-General *General Report on the Audit Outcomes of Provincial Government PFMA 2012-13: Eastern Cape* (2013) and Auditor-General *General Report on the Audit Outcomes of Provincial Government PFMA 2012-13: Free State* (2013).

[260] Financial and Fiscal Commission *Submission on National Intervention in Financially Distressed Provincial Governments* (2012) Concluding Remarks and Recommendations.

[261] Financial and Fiscal Commission *Briefing to the Standing Committee on the Appropriation Bill* (2013) 11.

[262] 2011 3 SA 347 (CC).

[263] Para 57; see also paras 166, 176.

with pervasive tender fraud, detract significantly from the resource pool available for allocation to socio-economic capabilities.[264]

In addition, blatantly wasteful expenditure flouts the right to just administrative action and further directs resources away from establishing mechanisms to ensure effective resource allocation. Where corruption and patently uneconomical spending are rife, a court should demand even greater justification from the State for inadequate and ineffective resource allocation.

Scarce resources that are depleted through maladministration cannot necessarily be redirected to the fulfilment of the particular right at issue. Nevertheless, the resources lost through such activities must be taken into account both at the justificatory stage of the proportionality enquiry and at the remedial stage of adjudication. When a court adjudicates a State resource allocation decision, the effectiveness of the decision's implementation as well as any mechanisms to ensure effective allocation and expenditure must thus be carefully considered before an allocative decision can be upheld as reasonable.

5 4 2 5 Participation as informational broadening

When courts adjudicate State resource allocation decisions, they must ensure that the judicial process facilitates participation among various parties. A participative judicial process where the information available to the court is broadened to the greatest extent possible, is thus congruent with a project of transformative constitutionalism, the tenets of administrative justice and a capabilities approach to adjudication.[265] Mechanisms through which the judiciary can foster participation and informational broadening will be examined in the following chapter.[266]

Where a court reviews a certain State resource allocation decision, it must not only promote participation itself but also ensure that the State has done so in coming to its allocative decision. Participation and informational broadening, as manifested in the

[264] See in this regard, for example, Public Protector *Against the Rules* Report No 33 of 2010/11 and Public Protector *Secure in Comfort* Report No 25 of 2013/14 (2014). Regarding irregular tender processes see, for example, Auditor-General *Report of the Auditor-General to the Northern Cape Provincial Legislature on an Investigation at the Northern Cape Department of Health* (2011). Reports of wasteful and corrupt expenditure in South Africa are frequent. See, for example Corruption Watch *Anniversary Report* (2012).

[265] See further chapter two part 2 4 3 above.

[266] Chapter six part 6 4 1.

need for public reasoning, are crucial components of the capabilities approach.[267] In formulating its priorities and allocating resources accordingly, the State should thus in the first place arrive at its decision after consulting with a wide variety of stakeholders. Participation in this sense is mandated by the constitutional requirement for procedurally fair administrative action,[268] and in the remedy of meaningful engagement.[269] Simultaneously, the State should be aware of the fact that its resource allocation decisions must be directed to the realisation of capabilities that are vital prerequisites for subsequent participation by its recipients.

The nature of the capabilities to which resource allocation is directed, coupled with the context at play,[270] will determine with whom and to what extent the State should consult and foster participation prior to coming to a final allocative decision. Given that the realisation of vital capabilities will depend on the allocation of proportionate resources, a robust form of engagement will usually be appropriate.[271] A court adjudicating a State resource allocation decision must thus confirm that an appropriately robust process of meaningful engagement was followed, and that sufficient resources to enable an effective engagement process were allocated. In addition to garnering meaningful input from those suffering from capability deprivation prior to establishing its priorities, the State must also enable participation and dialogue among different government departments and between government and other institutions.[272] Where the State has not demonstrated such comprehensive participation in order to establish proportionate resource allocation, a court should be hesitant to uphold an allegedly insufficient allocative decision as reasonable.

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[267] See further chapter two part 2 4 3 above; A Sen *Development as Freedom* (1999) 78-79.

[268] S 33(1) of the Constitution. See also ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000.

[269] For a discussion of meaningful engagement, see chapter six part 6 4 1 2 below.

[270] For the importance that context plays in a capabilities approach to adjudication, see further chapter two part 2 3 3 3 3 above.

[271] For a discussion of meaningful engagement as an incarnation of robust procedural fairness, see S van der Berg “Meaningful Engagement: Proceduralising Socio-economic Rights Further or Infusing Administrative Law with Substance?” (2013) 29 *SAJHR* 376.

[272] The importance of inter-governmental communication for the realisation of the National Planning Commission *National Development Plan* (2011) is noted in Financial and Fiscal Commission *Submission for the Division of Revenue 2014/2015* (2013) 12. See further the discussion of inter-governmental allocative responsibility in chapter four part 4 3 4 2 1 above.

5 5 Conclusion

This chapter has demonstrated that a capabilities approach to the adjudication of State resource allocation decisions requires a two-stage adjudicative process, according to which the normative content of the right at issue is allowed to determine the level of scrutiny to which State resource allocation decisions are subjected during the second, justificatory stage of the analysis. Where diverse rights compete for prominence and resource allocation, or where long-term and short-term capability realisation vies for resources, the weighting exercise required for the ranking of capabilities calls for sophisticated development. Proportionality review, as a robust manifestation of reasonableness review, can be carefully adapted to constitute a judicial tool for the capabilities-based adjudication of State resource allocation decisions.

Elements of proportionality review are discernible from existing socio-economic rights and administrative law jurisprudence. These elements are thus susceptible to development and adaptation by the South African courts in the direction of a more systematic capabilities-infused weighting analysis. The benefits of the proportionality enquiry constituted by the multi-factor test set out in the general limitations clause of the Constitution can thus be exploited and further refined to form part of reasonableness review as required by qualified socio-economic rights and the right to administrative justice. As a normative, balancing test, proportionality as weighting allows the capabilities that inform the content of socio-economic rights to dictate with what level of scrutiny State resource allocation decisions should be adjudicated.

When applying proportionality as a capabilities-based standard of review, courts should be mindful to promote the tenets on which a culture of justification is based. Proportionality elicits responsiveness, openness and accountability from the State as primary decision-maker as well as from the subsequently reviewing court. The judiciary must be willing to accept its constitutional interpretative and enforcement responsibilities, lest an overly deferential attitude is allowed to impede a shift from a culture of authority to a culture of justification.

Moreover, when adjudicating complex State resource allocation decisions, courts should ensure that the State's allocative choices pass muster when judged according to various capabilities-based review criteria. It is incumbent on the court to interpret the content and normative purposes of socio-economic rights with reference to the foundational constitutional values in order to review an allocative decision that impacts

on these rights. The court must likewise ensure that the State considered the fundamental values of freedom, dignity and equality in arriving at its prioritisation decisions. These values can also be used to aid the prioritisation of competing capabilities. Furthermore, Courts should not shy away from interpreting "available resources" widely when adjudicating a State resource allocation that detrimentally affects critical capabilities.

In addition, the State must adhere to explicit, capabilities-based allocative processes in order for a particular resource allocation decision to be upheld as reasonable and proportionate to the capabilities at issue. However, a resource allocation decision that is sufficient in scope is not necessarily reasonable – such decisions must be implemented effectively. Given the limited resources at the State's disposal for the realisation of socio-economic capabilities, irregular and wasteful expenditure, as well as under-spending, should be eliminated. Finally, where the State cannot demonstrate that it has allowed participatory processes to broaden the information available to it in determining what resource allocation is necessary for capability realisation, its subsequent inadequate allocative choices cannot be held to be reasonable. By applying a capabilities-based standard of review, State resource allocation decisions can thus be adjudicated to ensure allocative choices that systemically and effectively advance critical socio-economic capabilities.

The following chapter will critically evaluate and develop a capabilities approach to remedies that can address objections to the adjudication of State resource allocation decisions based on considerations of constitutional and institutional competence.

Chapter 6: A capabilities approach to remedies

6 1 Introduction

Where a court applies a capabilities-based standard of review to a State resource allocation decision and finds such allocative decision to be unreasonable, the infringement of a socio-economic right will be established. The court's next task is to devise an appropriate remedy. First, a court must declare the allocative legislation, policy or administrative action in question constitutionally invalid.[1] Thereafter, it must proceed with the more onerous duty of issuing "just and equitable"[2] relief.

A capabilities approach to remedies posits that relief must *effectively* vindicate the capabilities underlying the infringed right. Where socio-economic capabilities are realised through proportionate resource allocation, the infringement is remedied and the socio-economic right is fulfilled. Capability realisation thus constitutes the measure against which the efficacy of the remedy can be assessed. This chapter will investigate how a remedy can be designed to ensure the effective formulation of an allocative plan aimed at remedying capability deprivation.

A capabilities approach to remedies further requires that appropriate relief includes three important capabilities-based characteristics that interact with each other to ensure *effective* resource allocation and concomitant capability realisation. First, it will be argued that a capabilities approach to remedies requires that a remedy should include participatory processes aimed at broadening the information available to the court and State for the formulation and implementation of an effective remedial allocative plan. This is the requirement for "participation and informational broadening". Second, it will be contended that the court must issue explicit normative guidelines that can aid the State in its formulation of an effective remedial allocative plan. The State should also explicitly indicate its progress in formulating and implementing its remedial action. This is the requirement for "explicitness". Both the requirements for informational broadening and explicitness are central tenets of a capabilities approach to adjudication.[3] Finally, it will be shown that the court must retain supervision to monitor compliance with its orders and ensure that remedial action is being instituted effectively.

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[1] S 172(1)(a) of the Constitution of the Republic of South Africa (the "Constitution").

[2] S 172(1)(b).

[3] See chapter two parts 2 4 3 and 2 4 4 and chapter five parts 5 4 2 3 and 5 4 2 5 above.

Focus is thus placed on the structural interdict as a remedy for deficient State resource allocation decisions due to its potential to include these characteristics. A structural interdict should be distinguished from a "reporting order" in that it involves a negotiated plan and "ongoing supervision and the issuing of periodic directions by the Court".[4] A structural interdict requires parties to enter into a process of engagement in order to formulate an allocative plan and report back to the reviewing court on a regular basis in order to obtain judicial approval or further instructions.[5]

This chapter will commence by analysing the judiciary's remedial powers and the reasons for the Constitution Court's reluctance to issue structural interdicts in cases where qualified socio-economic rights were at issue. Thereafter, the focus turns to whether a capabilities-focused structural interdict is capable of addressing concerns that courts lack the constitutional and institutional competence to adjudicate polycentric resource allocation decisions. Finally, the possibility of designing structural interdicts that comply with a capabilities approach to remedies is critically examined with reference to pertinent jurisprudence. In particular, it will be argued that a capabilities approach to remedies can be adopted by ensuring that a remedy incorporates the requirements of participation and informational broadening, explicitness, and the retention of supervision.

6 2 The judiciary's remedial powers

6 2 1 Remedial powers under the Constitution

The South African judiciary enjoys wide remedial powers under the Constitution. Anyone who enjoys *locus standi* in terms of the broad provision made therefore in section 38 "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights".[6] Where a socio-economic right or the right to just administrative action is infringed by a resource allocation decision, courts are

[4] See further regarding this distinction S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 424-425. See also M Bishop "Remedies" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 9–6.

[5] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 424.

[6] S 38 of the Constitution.

empowered to grant "appropriate" relief. A capabilities approach to remedies implies that "appropriate" relief must be relief aimed at the realisation of the capabilities which the relevant infringed socio-economic right protects.[7] The Constitution and a capabilities approach to adjudication justify the judiciary's remedial competence, even where relief calls for increased resource allocation, or for institutional reform in order to ensure effective resource allocation.[8] Section 172 of the Constitution expands on the remedial powers of the courts:

> "172. (1) When deciding a constitutional matter within its power, a court -
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including -
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Where resource allocation is disproportionate to the socio-economic capabilities at stake, the unjustifiable infringement of a socio-economic right occurs. Courts are obliged under section 172(1)(a) to declare such allocative decision invalid. However, a declaration of invalidity runs the risk of leading to polycentric results. For instance, if the executive takes a decision regarding precise allocations to specific programmes within a particular State department, such order could result in ramifications for the relevant department's budget.[9] It would accordingly be "just and equitable" to suspend such a declaration of invalidity[10] and to couple such order with a structural interdict[11] to allow government to formulate a plan to rectify an unconstitutional resource allocation decision and thereby fulfil the infringed socio-economic right.

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[7] For the relationship between capabilities and functionings, see A Sen *Development as Freedom* (1999) 75 and chapter two part 2 2 2 1.

[8] A Sen *Development as Freedom* (1999) 141-143. For the importance of public expenditure to capability realisation see further chapter two part 2 2 3. For the meaning and importance of "effective" resource allocation, see chapter five part 5 4 2 4.

[9] The executive can formulate allocative policy in a broad sense or a narrow sense. Where the executive formulates policy in the narrow sense in the course of implementing legislation such as a provincial Appropriation Act, such conduct can constitute administrative action. See *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province v Ed-U-College (PE) (Section21) Inc* 2001 2 SA 1 (CC) paras 18-19.

[10] S 172(1)(b)(ii) of the Constitution.

[11] For the potential of the structural interdict to mitigate polycentric effects and effect capability realisation, see further part 6 3 2 below.

6 2 2 Remedial powers under PAJA

Where a resource allocation decision that results in socio-economic capability deprivation also infringes the right to just administrative action,[12] sections 38 and 172(1) of the Constitution are likewise applicable.[13] However, direct application of the Constitution will seldom be appropriate in administrative law cases.[14] Fortunately, section 8 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") grants courts similarly wide remedial powers.

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*[15] ("*Allpay*"), the Constitutional Court stated that "[s]ection 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy". However, in granting a remedy for an irregular tender award,[16] the Court relied exclusively on its remedial powers in terms of the Constitution, and not on those set out in PAJA.[17] A more consistent approach to claims framed in terms of PAJA[18] would require remedies to be devised and granted in terms of this Act, while acknowledging the complementary relationship between section 172 of the Constitution and section 8 of PAJA. The most pertinent provisions for the remediation

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[12] S 33 of the Constitution.

[13] For an elaboration of the arguments made in part 6 2 2 in the context of an argument for the reconceptualisation of the remedy of meaningful engagement as infusing administrative law with substance, see S van der Berg "Meaningful Engagement: Proceduralising Socio-economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376 378-381.

[14] C Hoexter *Administrative Law in South Africa* 2 ed (2012) 516; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 96; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

[15] 2014 1 SA 604 (CC) para 12.

[16] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC).

[17] With the exception of rejecting a claim for compensation in terms of s 8(1)(c)(ii)(bb) of PAJA. See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 72.

[18] The doctrine of subsidiarity dictates that where a statute gives effect to constitutional provisions, including remedies, the statute, and not the Constitution, should be relied on. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 22.

of administratively unjust resource allocation decisions resulting in capability deprivation are as follows:

> "Remedies in proceedings for judicial review
> 8. (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –
> (a) directing the administrator –
> (i) …
> (ii) to act in the manner the court or tribunal requires;
> (b) …
> (c) setting aside the administrative action and –
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
> (ii) in exceptional cases –
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action…"

In congruence with section 172(1)(b) of the Constitution, courts are empowered by section 8(1) of PAJA to make "any order that is just and equitable". Concerns that courts may lack the constitutional and institutional competence to adjudicate polycentric resource allocation decisions can therefore be addressed through the design of innovative remedies.

In terms of PAJA, a court may substitute its own decision for that of an administrator in "exceptional cases".[19] In the recent judgment of *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*,[20] the Constitutional Court elucidated what the test for "exceptional circumstances" entails under our constitutional dispensation. The Court noted at the outset that courts considering substitution orders must take cognisance of the separation of powers doctrine and the judiciary's obligations under the Constitution, including the obligation to provide effective relief.[21] The Court proceeded to state that under the separation of powers

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[19] S 8(1)(c)(ii) of PAJA. According to pre-constitutional jurisprudence the court's decision could be substituted for that of the administrator only where the result was a foregone conclusion and it would be a waste of time to remit the matter to the administrator; where delay would cause unjustifiable prejudice; where the decision-maker showed bias or serious incompetence; or where the court considered itself as being as well-qualified as the original decision-maker. *Johannesburg City Council v Administrator, Transvaal* 1969 2 SA 72 (T) 76; *Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika* 1976 2 SA 1 (A) 31B-E; *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C) 502.

[20] 2015 JDR 1325 (CC).

[21] Paras 43-46.

doctrine, two factors hold significant weight in determining whether a substitution order is appropriate: First, a court must determine whether it is in as good a position as the administrator to make the relevant decision. Thereafter, a court must decide whether the decision of the administrator is a foregone conclusion. Both these factors must be considered cumulatively. Only once these determinations are made can a court consider other factors, including delay, bias or the incompetence of an administrator. The Court emphasised that the "ultimate consideration is whether a substitution order is just and equitable" and that the determination of this issue will "involve a consideration of fairness to all implicated parties".[22] Importantly, the Court acknowledged that the "exceptional circumstances enquiry" must take place on a case-by-case, contextual basis and that all relevant facts and circumstances must be taken into account.[23]

Despite the judiciary's constitutional responsibility to interpret the content of socio-economic rights,[24] courts can seldom be regarded as being "as qualified" as administrators to implement socio-economic policy. Where a particular administrative decision requires on-going allocative expertise – or the court does not have all the relevant information before it – the court will not be in as good a position as the administrator to take the decision at issue.[25] Furthermore, in polycentric disputes involving resource allocation decisions that result in socio-economic capability deprivation, the result of an allocative decision will rarely amount to "a foregone conclusion".[26] Once these two factors have been considered, a court must proceed to determine whether a delay in remedying unreasonable resource allocation might cause unjustifiable prejudice to the capabilities impinged by a deficient allocative decision. Inefficient expenditure in the form of wasteful expenditure and maladministration could also justify a substantive remedy on the basis of the incompetence of the administrator.[27] Ultimately, a court will rarely regard itself as constitutionally and

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[22] Para 47.

[23] Para 47.

[24] See further chapter four part 4 2 1 above.

[25] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* 2015 JDR 1325 (CC) para 48.

[26] Para 49. The Constitutional Court further held that "there can never be a foregone conclusion unless a court is in as good a position as the administrator" (para 50).

[27] See further chapter five part 5 4 2 4 above regarding the need for effective expenditure; part 6 4 3 below; K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 345.

institutionally competent to substitute its own decision for an administrator's polycentric resource allocation decision.

The court's ability to direct the administrator to act in the manner the court requires may find wider application than its power to substitute its own decision for that of an administrator.[28] This remedy could potentially amount to a structural interdict. Thus, where a resource allocation decision is unreasonable both in terms of a qualified socio-economic right and the right to administrative justice, a claim framed in terms of PAJA could yield a similar remedy to a claim framed in terms of the relevant socio-economic right. In terms of a structural interdict, a court could compel the administrator to take positive steps to fulfil its administrative duties in consultation with other stakeholders, and could retain supervision until the administrative action meets the requirements found to have been lacking in the initial, flawed allocative decision.[29]

Furthermore, the court's power to set aside the administrative act and remit the matter to the administrator for reconsideration "with or without directions"[30] is also significant for the formulation of a capabilities-focused remedy such as the structural interdict. Importantly, a capabilities approach to a remedy could be accommodated by remitting the matter with explicit normative directions that include substantive guidelines for the capabilities-directed allocation of resources.[31] The court could again retain supervision to ensure effective relief.

6 2 3 The remedial approach of the Constitutional Court in qualified socio-economic rights cases

Where qualified socio-economic rights are at issue, the availability of resources – and the reasonableness of allocative decisions – is always of central significance. It is therefore instructive to analyse the Constitutional Court's approach to remedies where complex, polycentric matters of resource allocation were at issue.

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[28] S 8(1)(a)(ii) of PAJA.

[29] C Hoexter *Administrative Law in South Africa* 2 ed (2012) 561-564.

[30] S 8(1)(c)(i) of PAJA.

[31] For the importance of issuing explicit normative guidelines when granting a remedy, see further part 6 4 2 1 below.

6 2 3 1 The potential inefficiency of declaratory orders

In *Government of the Republic of South Africa v Grootboom*[32] ("*Grootboom*"), the court issued a declaratory order regarding the constitutional shortcomings of the State's housing policy.[33] In terms of the declaratory relief issued, the Court held that "[s]ection 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing".[34] Regrettably, the order was not expeditiously implemented and a delay of over three years ensued before the State devised a revised housing policy that catered for those in urgent housing need.[35] During this period of delay, all persons "in desperate need"[36] of temporary housing continued to live in "intolerable conditions",[37] without access to any type of shelter. It is clear that in such conditions severe basic capability deprivation occurs.[38] Not even elementary functioning outcomes such as possessing adequate shelter, enjoying basic services or attaining a basic state of good health can be achieved in such circumstances. In this case, a capabilities approach to a remedy would thus have required the participation of all stakeholders to identify the capability needs at stake and respond accordingly. Moreover, the retention of supervision may have helped to ensure that the State revised its programme expeditiously. The retention of supervision would have been justified in the light of the grave capability deprivation that occurred in the absence of provision for emergency housing relief.

In addition, uncertainty arose regarding which sphere of government should be responsible for resource allocation in this regard. The national Housing Department

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[32] 2001 1 SA 46 (CC). See the discussion of this judgment in chapter four parts 4 2 1 2 and 4 3 1 above.

[33] The Constitutional Court previously made the negotiated settlement between the parties an order of court, dated 21 September 2000 (on file with author) which was implemented to a certain extent. K Pillay "Implementing *Grootboom*: Supervision Needed" (2002) 3 *ESR Review* 13 14; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 401.

[34] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 99.

[35] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 401-403.

[36] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 52.

[37] Para 52.

[38] As discussed in chapter two part 2 2 2 1 1, Sen perceives poverty as constituting basic capability deprivation. A Sen *Development as Freedom* (1999) 20.

was of the opinion that it was impracticable to assign funding responsibility to provinces with diverse and urgent housing needs. However, the Treasury advised that resource allocation for emergency housing needs fell within the competence of each province. By removing the power to administrate emergency funds from the national sphere, the risk of over- or under-spending by provinces with differing budgetary needs consequently arose.[39] Had supervisory jurisdiction been retained and combined with a participatory remedy,[40] these problems could have been substantially avoided.

6 2 3 2 A reluctance to retain supervision

Subsequently, in *Minister of Health v Treatment Action Campaign (No 2)*[41] ("*TAC*"), the Constitutional Court clarified that, contrary to the State's arguments *in casu*, courts are not limited to issuing declaratory orders only:

> "There is … no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and *has to find the resources to do so*."[42]

In terms of *TAC*, courts are therefore empowered to grant orders that affect policy and resource allocation,[43] while remaining sensitive to the institutional roles of the different branches of government under the separation of powers doctrine.[44] According to the Court, where the nature of the right infringed, the nature of the infringement[45] and the circumstances of the particular case so demand, "courts may - and if need be

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[39] K Pillay "Implementation of *Grootboom:* Implications for the Enforcement of Socio-Economic Rights" (2002) 6 *LDD* 255 267-268.

[40] Thereby compelling dialogue among, *inter alia*, the national and provincial spheres responsible for housing as well as the National Treasury. Participatory remedies should always include engagement with the rights beneficiaries, ie the litigants and similarly placed persons.

[41] 2002 5 SA 721 (CC). See the discussion of this judgment in chapter four part 4 3 2 above.

[42] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 99 (emphasis added).

[43] Para 99.

[44] Para 113. For an analysis of the Court's approach in respect of its remedial competence to issue strong remedies, see chapter four part 4 3 2 3 above.

[45] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 106.

must - use their wide powers to make orders that affect policy as well as legislation".[46] After conducting a comparative survey, the Court concluded that structural interdicts do not breach the separation of powers doctrine, "particularly when the state's obligations are not performed diligently and without delay".[47]

However, the Court, in issuing declaratory and mandatory orders, again declined to retain supervisory jurisdiction, stating that a structural interdict was unnecessary since "government has always respected and executed orders" of the Court.[48] Given the delayed implementation of a revised housing policy in *Grootboom*, and certain provinces' recalcitrance in implementing the orders made in *TAC*,[49] the Court's reluctance to issue a structural interdict was inapt. Moreover, the consequences that delayed or inadequate government action would have on those whose right of access to health care services had been infringed would be severe. *In casu*, the failure to provide immediate and effective relief would lead to the death of a significant number of HIV-infected infants. In other words, the capability deprivation of an exceptionally vulnerable group (infants) would be absolute. The urgent necessity of protecting these vital capabilities, including the capabilities related to life itself, would therefore have justified a capabilities approach to a remedy in the form of a structural interdict.

6 2 3 3 The need for participation where potentially polycentric remedies are granted

The Constitutional Court has issued remedies with manifest resource implications in those cases where it also applied a robust standard of scrutiny to State arguments of resource constraints.[50] Whereas the capabilities at issue and the impact of allegedly disproportionate resource allocation should determine the standard of scrutiny applied to allocative decisions,[51] the complex and polycentric nature of resource allocation should not be ignored.

The Constitutional Court has, for instance, used the remedy of "reading in" to extend social security benefits to permanent residents of South Africa in *Khosa v Minister of*

[46] Para 113.

[47] Para 112.

[48] Para 129.

[49] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 333-334; C Hoexter *Administrative Law in South Africa* 2 ed (2012) 562-563.

[50] See further chapter five part 5 2 3 above.

[51] See in this regard chapter five part 5 3 3 2 above.

Social Development; Mahlaule v Minister of Social Development[52] ("*Khosa*"). The Court was seemingly fortified in its decision to read additional social grant beneficiaries into the impugned legislation given the limited size of the beneficiary group and the relatively small "budgetary intrusion"[53] constituted by the inclusion of permanent residents as social grant beneficiaries.[54] Nevertheless, the order could have had polycentric effects, especially where strained provincial budgets were at issue.[55]

Where complex resource allocation decisions are concerned, and the capabilities of diverse groups – not all of whom are before the Court – are at stake, more participatory remedies will normally be preferable. Such an approach resonates with Rodríguez-Garavito's model of dialogic activism espoused in chapter two.[56] It will be recalled that this model advocates the judicial implementation of strong (substantively interpreted) rights, moderate (participatory) remedies and strong monitoring.[57] Furthermore, it accords with a capabilities approach to adjudication in that a court should strive to expand the information available to it to the greatest extent possible and incorporate the perspectives of a diverse range of stakeholders in order to formulate appropriate remedies.[58] Participation is also central to the project of transformative constitutionalism. The requirement for participation justifies the role of courts in

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[52] 2004 6 SA 505 (CC). See the discussion of this judgment in chapter five part 5 2 3 above.

[53] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 75.

[54] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) paras 59, 62.

[55] Para 60. At the time of this judgment, the Social Assistance Act 59 of 1992 was administered provincially. Subsequently, in *Mashavha v President of the Republic of South Africa* 2005 2 SA 476 (CC) it was argued, *inter alia*, that the provincial administration of the Act could subject grant beneficiaries in different provinces to different provincial budgeting processes. Furthermore, a particular province could re-allocate funds earmarked for social assistance grants for other purpose (para 10). The Constitutional Court held *in casu* that the Act was to be administered by the national sphere in the future, and that this would necessarily include budgeting decisions (para 59). The Social Assistance Act 13 of 2004 was subsequently enacted in order to, *inter alia*, provide for "a national policy for the efficient, economic and effective use of the limited resources available for social assistance" (Preamble of the Social Assistance Act 13 of 2004).

[56] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1688 discussed in chapter two part 2 4 3 above.

[57] 1692.

[58] A Sen *Development as Freedom* (1999) 56-57.

facilitating participatory processes while serving as deliberative *fora* in which a multiplicity of interests can be represented.[59]

However, in *Khosa*, the Court observed the intransigence of government in failing to produce relevant financial and other evidence, or to comply with directions issued by the Court.[60] The lack of explicitness in the State's submissions related to resource allocation may therefore have contributed to the Court's decision to grant a "reading in" remedy.[61] A capabilities approach requires explicit reasoning. This allows for the subsequent public scrutiny of evaluative judgments concerning what action or policy measures capability realisation may require in a given situation.[62] Explicitness is also central to a transformative approach to adjudication, in that it reinforces a shift from a culture of authority to a culture of justification.[63] The requirement for explicitness thus demands that State actors must account for the formulation and implementation of socio-economic policy, generally, as well as for their resource allocation decisions in particular.

An order directing government to provide alternative accommodation, without issuing a corollary order to meaningfully engage with stakeholders while retaining supervisory jurisdiction, is similarly problematic.[64] The robust review of resource-based justificatory arguments proffered by the State in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[65] is supported. However, the

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[59] For the links between the importance of participation under a transformative constitution and "informational broadening" in terms of the capabilities approach, as well as the transformation imperative to reconceptualise courts as platforms for participation and deliberation, see chapter two part 2 4 3. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 33:

> "The adjudication of human rights norms may be seen as a significant forum for deliberation on whether the outcomes of formal democratic processes are consistent with these norms. Within this conception, courts are significant components of deliberative democracy…"

[60] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) paras 18-22.

[61] See for a discussion of the need for the State to produce explicit justificatory evidence in respect of an impugned resource allocation decision, chapter five part 5 4 2 3 above.

[62] A Sen *Development as Freedom* (1999) 30.

[63] E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

[64] See chapter four part 4 3 4 above.

[65] 2012 2 SA 104 (CC).

remedy issued lacked the participatory and supervisory elements needed to ensure its congruence with a capabilities approach to remedies.[66]

6 3 Overcoming the judicial reluctance to issue structural interdicts in qualified socio-economic rights cases

6 3 1 Constitutional and institutional competence

From the above discussion it emerges that the Constitutional Court has been reluctant to grant structural remedies (or to delegate this function to the High Courts) in cases where qualified socio-economic rights were at issue.[67] Instead, the Court has

[66] See further parts 6 4 1 and 6 4 3 below.

[67] In contrast, the Constitutional Court has issued supervisory remedies in cases where the unqualified right to education, enshrined in s 29(1)(a) of the Constitution, was at stake. See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 97-104, where the Court made a supervisory order directing the school governing body to review its language policy and report back to the Court and further obliged the Head of the Mpumalanga Department of Education to file a report with the Court setting out the likely demand for school places and the steps taken by the Department to cater for such demand. This case therefore concerned the right enshrined in s 29(2) to receive education in the official language of one's choice, but entailed indirect implications for the unqualified right enshrined in s 29(1)(a). In *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC), the Court weighed the unqualified right to basic education in s 29(1)(a) of the Constitution against the property rights of a private entity. In determining under what circumstances the eviction of a public school from private property would be justified, the Court required the Member of the Executive Council for Education for KwaZulu-Natal to file a report indicating how learners would be accommodated in neighbouring schools. In *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC), the Court ordered the relevant school governing body to review its policy pertaining to pregnant learners despite the constitutionality of the policy not having been before the Court. Furthermore, the Court made an order for the parties to the litigation to meaningfully engage with each other (para 125) and retained supervision in terms of a reporting back order (para 128). All these cases concerned the imposition of a reporting order as opposed to a structural interdict (see further regarding this distinction S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 424-425). Furthermore, it is pertinent that the right to basic education does not contain an explicit qualification that the State need only take steps to realise these rights within its available resources. The Court has also felt constitutionally and institutionally competent to issue mandatory orders and retain supervision in cases where civil and political rights were at stake. See *August v Electoral Commission* 1999 3 SA 1 (CC); *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* 2005

seemingly conceptualised the structural interdict as a "remedy of last resort"[68] only to be granted where it is crucial to ensure compliance with a court order "where governments are incompetent or intransigent with respect to the implementation of rights".[69]

6 3 1 1 The need to accept judicial responsibility for the granting of effective relief

Davis ascribes the judicial reluctance to grant managerial remedies where qualified socio-economic rights are concerned to the same factor arguably responsible for the Court's resort to a "proceduralised", normatively weak model of reasonableness review:[70] namely, the Court's hesitancy to encroach upon the terrain of the executive or legislative branches of government.[71] The Supreme Court of Appeal has also voiced its separation of powers-based concerns regarding the nature of the structural interdict:

> "Structural interdicts… have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights… Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise."[72]

However, it must be borne in mind that the separation of powers allocates adjudicative responsibility to the judiciary. This includes the power to grant just,

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3 SA 280 (CC) and *Sibiya v Director of Public Prosecutions: Johannesburg* 2005 5 SA 315 (CC).

[68] *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 112, 129.

[69] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 327. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 109.

[70] D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'" in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33. For a discussion of the need to develop a capabilities-based standard of review in lieu of a normatively weak model of reasonableness review, see chapter four part 4 2 1 6 above.

[71] D Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301 311. See also an elaboration of this argument in S van der Berg "Meaningful Engagement: Proceduralising Socio-economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376 382.

[72] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) para 39.

equitable and effective remedies. In *Allpay*, in which the Constitutional Court issued what it termed a structural interdict[73] in respect of the running of a new tender process for the payment of social security grants, the Court emphasised this point:

> "There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights."[74]

6 3 1 2 The structural interdict as an effective and participatory remedy

The structural interdict potentially embodies an effective and participatory remedy that can overcome traditional concerns that courts lack the constitutional and institutional competence required to adjudicate complex resource allocation decisions. By accommodating these concerns at the remedial stage of adjudication, the need for deference in applying a capabilities-based standard of review to allocative decisions is obviated.

Once a court has identified the ways in which an impugned resource allocation decision infringes a socio-economic right,[75] it will formulate an appropriate remedy. Where the capabilities underlying the breached socio-economic right are critical, their deprivation is severe, and the source of infringement involves polycentric decision-making, a capabilities approach to a remedy may necessitate a participatory structural interdict. The effectiveness of this remedy will depend on its ability to vindicate the capabilities at stake through its remediation of the right-infringement. To ensure its effectiveness, the court will have to elicit the input of various stakeholders through, for example, the use of *amici curiae* interventions or the consideration of other expert evidence. However, participation aimed at broadening the information available to devise an effective remedy must continue beyond the courtroom.

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[73] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 71. The fact that the Court did not expressly make the reports thus lodged subject to judicial approval following an engagement process may amount to mere judicial oversight, and serves as a further demonstration of the Court's failure to adhere to the capabilities tenet of explicitness *in casu*. See further part 6 4 2 1 1 below.

[74] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 42.

[75] Capabilities-based review criteria are set out in chapter five part 5 4 above.

The court should issue an order that compels the State to meaningfully engage with the litigants and a wider group of stakeholders, in order to broaden the information available to it to the greatest extent possible.[76] With a sufficiently broad array of information at its disposal, the State can accurately determine what resources are necessary for the realisation of the socio-economic right at issue. Besides the instrumental value of participation for the formulation of effective remedial action, the substantive freedom to participate is a manifestation of agency and is central to the capabilities approach. Participatory capabilities are thus intrinsically important in addition to their instrumental importance for the development of capabilities-focused public policy.[77]

Once meaningful engagement has been ordered, the court will retain supervision in order to approve the State's allocative plan and the implementation thereof at various stages, or to issue further instructions where necessary. Supervisory jurisdiction is therefore essential to ensure that the revised allocative decision results from a participatory process, and is effective in the sense of being directed at capability realisation. The realisation of greater capability sets and more complex functioning combinations will in turn lead to more meaningful social, economic and political participation.[78] Participation is thus of instrumental importance for the effective realisation of capabilities, and simultaneously constitutes a valuable capability in itself.[79] The retention of supervision coupled with an order to engage thereby fosters the foundational constitutional values of accountability, responsiveness and openness.[80]

6 3 1 3 Addressing concerns based on constitutional competence

The participatory and dialogic elements of a capabilities-informed structural interdict are capable of accommodating concerns that the judiciary may lack the constitutional

[76] See part 6 4 1 2 below.

[77] See further A Sen *Development as Freedom* (1999) 18-19, 53 and chapter two part 2 2 2 2 1.

[78] See chapter two part 2 4 3 above.

[79] The substantive freedom to participate in the social, economic and political *milieu* constitutes a capability set.

[80] S 1(d) of the Constitution; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 436.

or institutional competence to adjudicate State resource allocation decisions.[81] Legitimacy concerns are mitigated by conceptualising the structural remedy as a dialogic engagement among all stakeholders, including the legislature. Stakeholders thus express their agency through participation, and simultaneously influence the formulation of public policy that can potentially lead to new legislation. This possibility was recognised in *Doctors for Life International v Speaker of the National Assembly* in the context of participation in the legislative process:[82]

> "The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people."[83]

6 3 1 4 Addressing concerns based on institutional competence

Furthermore, a structural interdict affords leeway to the executive to design a plan for the procurement of additional resources aimed at capability realisation, or for the effective implementation of existing allocations.[84] Besides government recalcitrance in adhering to court orders or cases where non-compliance would cause irremediable damage,[85] Roach and Budlender identify a third situation where the structural interdict would be appropriately granted. According to the authors, courts should feel fortified in granting a managerial remedy where a mandatory order is stated in general terms, due to the nature of the duty involved[86] or the need to grant the State as much latitude as

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[81] The characteristics of a capabilities-infused structural interdict, including the ways in which the adversarial nature of litigation should be relaxed and judicial mechanisms should be developed and utilised where capabilities are at stake, are discussed in part 6 4 below.

[82] 2006 6 SA 416 (CC).

[83] Para 115.

[84] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334.

[85] Where basic capability deprivation occurs due to unreasonable resource allocation, non-compliance with a court order will potentially lead to irremediable damage.

[86] For example, to allocate "reasonable" or "proportionate" resources to the fulfilment of a socio-economic right. However, see part 6 4 2 below regarding the importance of explicitness both

possible to devise its own plan.[87] This may be the case where broad structural reform is necessary, or where the remediation of the law or conduct in question raises complex, polycentric issues. The authors explain the benefit of a structural interdict to the State in such instances:

> "This approach to structural relief has some benefits to governments. It may provide governments with a timeline to follow. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution."[88]

Allowing the State such latitude, in turn, ensures that the executive can devise a plan with which it can comply within the limits of its financial capabilities. A capabilities-infused structural interdict can therefore complement a fluid conceptualisation of the separation of powers doctrine.[89] Rodríguez-Garavito elaborates:

> "[D]ialogic judgments tend to outline procedures and broad goals and, in line with the principle of separation of powers, place the burden on government agencies to design and implement policies."[90]

By affording the State the discretion to devise an allocative plan in consultation[91] with the broadest range of stakeholders possible, concerns regarding the judiciary's

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in granting a structural interdict (explicitness on the part of the court) and complying therewith (explicitness on the part of the State).

[87] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334. See also *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) where the Court stated that "[s]uch relief … is appropriate when the court does not wish to prescribe to the respondent the detail of what steps must be taken" (para 50).

[88] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334.

[89] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 436; CF Sabel & WH Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1016 1090.

[90] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1691.

[91] See part 6 4 1 below.

constitutional and institutional competence to review allocative decisions can be addressed at the remedial stage of adjudication.[92]

6 3 2 Polycentricity

The polycentricity inherent in State resource allocation decisions is often highlighted as a bar to their justiciability.[93] Nevertheless, in *August v Electoral Commission*,[94] the Constitutional Court held:

> "We cannot deny strong actual claims timeously asserted by determinate people, because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups."[95]

Yet the potential of a decision to result in unknown ramifications for a complex web of other issues is increased in proportion to the range of interests not represented before a court.[96] At the remedial stage of adjudication, "[f]airness requires a consideration of the *interests of all those who might be affected* by the order".[97] However, given that increased budgetary allocation can impact on different votes in the national budget and even on the macro-economic obligations of the State, it will

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[92] For the inappropriateness of deference in terms of a capabilities approach to adjudication under a transformative constitution, see chapter two part 2 4 2; chapter four part 4 2 3; and chapter five part 5 4 1 2 above.

[93] L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harv LR* 353 394. Resource allocation decisions are polycentric, since a judgment on a specific instance of resource allocation could result in unforeseen consequences for other budgetary allocations. Unforeseen consequences for budgetary allocations could result where groups in need of State resources are left unrepresented in litigation. For the importance of participation and informational broadening in both the interpretative and remedial phases of adjudication, see chapter two part 2 4 3 and chapter five part 5 4 2 5 above and part 6 4 1 below.

[94] 1999 3 SA 1 (CC).

[95] Para 30.

[96] C Mbazira "Confronting the Problem of Polycentricity in Enforcing Socio-economic Rights in the South African Constitution" (2008) 23 *SAPL* 30 41 states in this regard:

> "Polycentricity comes alive [in cases demanding distributive justice] because the court must try to understand the wide range of interests involved in the case and appreciate the polycentric repercussions of any decision it makes. In this regard, when faced with a socio-economic rights case, the court's focus will go beyond the interests of the individual litigant(s)."

[97] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 43 (emphasis added).

seldom be possible to understand and accommodate *all* the interests at stake. Nevertheless, the emphasis that a capabilities approach to adjudication places on informational broadening can significantly extend the scope of represented interests.[98] The information available to the court for the formulation of an appropriate remedy can be expanded through, for example, the use of *amici curiae* interventions or the consideration of other expert evidence. An even wider range of perspectives can be incorporated into the design of a remedy by requiring the State to engage with a broad range of stakeholders and report back to the court.

Moreover, the latitude afforded to the State to formulate a constitutionally compliant allocative plan, as well as the retention of supervision, promotes the flexibility needed to cater for adjustments in the light of the materialisation of initially unforeseen consequences. The Constitutional Court has observed that "any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable".[99] The polycentric nature of resource allocation decisions can therefore be accommodated by the granting of structural interdicts, which allow for changes in allocative plans as circumstances change.[100]

Sabel and Simon furthermore point out the capacity of "experimentalist" remedies,[101] including structural interdicts, to deal with polycentric effects as they arise:

> "Just as the court's liability determination destabilizes relations and practices within the defendant institution, so does it ramify to other institutions and practices. These ramifications, and their monitored feedback on the institutions in the case, are the web effect. The web effect makes it possible to address sequentially - in a sequence determined in the course of problem-solving itself - reforms too complex to be addressed whole. This effect is polycentricity viewed as an aid, not an obstacle, to problem solving."[102]

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[98] See part 6 4 1 below.

[99] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 49.

[100] For a discussion of the capabilities approach's incorporation of flexible contextualism that accommodates changing circumstances, see chapter two part 2 3 2 3 4 above. See further for the scope left for the re-examination of polycentric decisions in Sen's adaptation of social choice theory chapter two part 2 3 2 4 4 above.

[101] Democratic experimentalism falls beyond the scope of this dissertation and is only discussed where it is apposite to the discussion of the structural interdict.

[102] CF Sabel & WH Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1016 1080.

The retention of supervision therefore allows a court to modify its orders sequentially, as circumstances change or initially unavailable information comes to light. Without the retention of supervision and the establishment of a dialogic relationship between the court and other branches of government, unforeseen consequences of a particular court order could not be accommodated. A traditional remedy, such as a simple mandatory order without the retention of supervision, does not allow for similar flexibility. However, the flexibility inherent in the structural interdict must be combined with explicit normative parameters, set by the court, in order to ensure effective, constitutionally compliant resource allocation decisions.[103]

6 4 A capabilities approach to remedies

A capabilities approach to remedies posits that where the infringement of a socio-economic right entails the deprivation of critical capabilities, a remedy that can *effectively* vindicate those capabilities is required. Whereas the remedy will thus be directed at remediating the infringement of the socio-economic right, its effectiveness can be measured by its success in realising the capabilities underlying the right.

Basic socio-economic capability deprivation can have a grave impact on the fundamental constitutional values of freedom, dignity and equality. For example, an unreasonable resource allocation decision may infringe the right of access to social security.[104] Where the right-holder consequently lacks the basic means of subsistence necessary to make any meaningful life choices, even her most elementary capabilities will be curtailed. The severity of this type of rudimentary capability deprivation will negate her freedom to achieve the complex functioning outcome[105] of living an autonomous, dignified life in a position of substantive equality with other persons whose rights have not similarly been infringed.[106] The serious consequences of socio-economic capability deprivation call for the most effective relief possible.

The structural interdict can be designed so as to incorporate three capabilities-based features that are mutually reinforcing and conducive to effective relief: First, the

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[103] For a discussion regarding the importance of explicit, normative parameters in granting a structural remedy, see part 6 4 2 below.

[104] S 27(1)(c) of the Constitution.

[105] See for an explanation of the concept of functionings, chapter two part 2 2 2 1 above.

[106] For the relationship between the fundamental values of freedom, dignity and equality and capabilities, see further chapter two part 2 4 1.

structural interdict can facilitate participation by a wide range of stakeholders. This process of informational broadening can identify the capability needs at stake, and assist in the formulation of an appropriate allocative response thereto. Participation in the sense of informational broadening constitutes an on-going requirement. A court will require the input of, for example, *amici curiae*, prior to issuing its initial order. In its order, a court may then require the State to elicit further participation from a range of stakeholders in order to assess what capability realisation requires in a given instance. This will allow the State to formulate a progressive remedial plan in response to the needs thus identified. If participation is not promoted on a continuous basis, the State's resource allocation may remain under-inclusive and disproportionate to the capability needs at issue.

Second, any order that compels the State to engage with stakeholders and respond accordingly can be accompanied by explicit normative guidelines that outline the broad contours of what proportionate resource allocation may necessitate. Such normative parameters can aid the State in understanding its constitutional obligations and enable it to devise an effective allocative plan. By also requiring the State to explicitly indicate its progress in formulating and implementing a remedial plan, accountability is fostered. The issuing of normative guidelines resonates with the requirement for substantive reasoning under a culture of justification. It can therefore likewise be said to be required under a transformative constitution. Furthermore, it accords with the capabilities approach requirement for explicit reasoning when making evaluative judgments.[107] Explicit reasoning allows for subsequent public scrutiny of decisions reached. The normative parameters initially set by a court can thus evolve as the results of an on-going process of participation become known.

Finally, the retention of supervision will allow the court to monitor compliance with its orders, and to revise its orders as needed in the light of the challenges identified by an on-going process of participation amongst all stakeholders. Where, for example, additional resources become available, a court can modify its order to require the immediate allocation of such resources to capability realisation. Where resources become more limited or capability needs become greater, a court can accordingly alter its order to grant the State additional time to procure the resources necessary to remedy a capability deprivation.

[107] See further chapter two part 2 4 4.

All three features of a capabilities approach to the structural interdict are mutually supporting and combine to encapsulate an effective remedy. The features will thus overlap with each other during the remedial process. First, a court will facilitate participation prior to issuing an initial order. The first order will be accompanied by explicit normative guidelines. A process of participation will then continue amongst the State and various other stakeholders. The results of the participatory process may in turn require the court to adapt its initial normative guidelines. The retention of supervision makes an on-going process of participation and the revision of orders possible.

6 4 1 Participation and informational broadening

Under South African's transformative Constitution, participation should be promoted in all spheres of government and in any decision that may have an impact on rights.[108] Participation is thus a key foundational requirement that should be facilitated by the judiciary as part of a collaborative partnership with other branches of the State,[109] aimed at the realisation of the ideals encapsulated by the Constitution. Just as participation should be fostered when applying a capabilities-based standard of review to an impugned resource allocation decision,[110] it should again be promoted at the remedial stage of adjudication.

Participation is also a central tenet of a capabilities approach to adjudication, in that it fosters the agency of those whose capabilities are affected by State allocative decisions.[111] Participatory capabilities[112] are thus intrinsically valuable. They are also instrumentally important in that participation can shape government allocative policy and so lead to the realisation of other capabilities that are prerequisites for meaningful participation in the social, economic and political *milieu*.

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[108] KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 155; D Brand "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 622-623.

[109] For a discussion of a collaborative partnership between all branches of government in the Indian context, see chapter three part 3 3 2 3 2 above.

[110] Chapter five part 5 4 2 5.

[111] For the importance of agency to the capabilities theory, see chapter two part 2 2 2 2 1.

[112] Participatory capabilities refer to the capabilities related to social, economic and political participation.

The informational base used for making evaluative judgments is also of central significance to the capabilities theory.[113] Thus, a capabilities approach to adjudication uses the informational base of *capabilities* as the measure against which resource allocation as well as remedial effectiveness can be judged. For remedial action to be effective, capability needs in a given contextual setting as well as the potential means for meeting such needs must be identified. The information must be sufficient to demonstrate the costs of remedying capability deprivation, as well as the resources potentially at the State's disposal for this purpose. The information available to a court and the State for the formulation and implementation of a remedy must thus be broadened to the greatest extent practicable. Sen states with regards to the requirement for informational broadening:

> "[W]hat is possible and what is not may turn crucially on what information is taken into effective account in making social decisions."[114]

Bearing in mind that socio-economic rights adjudication can be described as the "art of the possible",[115] courts must stimulate participation as informational broadening at the remedial stage of adjudication in order to determine what is possible regarding the achievement of systemically reasonable allocative decisions.[116] In order to determine what resource allocation will be proportionate to the socio-economic capabilities at issue, public reasoning demands that no relevant perspectives are omitted from the State's remedial plans and calculations.[117]

A capabilities approach to remedies' emphasis on informational broadening through participatory processes resonates strongly with Rodríguez-Garavito's proposal for dialogic remedies coupled with strong monitoring. The author expounds his arguments for strongly interpreted rights, dialogic remedies and the retention of supervision:

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[113] For a comprehensive discussion of the importance of informational broadening and participation to a capabilities approach to adjudication, see chapter two part 2 4 3 above.

[114] A Sen *Development as Freedom* (1999) 253.

[115] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 54.

[116] A Sen *Development as Freedom* (1999) 57.

[117] A Sen *The Idea of Justice* (2009) 44. This central tenet of the capabilities approach is reflected in Constitutional Court jurisprudence. See *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 43.

> "Dialogic decisions tend to open a monitoring process that encourages discussion of policy alternatives to solve the structural problem detected in the ruling. Unlike monologic judicial proceedings, the minutiae of the policies arise during the course of the monitoring process, not in the judgment itself… [T]his constitutional dialogue involves a broader spectrum of stakeholders in the monitoring process. In addition to the court and state agencies directly affected by the judgment, implementation involves victims whose rights have been violated, relevant civil-society organizations, international human rights agencies, and other actors whose participation is useful…"[118]

It is thus through a process of informational broadening – starting in the courtroom,[119] expanding to other stakeholders and returning to the courtroom for approval and normative guidance – that capabilities-focused allocative choices can be ensured.

6 4 1 1 Informational broadening in the courtroom

Informational broadening must commence in court in order to effectively apply a capabilities-based standard of review, and to formulate an appropriate remedy aimed at achieving proportionate resource allocation. Where relevant capabilities and interests are not considered, allocative policy may remain under-inclusive or ineffective.[120] By assimilating a multitude of perspectives, the formulation of an effective remedy directed at reasonable and proportionate resource allocation is possible.[121]

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[118] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1691-1692.

[119] Participation should be observed in the exercise of all public power, including the drafting of legislation and formulation and implementation of policies related to resource allocation. *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) para 625. Participation in the allocative process will thus be one factor a court should consider in applying a capabilities-based standard of review. See chapter five part 5 4 2 5 above. However, once a resource allocation decision is found to be unreasonable or disproportionate, thus infringing a socio-economic right, participation as informational broadening again becomes crucial.

[120] See further chapter two part 2 4 3 above.

[121] C Mbazira "Confronting the Problem of Polycentricity in Enforcing Socio-economic Rights in the South African Constitution" (2008) 23 *SAPL* 30 43.

6 4 1 1 1 Joinder

One way in which the judiciary can initiate the process of informational broadening is to direct the joinder of all relevant parties. Joinder will be appropriate where a party has a substantial interest in the matter.[122] Furthermore, informational broadening through joinder can circumvent problems related to legitimacy and institutional competence by allowing relevant organs of State to participate in matters within their expertise.[123] Thus, if the national government had been joined in *Soobramoney v Minister of Health (KwaZulu-Natal)*,[124] the Court may have scrutinised budgetary allocations to the relevant provincial Health Department more closely in the light of the obligations imposed by section 27 of the Constitution. If the facts of the case had called for a remedy in response to insufficient budgetary allocation, the involvement of the national government in allocating additional resources would have been of critical importance.[125]

In *Basic Education for All v Minister of Basic Education*,[126] the Court stated *obiter* that while difficult, a case could feasibly be made to contest insufficient budgetary allocations to provincial Departments of Education by challenging the national budget.[127] In declining to retain supervisory jurisdiction, the Court highlighted the fact that the relevant fiscal authorities had not been cited *in casu*.[128] However, the court did not clarify precisely which organs of state constituted the "fiscal authorities" in this matter.

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[122] See the comprehensive discussion of joinder in the context of eviction law in G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD dissertation Stellenbosch (2011) 231. See further G Muller & S Liebenberg "Developing the Law of Joinder in the Context of Evictions of People from their Homes" (2013) 29 *SAJHR* 554.

[123] *Mabaso v Law Society, Northern Provinces* 2005 2 SA 117 (CC) para 13.

[124] 1998 1 SA 765 (CC). For a critical analysis of this judgment, see chapter four parts 4 2 1 1 and 4 2 2 above.

[125] For a discussion of inter-governmental allocative responsibility with reference to *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC), see chapter four part 4 3 4 2 1 above.

[126] 2014 4 SA 274 (GP).

[127] The national budget could be challenged by challenging the constitutional validity of the relevant Appropriation Act or Division of Revenue Act.

[128] *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP) para 74.

Where a particular State department is in violation of the State's duties to realise a socio-economic right due to the inadequate allocation of resources, various government channels may exist for the procurement of additional resources. Since it is "the State" as a unified entity that bears the obligations imposed by the Constitution, a practical approach may be to join the Presidency from the outset. By citing the national and provincial governments at the initiation of the proceedings, provision can be made for the inclusion of all relevant organs of State while fostering intergovernmental participation and accountability.[129] The non-joinder of parties with an interest in the adjudication of State resource allocation decisions can therefore have a critical bearing on the possibility of an effective remedy to ensure systemic resource allocation aimed at capability realisation.[130]

6 4 1 1 2 Interventions

Another way in which informational broadening can occur in the courtroom is by drawing from the Indian Supreme Court's experience in appointing commissions to provide information, help in the design of remedies and monitor the implementation of remedies where necessary.[131] Mechanisms already exist in legislation and court rules to garner information from parties who may lack a direct interest in reasonable resource allocation aimed at socio-economic capability realisation, but whose input may nonetheless "throw light on particular judgements".[132]

Amici curiae interventions constitute an exceptionally valuable mechanism for broadening the information available to the reviewing court and the State in order to

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[129] For example, "the government of the Republic of South Africa" and the "Premier of the Province of the Western Cape" were cited in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). A similar approach was followed in the recent case of *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM).

[130] Rule 8(1) of the Rules of the Constitutional Court GN R1675 in *GG* 25726 of 31-10-2003 states:

> "Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."

[131] See chapter three part 3 3 2 3 above; PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 575-577; J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495 500, 506.

[132] A Sen *The Idea of Justice* (2009) 44.

formulate effective remedies.[133] An *amicus curiae* "acts in the interests of the broader society rather than of specific individuals, focusing on the broader implications of a case".[134] *Amici curiae* can thus alert the court and State to any overlooked and unrepresented interests. They can also timeously identify at least some of the polycentric effects that might result from ordering the State to devise and implement reasonable allocative decisions.[135]

In the recent judgment of *Allpay*, the Constitutional Court highlighted the multi-dimensional approach necessary to formulate a "just and equitable" remedy and the Court's inability to identify all the interests that may be affected by its order.[136] *In casu*, one of the *amici curiae*'s submissions that any order made should not result in the interruption of social grants was duly noted by the Court,[137] which indicated at the outset of its judgment that the order to rerun the tender process for the payment of social grants would not result in an interruption of such payment.[138] The *amicus curiae* therefore brought the capabilities of the unrepresented grant beneficiaries squarely into focus for the Court to consider in formulating an appropriate remedy, even though its submissions were not pertinent to the determination of the merits of the matter at hand.

In addition to *amici curiae* interventions, courts can utilise provisions that allow for the appointment of expert referees with the consent of the parties in technical, complex and polycentric matters such as those related to resource allocation.[139] The findings of such referees can subsequently be incorporated into the normative guidelines issued

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[133] Rule 10 of the Rules of the Constitutional Court GN R1675 in *GG* 25726 of 31-10-2003 makes provision for *amicus curiae* interventions.

[134] L Chenwi "Litigating Socio-economic Rights through *Amicus* Briefs" (2009) 10 *ESR Review* 7 8.

[135] See further *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 9; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 63; M Heywood "Debunking 'conglomo talk': A Case Study of the Amicus Curiae as an Instrument for Advocacy, Investigation and Mobilization" (2001) 5 *LDD* 133.

[136] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) paras 39-40.

[137] Para 27.

[138] Para 4.

[139] S 19bis of the Supreme Court Act 59 of 1959; J Fowkes "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27 *SAJHR* 434 457; D Butterworth, J de Oliviera & C de Moor "Are South African Administrative Law Procedures Adequate for the Evaluation of Issues resting on Scientific Analyses?" (2012) 129 *SALJ* 461 476 n 42.

by a court along with a participatory remedy and the retention of supervision. Finally, courts can order the formulation of specialised task forces to investigate the allocative needs of litigants and those similarly placed, in order for any resultant resource allocation decision to be proportionate to the capability needs thus identified.[140]

6 4 1 2 Informational broadening among the State and other stakeholders

In addition to fostering participation in the courtroom, courts can issue participatory remedies in combination with explicit normative guidelines and the retention of supervision.[141] One of the most promising developments in recent socio-economic rights and administrative justice jurisprudence is the innovation of requiring meaningful engagement both as a prerequisite for reasonable socio-economic policy and as a remedy in appropriate cases.[142] In *Port Elizabeth Municipality v Various Occupiers*[143] Sachs J stated:

> "[T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever

[140] See *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM), where a dedicated Furniture Task Force was established in order to identify the furniture needs of the relevant schools. This, in turn, enabled an estimation of the budgetary resources required to meet said needs.

[141] For an elaboration of the arguments made in part 6 4 1 2 in the context of an argument for the reconceptualisation of the remedy of meaningful engagement as infusing administrative law with substance, see S van der Berg "Meaningful Engagement: Proceduralising Socio-economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376. Participatory remedies must be preceded by strong, substantively interpreted rights during the application of a capabilities-based standard of review. See chapter five part 5 4 2 1 above and C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1691-1692.

[142] B Ray "Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation" (2011) 27 *SAJHR* 107 116-120 argues that engagement, if properly developed and *institutionalised*, can constitute an effective and valuable tool for the poor with which to vindicate their socio-economic rights. Moreover, once institutionalised, an order of meaningful engagement will gradually become less resource intensive.

[143] 2005 1 SA 217 (CC). The remedy of meaningful engagement was foreshadowed in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 87.

possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents."[144]

Meaningful engagement was first utilised as a remedy in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.[145] The Constitutional Court issued an interim order for the City of Johannesburg to engage meaningfully with potential evictees from "bad buildings". The Court indicated that meaningful engagement was "in some sense foreshadowed by [the occupiers'] contention that the City was obliged to give the occupiers a hearing before taking the decision to evict on the basis that the decision was an administrative one".[146] The Court also linked the duty to engage meaningfully with several constitutional duties owed to occupiers that are intricately connected to the fundamental rights of dignity and life.[147] The Court held that a failure to meaningfully engage with the occupiers would constitute conduct that stood at odds with the City's constitutional obligations. Meaningful engagement is capable of forming a valuable component of a capabilities approach to remedies, given the role of dignity in identifying which socio-economic capabilities may be threatened by unconstitutional State conduct in a given case.[148] Meaningful engagement can thus be used as a mechanism to identify which capabilities are at stake. Once this information is known, allocative decisions can be revised accordingly.[149]

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[144] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.

[145] 2008 3 SA 208 (CC).

[146] Para 9. See also the later decision of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 297.

[147] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16.

[148] See chapter two part 2 4 1 and chapter five part 5 4 2 1 regarding the role of the fundamental values of dignity, equality and freedom in identifying which socio-economic capabilities may be implicated in a given case. Once relevant socio-economic capabilities are identified, they can be utilised to inform socio-economic rights with substance.

[149] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 18, 22: The Court stated that meaningful engagement is "also" squarely grounded in section 26(2) of the Constitution. Furthermore, the Court elevated meaningful engagement to the status of one of the considerations that will be taken into account in terms of section 26(3) when a court is asked to grant an eviction order. In *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC), the Constitutional Court recognised meaningful engagement as potentially applying to a range of cases beyond eviction. The Court stated that many provisions in the Constitution "require the substantive involvement and engagement of people in decisions that

6 4 1 2 1 Affording the State sufficient leeway to formulate proportionate allocative decisions

The participatory element of a capabilities-focused structural interdict acknowledges that latitude must be afforded to the other branches of government to design reasonable allocative policies in the light of the polycentricity inherent in matters of resource allocation. Chenwi states in this regard:

> "The meaningful engagement remedy … surmounts concerns around the separation of powers and issues of polycentricity in socioeconomic rights adjudication, giving the government some leeway in policy-decision making, while embracing other democratic principles such as transparency and accountability."[150]

Meaningful engagement or robust procedural fairness can thus be used by the State to identify a broad category of socio-economic capabilities at stake and to tailor its allocative policy accordingly.

6 4 1 2 2 Engaging with a broad range of stakeholders

In designing reasonable allocative policies, the State should engage with as broad a range of stakeholders as possible. By broadening the pool of information available to the State in formulating its remedial action, a wide definition of "available resources" is simultaneously supported: The State may have to consult with a diverse range of stakeholders in order to adequately identify what resources should be made available.[151] Where necessary, the participatory process may further be utilised to

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may affect their lives" (para 43) and that "often competing rights and interests can best be resolved by engagement between the parties" (para 44). Moreover, the Court held that the right to dignity entitled the occupiers to be treated as equals in the engagement process (para 49) and that engagement could be ordered in terms of s 38 of the Constitution (para 51), which empowers a court to grant "appropriate relief". Meaningful engagement on this conception is thus clearly not exclusively rooted in s 26(2) and applicable to s 26(3) of the Constitution.

[150] L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *CCR* 371 382.

[151] Engagement processes should include not only the litigants in the case, but those similarly placed, civil society organisations, and Chapter 9 institutions. In terms of s 181(1) of the Constitution, the Public Protector, the Human Rights Commission and the Auditor General may provide relevant information which can be consulted in order to further clarify what direction the participatory process should take. Thus, for example, where resource allocation in respect

identify sources of additional resources beyond those already allocated to the programme in question.[152]

6 4 1 2 3 Ordering meaningful engagement as part of a structural interdict

In *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development*[153] ("*NAWONGO 1*") the Court issued a structural interdict aimed at bringing the Free State Department of Social Development's funding policy for the funding of non-profit organisations ("NPO's") that provide social welfare services to those in need in the Free State in line with its constitutional and statutory obligations.

In evaluating the funding policy for compliance with the constitutional obligations placed on the State by the socio-economic rights enshrined in the Bill of Rights,[154] the Court noted that the NPO's concerned were in reality providing services that the department was required to provide.[155] Paradoxically, in fulfilling the duties of the State, the NPO's were merely allocated partial subsidies that were determined as a prerogative of the department.[156] After comparing the amount expended by the department per person in need in its own State-run facilities to the significantly lesser amounts subsidised to NPO's, the Court concluded that all NPO subsidies were woefully insufficient in the light of the obligations placed upon the State by sections 26,

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of health care is at issue, a civil society organisation such as Section 27 (see <http://www.section27.org.za/> for further information) may offer valuable insights as to the capabilities at stake and the resources required to realise them. Where unreasonable or disproportionate resource allocation occurred in a province which underspent its budget, or where other financial irregularities occurred, the information provided by the office of the Auditor General may be fruitfully consulted on the relevant issues. This information can then be used to further identify what stakeholders should be engaged, or in what direction the participatory process should proceed.

[152] A wide definition of "available resources" is espoused in chapter two part 2 2 3 and chapter five part 5 4 2 2.

[153] (1719/2010) [2010] ZAFSHC 73 (5 August 2010).

[154] It was alleged that the State was in breach of its constitutional obligations in terms of, *inter alia*, ss 26, 27 and 28 of the Constitution.

[155] See also C Ngwenya & L Pretorius "Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa" (2012) 28 *SAJHR* 81 101.

[156] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2010] ZAFSHC 73 (5 August 2010) para 31.

27 and 28 of the Constitution.[157] The Court subsequently made two further orders in terms of the structural interdict.[158]

In *NAWONGO 2*, the Court ordered the State to meaningfully engage with the under-funded NPO's in order to bring its funding policy in line with its constitutional obligations.[159] However, when *NAWONGO 3* came before the Court, the State had not complied with the engagement order. The State's failure to engage with the NPO's and thereby broaden the information available to it was consequently reflected in its still constitutionally deficient funding policy. In castigating the State for its non-compliance, the Court emphasised that "[m]eaningful engagement is a minimum required for formulating social welfare policy"[160] and, as the facts of the case show, for socio-economic *allocative* policies as well. One factor leading to the ineffective design of a constitutional allocative policy in this case was thus likely the State's failure to engage with a broad range of stakeholders.

The policy was finally upheld as constitutionally compliant in *NAWONGO 4*. The robust process of engagement that preceded the third revision of the policy contributed to the Court's finding that the policy was constitutionally sound.[161] The engagement process included the provision of the working policy document to the NPO's for comment, a full written response by the State to the NPO comments, the formulation of a task team that included the department, KPMG, the NPO's and social welfare

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[157] Paras 33-36. Thereafter, the Court turned to an analysis of the obligations of the department and took as its point of departure in this respect the foundational constitutional values of human dignity, equality and freedom (paras 37-46).

[158] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) ("*NAWONGO 2*") and *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) ("*NAWONGO 3*"). The allocative policy was finally upheld as constitutional in *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014) ("*NAWONGO 4*").

[159] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) para 28 order 2.

[160] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) para 15.

[161] *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014) paras 16-22.

experts to calculate the core costs involved in funding prioritised programmes, a three day workshop involving all stakeholders and follow-up meetings.[162] This case therefore demonstrates the critical importance of adhering to all three of the interacting tenets espoused by a capabilities approach to remedies (informational broadening, explicitness and supervision) in order to ensure effective relief.

6 4 1 3 Informational broadening within different spheres and organs of State

In *Grootboom*, the need for co-operation between different spheres of government in their efforts to realise socio-economic rights was highlighted.[163] As observed by Pillay, a breakdown in communication between different spheres of government following the order in *Grootboom* resulted in uncertainty regarding who bore the responsibility for resource allocation, and consequently in ineffective allocative decisions.[164] The requirement for informational broadening therefore requires different spheres of government and organs of State to co-operate and share information in order for reasonable allocative decisions to be designed and implemented effectively.

The duty of different organs of State to co-operate *inter se* has subsequently been emphasised by the Constitutional Court in several cases in which the right to education was implicated.[165] Thus, in *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School*[166] the Constitutional Court stated the following regarding the relationship between the Department of Education and school governing bodies:

> "[T]he relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith."[167]

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[162] Paras 16-22.

[163] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 68. See further the discussion of inter-governmental allocative responsibility in chapter four part 4 3 4 2 1 above.

[164] K Pillay "Implementation of *Grootboom:* Implications for the Enforcement of Socio-Economic Rights" (2002) 6 *LDD* 255 267-268.

[165] S 29 of the Constitution.

[166] 2014 2 SA 228 (CC).

[167] Para 125.

The concurring judgment of Froneman J and Skweyiya J affirmed the duty of different public organs to co-operate with each other in good faith, locating this duty in the co-operative governance provisions of the Constitution.[168] Significantly, the justices stated that in appropriate cases, the remedial provisions contained in section 172 of the Constitution empowered courts to ensure compliance with this co-operative duty.[169] Subsequently, in *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School*[170] the Court repeated the necessity for "proper engagement between all parties affected",[171] and highlighted "the damage that results when some functionaries fail to take the general obligation to act in partnership and co-operation seriously".[172]

Inter-governmental co-operation where complex, polycentric resource allocation decisions are concerned is of similarly critical importance. This is confirmed by the very *raison d'etre* of the Intergovernmental Fiscal Relations Act 97 of 1997, the purpose of which is stated to be "[t]o promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters".[173] Where a court adopts a wide definition of "available resources" in applying a capabilities-based standard of review to allocative decisions, different departments of State may need to engage with each other on macro-economic matters where this is necessary for the remediation of unreasonable resource allocation decisions.[174] Informational

[168] S 41 of the Constitution.

[169] *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC) para 162.

[170] 2013 6 SA 582 (CC).

[171] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School* 2013 6 SA 582 (CC) para 72.

[172] Para 74. See S Liebenberg "Deepening Democratic Transformation in South Africa through Participatory Constitutional Remedies" (2015) *National Journal of Constitutional Law* (forthcoming) for a comprehensive survey and insightful evaluation of all the education-related judgments in which engagement and the duty to co-operate featured prominently.

[173] Preamble of the Intergovernmental Fiscal Relations Act 97 of 1997.

[174] See *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP) para 80 where the Court acknowledged that, while difficult, a case could arguably be made to challenge vote allocations in the national budget.

broadening among different spheres of government and organs of State is therefore imperative in terms of a capabilities approach to remedies.[175]

Participation at the remedial stage of adjudication thus fosters the fundamental constitutional values of openness and responsiveness,[176] while forming an indispensable component of a capabilities approach to remedies. To furthermore foster the value of accountability and promote a culture of justification, a capabilities approach to remedies additionally requires explicitness.

6 4 2 Explicitness

A capabilities approach to the adjudication of State resource allocation decisions demands explicit reasoning when making evaluative judgments regarding the weighting and prioritisation of diverse capabilities and other interests.[177] Moreover, explicitness in the adjudicative process resonates with the demands of a culture of justification under our transformative Constitution.[178] Courts are therefore required to adopt a strategy of substantive reasoning in adjudicating State resource allocation decisions, whereas the State must explicitly justify its resource allocation decisions in

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[175] The involvement of, for example, the National Treasury where critical socio-economic capabilities are imperilled by unreasonable resource allocation is of crucial importance. See, for example, *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) para 37 where it was pointed out that the State could rely on certain Treasury regulations relating to emergency procurement in order to solicit the resources necessary to meet the relevant schools' furniture needs. The same argument was made in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 11 in relation to the contingency that Cash Paymaster might have refused to perform in terms of its contract with SASSA. See further Treasury Regulations GN R556 in *GG* 21249 of 31-05-2000 as amended by GN R225 in *GG* 27388 of 15-03-2005. The authority to conclude such a contract is in Regulation 16A6.4. The representation and participation of all relevant State departments may be best ensured by citing the national and provincial governments, as opposed to individual departments, at the initiation of proceedings. See further in this regard part 6 4 1 1 1 above.

[176] S 1(d) of the Constitution.

[177] A Sen *Development as Freedom* (1999) 75. For the importance of explicitness under a transformative constitution, see chapter two part 2 4 4 above.

[178] E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165; chapter two part 2 4 4 above.

the light of the capabilities at stake.[179] Explicit reasoning allows for the subsequent public scrutiny of decisions made by courts and the State and thereby facilitates public participation in socio-economic value formation. In order to ensure effective State resource allocation decisions aimed at capability realisation, explicitness is equally important at the remedial stage of adjudication. To constitute a capabilities approach to remedies, explicitness should therefore be observed both by a court in granting a structural interdict and by the State in devising a new capabilities-infused allocative plan subject to approval by the relevant court.

6 4 2 1 Judicial explicitness

A participatory remedy directed at informational broadening, in itself, may not constitute effective relief. A capabilities approach to remedies requires meaningful engagement and similar procedural remedies to be accompanied by explicit normative guidelines and the retention of judicial supervision.[180] Liebenberg forcefully argues for the provision of explicit normative guidelines where meaningful engagement is ordered:

> "If not combined with sufficient normative interpretative guidance on what the particular constitutional right requires of the duty-bearers, other groups similarly placed may not be able to derive the systemic benefits which should flow from constitutional rights litigation ... The potential radiating benefits of constitutional litigation will not be generated as organs of state will be left with insufficient guidance regarding the normative parameters and objectives of engagement processes – parameters and objectives which should be inextricably linked to the substantive interests and values which the relevant rights were designed to protect."[181]

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[179] The importance of explicitness on the part of the State in the justificatory stage of a proportionality as weighting exercise is fully discussed in chapter five part 5 4 2 3 above.

[180] See S Liebenberg "Deepening Democratic Transformation in South Africa through Participatory Constitutional Remedies" (2015) *National Journal of Constitutional Law* (forthcoming). See further L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *CCR* 371 389-391 for criticism of the Constitutional Court's failure to set normative parameters and its "sheer unwillingness" to make determinations on substantive issues in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

[181] S Liebenberg "Deepening Democratic Transformation in South Africa through Participatory Constitutional Remedies" (2015) *National Journal of Constitutional Law* (forthcoming).

The same objectives could be achieved through administrative law by situating the remedy of meaningful engagement within the constitutional requirement for procedural fairness and combining it with the administrative-law remedy of remitting a matter to an administrator with directions. Where the retention of supervision is necessary, administrative law allows for the creative use of structural interdicts.[182]

By combining an explicit order with an on-going process of participation and the retention of supervision, provision is also made for the adaptation of the order in the light of information yielded by the process of engagement described above. Michelman explains revisability in the context of democratic experimentalism:

> "As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with the emergent best-practice standards, in the name of the constitutional right (say) to access to healthcare services. The screws tighten on what can count as cogent or 'reasonable.' The court serves as arbiter but it never has or claims a door-closing last word."[183]

The need for the reassessment of initial judgments regarding the valuation or effective realisation of capabilities is also recognised by Sen, who acknowledges that initially unforeseen consequences may need to be addressed.[184] The requirements for explicitness and informational broadening through participatory processes thus dynamically interact with each other. This symbiotic relationship can be catered for by the on-going nature of the structural interdict.

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[182] For a generous approach to procedural fairness, see *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) and in particular para 64. See also G Quinot "Substantive Reasoning in Administrative-law Adjudication" (2010) 3 *CCR* 111. For the granting of a reporting back order in a tender case, see *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC).

[183] FI Michelman "Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions" in HA García, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice* (2015) 277 288-289.

[184] A Sen *The Idea of Justice* (2009) 107. See further chapter two part 2 3 2 4 4 above.

6 4 2 1 1 Explicitness in the Constitutional Court

A capabilities approach to remedies requires that courts set explicit, normative parameters indicating what a capabilities-focused, reasonable and proportionate resource allocation decision will comprise. The process of explicitness starts at the application of a capabilities-based standard of review to challenged resource allocation decisions,[185] but must be reinforced at the remedial stage of adjudication. The setting of normative parameters in which remediation should occur helps to ensure that the State fully comprehends its constitutional obligations in a given case. Where the State understands its allocative responsibilities, it can act expeditiously to remedy the socio-economic right violation at issue, and thereby effectively vindicate the capabilities underlying the infringed right.[186]

In a recent procurement law judgment where the right to social security[187] was directly implicated, the Constitutional Court failed to adhere to the capabilities precept of explicitness. In *Allpay*, the Constitutional Court declared a tender award by the South African Social Security Agency ("SASSA") to Cash Paymaster Services (Pty) Ltd ("Cash Paymaster") for the payment of social security grants invalid. The Court acknowledged the importance of the right to social security, and of not disrupting the payment of grants to socio-economically vulnerable beneficiaries in granting a remedy.[188] However, explicit normative guidelines bringing the important socio-economic right and its underlying capabilities into focus for each component of the remedy would have been valuable. The Court in *Allpay* set the tender award aside and ordered SASSA to rerun the tender process. The mandatory order was coupled with a reporting back order. Pending a decision by SASSA as to whether to award a new

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[185] Chapter five part 5 4 2 3 above.

[186] The danger of granting a participatory injunction such as meaningful engagement without setting explicit normative parameters is illustrated by the judgment of *Mamba v Minister of Social Development* CCT 65/08 (21 August 2008) even though resource allocation was not at issue in this case. The Constitutional Court ordered meaningful engagement with a view to resolve disputes that arose between the State and refugees when the State attempted to close camps that had been established to safeguard said refugees from xenophobic violence. The Court provided no additional normative guidance and the State responded by largely ignoring the order and proceeding with closure of the camps.

[187] S 27(1)(c) of the Constitution.

[188] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) paras 1, 56, 74.

tender or not, the order of invalidity was suspended.[189] If SASSA were to decide not to award a new tender, the declaration of invalidity would be further suspended until Cash Paymaster's initial contractual term would have come to an end.[190]

The Court did not grant any consideration to the resource implications of funding a new tender for a period of five years. The lack of explicitness in this regard could potentially lead to unintended consequences, such as the diversion of resources from grant payments. If this were to occur, serious socio-economic capability deprivation would follow. Furthermore, although the Court set normative boundaries for the administratively just award of a *new* tender,[191] it failed to explicitly provide any substantive normative or practical guidelines for SASSA to utilise in deciding *whether* to award a new tender at all. Given the protracted litigation in this matter,[192] SASSA might feasibly decide not to award a new tender so as to bring the matter to a close after having rerun the tender process. SASSA could then proceed to administer the

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[189] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 78 order 2. In *Bengwenyama Minerals* (*Pty*) *Ltd v Genorah Resources* (*Pty*) *Ltd* 2011 4 SA 113 (CC) para 84 the Court indicated that an invalid administrative act may not always have to be set aside:

> "It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."

[190] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 78 order 4.

[191] In the judgment on the merits: *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC).

[192] See the earlier judgments of the High Court and Supreme Court of Appeal in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (GPPHC) 28-08-2012 Case no 7447/2012 and *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency* 2013 4 SA 557 (SCA) respectively, and the later judgment of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2015 6 BCLR 653 (CC).

payment of grants itself, as planned.[193] Normative guidelines for deciding whether or not to award a new tender could have required SASSA to consider what course of action would most effectively vindicate the right of access to social security. In this way, normative guidelines could have brought the capabilities underlying the right of access to social security into focus in both scenarios contemplated by the court, *viz* SASSA deciding to grant a new tender or deciding to administer grant payments itself. In this way, explicit normative parameters could have promoted capabilities-centred administrative action on a systemic level.

6 4 2 1 2 Explicitness in the High Courts

The High Courts have displayed a greater willingness to issue structural interdicts than the Constitutional Court in general, and in cases pertaining to resource allocation in particular.[194] The constitutional and institutional competence assumed by the High Courts in granting managerial remedies has, for the most part, been reflected in the issuance of normative and practical guidelines for the benefit of the State and other stakeholders.

(a) *Centre for Child Law v MEC for Education, Gauteng*

In *Centre for Child Law v MEC for Education, Gauteng*[195] the Court had to determine whether deplorable conditions in a school of industry infringed the children's unqualified rights enshrined in section 28 of the Constitution.[196] *In casu*, the applicant sought orders compelling the State to take positive action and provide each child with a sleeping bag, and to establish proper access control and psychological support

[193] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 13.

[194] Cf, however, *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP) paras 73-75 in which the High Court relied on the explicitness of the information provided by the State regarding its budgetary constraints to *not* order a structural interdict. I submit that this approach is untenable, given the State's previous non-compliance with court orders coupled with the fertile capability (education) at stake.

[195] 2008 1 SA 223 (T).

[196] The rights of children in s 28(1) of the Constitution are not subject to considerations of "available resources" or "progressive realisation".

structures.[197] The Court pointed out that section 28 constituted an unqualified right free from internal limitations related to availability of resources and progressive realisation. The Court went on to explain that "[l]ike all rights, they remain subject to reasonable and proportional limitation [in terms of the general limitations clause], but the absence of any internal limitation entrenches the rights as unqualified and immediate".[198] The Court highlighted that, to the extent that judicial involvement in "budgetary or distribution matters" gave rise to concerns of polycentricity, the Constitution recognised that budgetary implications should not "compromise" the justiciability[199] of these types of unlimited rights. Each case deserved scrutiny on the basis of its own merits and circumstances and "the potential for negative or irreconcilable resource allocations".[200]

Having dismissed all the State's defences and alternative proposals in relation to the relief claimed, the Court went on to issue a detailed declaratory order and structural interdict.[201] The Court deemed a structural interdict to be appropriate in the light of the "dilatory and lackadaisical approach" adopted by the State.[202] Furthermore, the Court issued explicit instructions in order to avoid any uncertainty.[203] The remedy included a mandatory order to provide each student with a sleeping bag and to carry out a developmental quality-assurance process. The composition of the team tasked with carrying out the developmental quality-assurance process was explicitly elaborated. Moreover, the Court extracted explicitness from the State by compelling it to present its plan to implement the recommendations of the team to the Court and the applicants. The applicants were allowed to re-enrol the matter for further hearing if necessary in the light of the reports thus filed.[204] The judgment illustrates that a structural interdict may be appropriate despite the explicit recognition of the polycentricity inherent in ordering the State to allocate resources. Explicitness both in recognising the effect that a remedy may have, as well as in directing the State on how to act in order to guarantee

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[197] *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 225D-F.

[198] 227H-J.

[199] Qualified socio-economic rights with budgetary implications such as those enshrined in ss 26 and 27 are of course also justiciable despite inherently evoking polycentric concerns. *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 78; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 25.

[200] *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 228A-B.

[201] 230E-231G.

[202] 229H.

[203] 230D.

[204] 230F-231F.

reasonable and proportionate resource allocation, resonates strongly with a capabilities approach to remedies.

(b) *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*

In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*[205] the Court was called upon to adjudicate the allocation of available, albeit scarce, resources in terms of the unqualified right to basic education.[206] The Western Cape Forum for Intellectual Disability (the "applicant") alleged that the State's provision for children with severe or profound intellectual disabilities (the "affected children") was unconstitutional in that it was significantly less than that provided for other children, it was inadequate to cater for the educational needs of such children, and it was in any event only made available where a non-governmental organisation provided the necessary facilities.[207] The constitutionally appropriate allocation of resources was therefore central in this matter.

The State averred that limited resources justified the exclusion of the affected children in the face of competing demands and that "the right to education should not trump rights to housing, food, water, health care and social security".[208] The polycentric effects that the prioritisation of resource allocation has on a myriad socio-economic capabilities were thus squarely brought to the fore. The State further relied on the

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[205] 2011 5 SA 87 (WCC).

[206] S 29(1)(a) provides that everyone has the right to basic education. This right is not limited by considerations of "available resources" or "progressive realisation" as is the case in ss 26(2) and 27(2). In *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 37 the Constitutional Court affirmed the unqualified nature of the right in explaining that:

> "Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'."

See also *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP).

[207] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para 4.

[208] Para 17.

magnitude of the socio-economic situation in South Africa in requesting that the Court "soften the budgetary impact of an unqualified reading of the right to education".[209]

The Court rejected the State's resource-based defences and issued a structural interdict which explicitly included an order directing the State to allocate resources "to organizations which provide education for severely and profoundly intellectually disabled children… such as to enable them to… have the use of adequate facilities for this purpose [and]… hire adequate staff for this purpose".[210] Moreover, the Court extracted explicitness from the State by requiring it to file a report setting out which steps it had taken to comply with the order as well as which further steps it planned to take.

However, the Court failed to provide sufficient explicit normative guidelines to aid the prioritisation of resource allocation among competing socio-economic rights. The capabilities approach tenet of explicitness would have been better served had the Court dealt head-on with the unqualified nature of the right at issue, on the one hand, and its relation to other socio-economic rights and resource demands, on the other hand.[211] The Court evaded the issue as to when a defence of resource constraints could be upheld in the context of an unqualified right when it stated that the applicants

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[209] Para 17. The State had set out its policy and strategy aimed at the progressive realisation of the right to education over several years. However, the Court noted that even when these policies were implemented, certain children with severe or profound intellectual disability would remain excluded from the ambit of the State's resource allocation (para 19).

[210] Para 52.

[211] See N Murungi "The Duty to Provide Basic Education for Children with Severe and Profound Intellectual Disabilities" (2011) 12 *ESR Review* 10 11 who notes that while education may deserve special weight due to its nature as an "empowerment right" that aids the achievement of other rights, it should not without more be argued that education must trump other socio-economic rights. The author goes on to analyse international law, which points to the absolute nature of the right to primary education as opposed to the qualified nature of the right to further education, and concludes by acknowledging that the debate regarding the nature of this unqualified right persists (12). It is submitted that although the text of the Constitution should be adhered to in adjudicating unqualified rights, the Court should carefully weigh the nature of competing socio-economic interests in each case before it in order to determine what prioritisation will facilitate the realisation of the capabilities of all those who could be affected by that judgment. The unqualified nature of the right points to its relatively superior ability to realise potential or capabilities and should require stringent proof of the impossibility of procuring additional resources to secure its fulfilment, which can be adjudicated through the application of the general limitations clause. See further S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 244-245 regarding the justification for the higher protection afforded to the right to education.

were not requesting the allocation of *extra* funds, but merely asserting that *available* funds should be distributed more fairly among all children.[212] A redistribution of resources could, of course, lead to decreased allocation in other areas of basic education. The Court should thus have explicitly considered whether the State was obliged to solicit *additional* funds so as not to reduce allocation in other spheres of basic education. The lack of explicitness *in casu* thereby weakens the structural interdict's ability to accommodate the polycentric consequences of ordering the State to allocate resources.

(c) *Section 27 v Minister of Basic Education*

In *Section 27 v Minister of Basic Education*[213] the Court was approached in an attempt to solve the structural failure to realise the right to basic education in the Limpopo province. *In casu*, the widespread non-delivery of textbooks to schools in Limpopo was at issue. The Court, per Kollapen J, commenced its judgment by elaborating the normative importance of the right to education. Importantly, the Court recognised that education was vital for people to be able to reach their potential, and contributed to the general upliftment of society.[214] The normative purposes thus ascribed to the right resonate with the fertile nature of the capability to be educated, in that by realising this capability, various other capabilities become possible. The Court continued to employ a capabilities approach to adjudication by taking into account the historical context of the right to education.[215] The Court observed that given the gross inequality of the education system under the apartheid regime, education was now of macro- and micro-significance:

> "It becomes at the macro level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a *sine qua non* to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society."[216]

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[212] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para 28.

[213] 2013 2 SA 40 (GNP).

[214] Paras 1-4.

[215] For the role of context in identifying important capabilities and thereby infusing socio-economic rights with content, see chapter two part 2 3 3 3 3 above.

[216] *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 6.

A capabilities approach posits that in order to achieve the complex functioning outcome of living a dignified life as an educated person who participates fully in the affairs of society, a myriad much more basic capabilities must first be realised. For example, the capability to be educated must be realised in a manner that does not infringe the dignity of the learners in question. This in turn implies that learners must be capable of becoming educated in an adequate physical environment and within a functioning infrastructure. If these capabilities constitute the content of the right to education in a given case, it follows that dilapidated buildings or unsafe sanitation facilities would result in capability deprivation, and thus the infringement of the right to basic education.[217] Furthermore, learners must be capable of becoming educated in a position of equality with other members of society. In other words, the learners must have equally valuable educational materials and resources such as qualified teachers at their disposal.

In this case, the question was even narrower in only asking whether the provision of textbooks formed part of the content of the right: The Court answered this question in the affirmative.[218] In capabilities parlance, the substantive freedom to consult, engage with and learn from textbooks therefore constitutes a part of the content of the right to basic education. Where that freedom is negated, the right is infringed. Having provided a rich normative framework for the adjudication of the matter at issue, the Court held that the Department of Basic Education's failure to deliver textbooks to schools in Limpopo constituted an infringement of the right to basic education.[219]

The Court went on to grant the relief requested by the applicants in the form of a detailed structural interdict. First, the Court ordered the Department of Basic Education to deliver the textbooks to all schools in Limpopo on an urgent basis.[220] Moreover, the Court ordered the department to devise a comprehensive "catch up" or "remedial" plan to address the severe educational shortcomings that resulted from a lack of textbooks. Without prescribing the content of the plan, the Court provided explicit guidelines

[217] The Court did not decide the issue as to whether matters such as "infrastructure, learner transport, security at schools [and] nutrition" formed part of the content of the right to education, but described definitions advocating a broad and encompassing interpretation of the content of the right as "compelling" (para 22).

[218] Para 25.

[219] Para 32.

[220] Para 43 order 3.

outlining the contours of the plan.[221] These guidelines instructed the department to identify the "gaps" in the curriculum, identify the extent to which quality teaching was prejudiced, identify remedial measures to address these concerns in consultation with various stakeholders, provide a timeframe for the implementation of the plan and identify monitoring mechanisms to monitor its implementation, ensure that the plan is comprehensive, identify a point of responsibility at the national and provincial levels of government, and to submit monthly reports detailing both the achievements and setbacks experienced in the implementation of the plan as well as how any setbacks would be addressed.[222]

In providing these explicit guidelines, the Court's approach was wholly congruent with a capabilities approach to remedies. However, the department did not comply with the initial order and a further order was necessitated. Nonetheless, the implicit utilisation of a capabilities approach to remedies yielded valuable structural benefits. Veriava describes the impact of the judgment:

> "The mobilisation of public opinion and rights consciousness raising that occurred in the Limpopo textbook case has been unprecedented… The victory in the Limpopo textbook case and the subsequent failure of the state to comply has generated an awareness of the scale of the education crisis. Discussions on the Limpopo textbook crisis are often located within a broader discussion on the inadequacies in public schooling. It has also led to a heightened awareness of the other ills in the education system. In short, it contributed to a national mobilisation against inferior education. This case has also generated somewhat of a domino effect inspiring new cases and highlighting ongoing campaigns for improvements to educational quality in public schools. The case is also regularly cited as proof of the absence of an accountable government, and of the failure of the current government to deliver."[223]

Even where State compliance cannot be guaranteed, a capabilities approach to remedies transforms a court into a deliberative platform where government action can be subjected to public scrutiny. Explicitness in the form of substantive, normative reasoning is critical for the promotion of meaningful public scrutiny, debate and subsequent mobilisation of non-judicial actors. A capabilities approach to remedies can

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[221] F Veriava *The 2012 Limpopo Textbook Crisis: A Study in Rights-bases Advocacy, the Raising of Rights Consciousness and Governance* (2013) 38.

[222] *Section 27 v Minister of Basic Education* 2013 2 SA 40 (GNP) para 43 order 4.

[223] F Veriava *The 2012 Limpopo Textbook Crisis: A Study in Rights-bases Advocacy, the Raising of Rights Consciousness and Governance* (2013) 38.

thus facilitate structural reform, even if it is initially ineffective in extracting compliance from a recalcitrant government.[224]

(d) *NAWONGO 1*

In the *NAWONGO 1* case,[225] the Court held that the State's funding policy for NPO's was ultimately flawed to the extent that it did not explicitly recognise "as a fundamental principle of funding, that NPO's that provide care [such as in this case] … fulfil the constitutional and statutory obligations of the department".[226] Furthermore, the Court clarified what a "reasonable" funding policy would entail:

> "Reasonableness in this regard must be determined in the context of the Bill of Rights as a whole. What should be contributed from own resources and/or sources of income by the NPO's that fulfil the obligations of the department, cannot be determined arbitrally [*sic*]. *To be a reasonable measure in this regard, the policy must contain a fair, equitable and transparent method of determination of what these NPO's are able and should contribute to the provision of care* for children, older children and vulnerable persons in need and statutory services. The *department must show that the policy is reasonable* in this respect."[227]

The Court could have provided more substantive guidelines regarding what a "fair, equitable and transparent method" for determining allocation would entail. For example, the Court could have explicitly engaged with the capabilities underlying the socio-economic rights at stake. By identifying the importance and urgency of the relevant capability needs, the socio-economic rights in question could be imbued with

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[224] In contrast, when the issue of textbook delivery again came before the Court in *Basic Education for All v Minister of Basic Education* 2014 4 SA 274 (GP), the Court declined to issue a structural interdict. Despite the implication of the fertile capability to be educated in the matter, the Court justified its refusal to grant a structural remedy with reference to the demonstrable resource constraints of the Department as well as separation of powers concerns (paras 75-76). Given the litigation history in this matter, the recalcitrance and intransigence of the Department and the implication of a fertile capability (the deprivation of which can have dire consequences for the freedom, dignity and equality of learners without textbooks), the Court's approach *in casu* eschews a capabilities approach to remedies and cannot be supported.

[225] See part 6 4 1 2 3 above.

[226] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2010] ZAFSHC 73 (5 August 2010) para 47.

[227] Para 49 (emphasis added).

content. Once socio-economic rights acquire content, clarity regarding what resource allocation should aim to fulfil, becomes possible.

The Court deemed it appropriate to retain supervisory jurisdiction over the revision of the policy and issued a structural interdict. This remedy was justified by the lack of leadership and capacity exhibited by the department and the consequent doubt that arose as to whether the policy would be revised "expeditiously or efficiently".[228] The order reiterated the requirements identified by the Court for the policy to be "reasonable". According to the Court, a reasonable funding policy should explicitly recognise "as a fundamental principle of funding that nonprofit organisations that care for children, older persons or vulnerable persons in need or provide statutory services, fulfil the obligations of the first and second respondents" and contain a "fair, equitable and transparent method of determination of the contributions that the aforesaid non-profit organisations should make from own resources".[229]

Explicitness can thus stop short of the judicial quantification of reasonable allocations. However, the remedy could have been reinforced by requiring the department to investigate the possibility of procuring *additional* resources instead of merely requiring reprioritisation within a palpably inadequate budget.[230]

6 4 2 2 State explicitness

Just as a reviewing court should adhere to the capabilities tenet of explicit reasoning, the State should also explicitly indicate how its remedial allocative plan complies with a relevant court order. The following part investigates the State's compliance with the requirement for explicitness in terms of a capabilities-directed structural interdict.

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[228] Para 53.

[229] Para 56.

[230] Subsequent to *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011), the government appealed to the Supreme Court of Appeal. However, the appeal was struck off the roll since the Court found that the government had acted prematurely in appealing before finalising its policy. Thus, the process had to be started from scratch and parties first had to return to the High Court prior to recourse to the Supreme Court of Appeal. (Telephone conversation with Carina du Toit, Attorney at the Centre for Child Law (as *amicus curiae*) 03-02-2012).

6 4 2 2 1 NAWONGO 2

In *NAWONGO 2*, the government returned to court with a revised policy ostensibly based on an allocation model developed by the accounting firm, KPMG. The Court examined this technical evidence and concluded that one provision of the revised policy (the "impugned provision") was in fact inconsistent with the KPMG allocation model. In terms of the KPMG allocation model, where an NPO was unable to contribute from its own resources, it would be allocated a subsidy by the department that covered its full costs. In addition, the KPMG allocation formula was constrained by the premise that the total budget available for transfer to the NPO's, plus the funds contributed by NPO's from their own resources, equalled or exceeded the costs incurred by the NPO's in rendering social welfare services.[231] Incongruously, the impugned provision, in aiming to ensure that the approved awards to NPO's did not exceed the funds allocated by the department for transfer to NPO's, arbitrarily reduced the amount allocated to NPO's by a subjective, discretionary "appropriate percentage".[232]

The Court acknowledged that although a policy should contain a mechanism whereby an insufficient budget is allocated, such mechanism should be reasonable. In this instance, the proposed mechanism was instead illogical and irrational.[233] In capabilities parlance, the discretionary reduction of allocation by an "appropriate percentage" was not explicit in indicating what criteria the department in fact used to make such decisions.

Given that the budgetary process spanned over several months and provided the department with advance indications of the funds likely to be appropriated to it, the Court held that there was no reason why the department could not plan and prioritise its allocations in respect of the NPO service plans. In concluding that the department could not allocate its resources "senselessly" and end up paying "palpably insufficient amounts to all approved NPO's", the Court stated:

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[231] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) para 10.

[232] Thus, once service plans are approved based on objective criteria, and the NPO contribution is subtracted, the amount that should be allocated in terms of the KPMG allocation model is further reduced by what could amount to almost half of the initially determined allocation (para 15).

[233] Para 16.

> "The department's constitutional and statutory obligations require planning and prioritisation. In so doing, even though this may require some tough decisions, the department could justify in a manner *consistent with the Bill of Rights as a whole*, the *effective* funding of the prioritised services…"[234]

To be reasonable, resource allocation decisions must therefore be consistent with the normative objectives of the Bill of Rights and must in addition be fair, equitable and transparent.[235] Any prioritisation necessitated by an insufficient budget must be made by means of transparent and ascertainable criteria.[236] Moreover, the State must explicitly demonstrate its utilisation of such criteria. In *NAWONGO 2*, the Court thus demanded a further revision of the funding policy to bring it in line with the normative criteria expounded in *NAWONGO 1*, and additionally ordered the department to consult with the NPO's prior to filing a revised policy.[237] By combining explicitness with informational broadening and retaining supervision,[238] the Court thus by and large adopted a capabilities approach to remedies where State resource allocation was at issue.

6 4 2 2 2 NAWONGO 3 and NAWONGO 4

However, in *NAWONGO 3*, the revised funding policy was again held to be unconstitutional due to the retention of an "undefined discretion"[239] and a resulting lack of explicitness. The Court emphasised the need for explicitness in prioritising resource allocation:

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[234] Para 22. Compare *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 45.

[235] In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 45 the Constitutional Court likewise stated that allocative criteria for scarce resources must be consistent with the Bill of Rights as a whole. See chapter five part 5 2 3 above.

[236] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) para 24.

[237] Para 28 order 2.

[238] The Court adhered to the capabilities tenet of informational broadening when it ordered the State to meaningfully engage with the NPO's. See part 6 4 1 2 3 above.

[239] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) para 19.

> "The non-profit organisations must know what they are funded for, their funds cannot be determined by a discretion in relation to budget. The content of the item covered must be *clearly and unambiguously spelled out*."[240]

In *NAWONGO 4*, the revised policy was upheld as constitutional. The Court emphasised that it could not determine the exact amounts that the State should allocate to fund NPO programmes. However, the Court reiterated that a funding policy that did not address the needs of the most vulnerable or needy would not constitute a reasonable measure.[241] *In casu*, the Court concluded that the department's prioritisation of programmes which it would fund was reasonable.[242] In addition, the Court emphasised that once the policy was finalised, the department could approach the Treasury for increased allocation. The Court observed the importance of submitting an explicitly motivated request for increased allocation:

> "The department's budget submissions could clearly set out the needs and the core costs thereof. In this manner the extent of denial of rights by inadequate allocation will be clear and Treasury will have to make a decision in this regard that complies with the Constitution."[243]

The Court expressed its optimism that Treasury would allocate additional funds to the department in the light of an explicit or "properly motivated and costed request for funding".[244] The State must therefore make its prioritising decisions explicit, and must likewise submit explicit justifications for requests to receive increased allocations from Treasury.

6 4 2 2 3 Hlophe v City of Johannesburg Metropolitan Municipality

Hlophe v City of Johannesburg Metropolitan Municipality[245] is another example of the State not displaying explicitness in its remedial action. *In casu*, the City of Johannesburg was obliged to provide alternative accommodation to residents of a

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[240] Para 17 (emphasis added).

[241] *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State* (1719/2010) [2014] ZAFSHC 127 (28 August 2014) para 23.

[242] Paras 25-27.

[243] Para 26.

[244] Para 27.

[245] 2013 4 SA 212 (GSJ).

privately owned building prior to eviction.[246] The matter came to be heard by Satchwell J following the City's non-compliance with two previous court orders.[247]

Both previous orders had required the City to provide detailed reports regarding the "nature and location" of the temporary accommodation the City was obliged to provide to the occupiers.[248] However, the City concluded in its first resulting report that it would be impossible for it to comply with the order to provide alternative accommodation due to "the lack of available buildings and financial and other resources".[249] The second order[250] again required the City to file a further report, and stated in detail what information the report was to contain.[251] When the City responded by filing another inadequate report, Satchwell J proceeded to strongly condemn the lack of explicitness displayed by the City:

> "[T]he City was ordered to detail certain specified information viz 'the nature and location of the accommodation to be provided'. This both reports failed to do. General elucidation of accommodation provided to other persons is of no assistance to the court; information about other buildings which are not available for use in housing these occupiers does not take resolution of this matter any further; mission and vision and policy development are irrelevant to the particular task ordered by the court; budgetary and asset constraints were not sought by the court… On reading the report of November 2012, it would seem that nothing was done - the past and the present were simply described and the future was hoped for. There is no semblance of action and no pretence thereto."[252]

The Court accordingly ordered a further report to be filed, and spelled out the *minutiae* of what the report should contain in the hope that explicit instructions "might focus the minds of both politicians and functionaries on the work needed to be done

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[246] For a discussion of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC), which confirmed the State's obligation to provide alternative accommodation even where people are evicted from privately owned buildings, see chapter four part 4 3 4 above.

[247] A consent order issued by Claassen J on 12 June 2012 (*Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 12-06-2012 Case no 20127/2011) and a further order issued by Lamont J on 6 February 2013 (*Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 13-02-2013 Case nos 48103/2012 and 20127/2011).

[248] *Hlophe v City of Johannesburg Metropolitan Municipality* 2013 4 SA 212 (GSJ) para 11.

[249] Para 13.

[250] Dated 6 February 2013 per Lamont J. *Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 13-02-2013 Case nos 48103/2012 and 20127/2011.

[251] *Hlophe v City of Johannesburg Metropolitan Municipality* 2013 4 SA 212 (GSJ) para 15.

[252] Para 21.

by the City to meet its Constitutional obligations".[253] The City finally responded by tendering alternative accommodation.[254] Unfortunately, whereas recalcitrance on the part of the State is the most common justification for granting a structural interdict, neither explicitness – nor effectiveness – can always be extracted from intransigent officials.

The City subsequently lodged an appeal with the Supreme Court of Appeal claiming that a *mandamus* directing functionaries to perform their constitutional obligations is never appropriate.[255] The Supreme Court of Appeal rejected this argument[256] but proceeded to set aside the detailed reporting order issued by Satchwell J. The reporting order was set aside on the basis that only the nature and location of alternative accommodation were at issue before the court *a quo*.[257] This outcome might be avoided in the future by requiring litigants to place a wider array of issues before the court in an effort to elicit State compliance with its constitutional obligations. However, the Supreme Court of Appeal's further finding that the reporting order breached the separation of powers in that it purported "to give directions to the City in respect of what is required to comply with its constitutional obligations to provide temporary accommodation to homeless persons in general" cannot be supported.[258] Where the State has displayed a misapprehension of its constitutional obligations or has been recalcitrant in its attempts to remedy a right-violation, a court should provide explicit guidelines detailing what compliance with the State's relevant constitutional obligations demands.[259]

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[253] Para 27. An interim order to meaningfully engage with the applicants was issued in *Hlophe v City of Johannesburg Metropolitan Municipality* GSJ 14-06-2013 Case nos 48103/2012 and 20127/2011.

[254] For a summary of this protracted litigation, see SERI "Hlophe and Others v City of Johannesburg and Others ('Hlophe')" (2013) *SERI-SA* <http://www.seri-sa.org/index.php/19-litigation/case-entries/196-hlophe-and-others-v-city-of-johannesburg-and-others-hlophe> (accessed 15-09-2014).

[255] Respondent's heads of argument in *City of Johannesburg v Hlophe* SCA Case no 1035/2014.

[256] *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) para 26.

[257] Para 27.

[258] Para 28.

[259] See part 6 4 2 1 above regarding the requirement for judicial explicitness.

6 4 2 2 4 Madzodzo

Finally, in *Madzodzo v Minister of Basic Education*[260] ("*Madzodzo*"), the right to education was again at issue, this time in relation to school furniture shortages at schools in the Eastern Cape. Non-compliance with a consent order to, *inter alia*, establish a Furniture Task Team, conduct an audit of school furniture shortages, and to meet the furniture needs of the schools resulted in a further supervisory order. The Court again required explicitness on the part of the State when it held:

> "[I]t is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure."[261]

The Court accordingly held that the imposition of a structural interdict was called for to ensure reasonable compliance by the State with its constitutional obligations.[262] While recognising that the procurement of additional resources from the Provincial and National Treasuries, and a tender process to procure furniture, would take some time, the Court observed that the State had not explicitly indicated how much time would be needed for these purposes. The Court thus imposed a 90 day time limit for the State to meet the furniture needs of the relevant schools. In the event that the State required an extension, the Court again emphasised the need for explicitness in that the State would have to make "full disclosure" as to the steps already taken to meet the deadline, as well as the time period needed to comply with the original order.[263]

Explicitness at the remedial stage of adjudication is therefore crucial to ensure constitutionally complaint, capabilities-focused resource allocation decisions. Courts are required to provide the normative contours of a reasonable resource allocation decision, whereas the State must in turn provide explicit information regarding its efforts to devise reasonable allocative plans.

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[260] 2014 3 SA 441 (ECM).

[261] Para 35.

[262] Para 36.

[263] Para 40.

6 4 3 Supervision

A capabilities approach to development posits that capabilities can be realised in countries with limited resources through skilled implementation of social programmes.[264] The capabilities approach therefore postulates that programmes aimed at capability realisation must be effective. Similarly, where an unreasonable resource allocation decision results in the infringement of a socio-economic right, an effective remedy must follow. The effectiveness of a remedy can be assessed by determining to what extent it can and does realise the capabilities underlying the infringed socio-economic right. Capability realisation is therefore the measure against which the effectiveness of a remedy can be judged. In *Fose v Minister of Safety and Security*[265] the Constitutional Court echoed the need for effective remedies:

> "In our context an appropriate remedy must mean an *effective* remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. *The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal*."[266]

By adopting a capabilities approach to remedies, courts are able to discharge their responsibility by shaping innovative, effective remedies. An injunction to broaden the information available to the State in devising a reasonable allocative plan through participative processes, engagement and intergovernmental co-operation is essential. Where the State lacks the information necessary to determine what capability realisation requires in a given case, its remedial plan will not be effectively tailored to that end. Explicit normative parameters that broadly indicate what a reasonable allocative decision must encompass in order to remedy the infringement of a socio-economic right, is also an essential constituent of an effective remedy. This allows the State to gain a better understanding of its constitutional obligations, and can reduce the time required for the formulation of an effective remedial plan. In addition, the

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[264] A Sen *Development as Freedom* (1999) 46-49; chapter two part 2 2 3, chapter five part 5 4 2 4 above.

[265] 1997 3 SA 786 (CC).

[266] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69 (emphasis added).

dialogic aspect of a structural interdict transcends the need for reflexive resort to deference based on concerns of constitutional and institutional competence in the context of polycentric matters of resource allocation. However, participatory processes aimed at informational broadening and explicit reasoning are not sufficient. In addition, the retention of supervision is a crucial element of an effective remedy.[267]

Supervisory jurisdiction is not only justified where the State has demonstrated intransigence, but also where vital, basic socio-economic capabilities are imperilled by unreasonable resource allocation decisions. Where reasonable resource allocation decisions are not effectively secured by a chosen remedy, "irremediable" damage can result to those whose capabilities are being deprived as a result of the right-infringement.[268] By monitoring the various participatory processes aimed at informational broadening, courts can ensure that relevant capabilities and concomitant allocative needs are properly identified in a situation of bargaining parity.[269] Furthermore, the continued involvement of the court allows it to revise and adapt its orders based on the information that comes to light during the process of engagement and informational broadening. Supervision is also necessary to ensure that revised resource allocation decisions are not only aimed at capability realisation for the parties to the litigation, but that allocative decisions are *systemically* improved. Liebenberg states in this regard:

> "[J]udicial supervision to ensure that bargaining disparities do not undermine the rights of particular litigants is insufficient on its own … Constitutional remedies should strive as far as possible to ensure that others similarly situated benefit from the relief that a court is prepared to give to the particular successful litigants in a case. This principle captures the forward-looking dimension of constitutional remedies by seeking to secure systemic compliance with constitutional rights."[270]

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[267] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1691-1692. The retention of supervision is made possible by the broad provision made for remedies in s 172 of the Constitution and by s 8 of PAJA.

[268] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334.

[269] S Liebenberg "Deepening Democratic Transformation in South Africa through Participatory Constitutional Remedies" (2015) *National Journal of Constitutional Law* (forthcoming).

[270] S Liebenberg "Deepening Democratic Transformation in South Africa through Participatory Constitutional Remedies" (2015) *National Journal of Constitutional Law* (forthcoming).

In *Magidimisi NO v The Premier of the Eastern Cape*[271] the High Court was called upon to deal with a failure by government to comply with monetary judgments against it relating to social security. Owing to the apparent failure by the State to understand its constitutional obligation to comply with judgments, the Court felt compelled to make a declaratory order clarifying that judgments sounding in money constituted a direct charge against the Provincial Revenue Fund.[272] The Court therefore observed the capabilities-informed tenet of explicitness. Furthermore, the Court issued a detailed structural interdict by means of which it retained jurisdiction to ensure compliance with the various judgments in question in an attempt to guarantee the effectiveness of the remedy.[273] The Court elucidated the added benefits of structural interdicts:

> "[Structural interdicts] have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst it has also assisted the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties."[274]

Courts can accordingly discharge their constitutional duty to devise effective remedies by compelling the State to report back to the court regarding the steps it has taken to formulate reasonable allocative decisions in consultation with a broad range of stakeholders. Such plans must be made subject to judicial approval,[275] and should facilitate further public scrutiny. In appropriate cases, a court may revise its order and adapt its initial explicit normative guidelines in the light of the information garnered during the process of engagement. Where participatory processes have not been sufficiently adhered to, a court can issue explicit instructions compelling the State to rectify defects in relation to its engagement efforts. In so doing, the State can remedy any *lacunae* in its allocative plan that resulted from the participation deficit in the engagement process.

Where the State files a report regarding its progress in formulating and implementing reasonable resource allocation decisions, other stakeholders should be granted the first opportunity to comment on such report. This may alleviate the supervising court's

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[271] 2006 JDR 0346 (B).

[272] Para 36.

[273] Para 39.

[274] Para 32.

[275] Cf *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) where a reporting back order, and not a structural interdict, was granted.

burden to some extent. The assistance of organisations such as the South African Human Rights Commission or *ad hoc* commissions[276] may also be solicited in order to supervise the implementation of the order, with the court only approving plans or issuing further directions at protracted intervals.[277] The retention of supervision can thus catalyse a truly collaborative partnership between the courts, the State, and all stakeholders who have an interest in reasonable resource allocation decisions aimed at socio-economic capability realisation.

6 5 Conclusion

A capabilities approach to remedies postulates relief that can effectively vindicate the capabilities underlying a socio-economic right that was infringed through disproportionate resource allocation. The effectiveness of a remedy can thus be assessed against the measure of capability realisation. Furthermore, in this chapter it was argued that a capabilities approach to remedies requires the incorporation of three features that interact with each other in the common pursuit of ensuring effectiveness. These are participation aimed at broadening the information available to the court and the State for the formulation of an effective remedy, explicitness in the provision of normative guidelines by the court and the formulation of a remedial plan by the State, and the retention of supervision by the court. Where all three these principles are adhered to, remedies are capable of ensuring reasonable and proportionate resource allocation decisions at a systemic level. It was further shown that the structural interdict can be designed so as to include all three of these crucial capabilities-based features.

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[276] For the use of commissions in India to monitor the implementation of remedies, see chapter three part 3 3 2 3 3 above; PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 575-577; J Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *Am J Comp L* 495 500, 506.

[277] Where institutions or commissions are charged with monitoring the progress of a structural interdict, the supervising court must explicitly define their roles and functions to avoid the confusion that resulted when the South African Human Rights Commission agreed to "monitor" State compliance with its constitutional obligations in the wake of the judgment in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). See K Pillay "Implementing *Grootboom*: Supervision Needed" (2002) 3 *ESR Review* 13 14. See further M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve the Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYULR* 1565 1602-1605.

Thus far, the Constitutional Court has displayed reluctance to issue remedies that meet all three of these requirements in cases where qualified socio-economic rights were at issue. Instead, the Court has focused on issuing exclusively participatory remedies,[278] or remedies that encompass explicit normative guidelines or instructions but lack participatory and supervisory elements.[279] The Court has been loath to retain jurisdiction to monitor the formulation of reasonable allocative decisions and implementation of its orders, or to delegate this function to the High Courts. However, a structural interdict directed at systemic capability realisation has the potential to constitute an effective remedy where unreasonable State resource allocation decisions are concerned.

Moreover, a capabilities approach to the design of a structural interdict is capable of substantially addressing concerns that courts are constitutionally and institutionally incompetent *fora* for the adjudication of polycentric resource allocation decisions. The capabilities precept to broaden the information available to the State to the greatest extent possible in revising its allocative decisions grants the State sufficient latitude to devise its own allocative plans within its spheres of competence. A court thus provides normative parameters in which such remediation must occur, but leaves the *minutiae* of allocative decisions to the branches of government best equipped to grapple with matters of resource allocation. Furthermore, the flexibility inherent in a participatory remedy coupled with on-going judicial supervision enables polycentric consequences to be dealt with sequentially, as they arise. Polycentric effects are also minimised in proportion to the range of interests identified and represented through a process of informational broadening.

However, reasonable capabilities-centred resource allocation decisions can only be guaranteed at a systemic level if all three requirements of informational broadening, explicitness and supervision are met. A reviewing court must ensure that a participatory process directed at informational broadening genuinely occurs among the widest range of stakeholders possible. A court is also responsible for elucidating the normative contours of what a reasonable and proportionate resource allocation decision will encompass in the light of the vital socio-economic capabilities at stake.

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[278] For example, an order to meaningfully engage without accompanying explicit normative guidelines.

[279] For example, declaratory orders or mandatory orders not coupled with an order to engage and the retention of supervision.

Similarly, a court must demand that the State explicitly demonstrate its progress in formulating and implementing a remedial plan.

Finally, the retention of supervision is crucial to ensure an effective remedy. Supervision is not only justified where the State has displayed intransigence in devising reasonable allocative decisions in the past, but also where the critical importance of the basic socio-economic capabilities at issue demands structural relief. A capabilities approach to remedies thus aims at institutionalising capabilities-focused resource allocation decisions for the benefit of all those whose socio-economic rights remain unfulfilled.

Chapter 7: Conclusion

7 1 The need for a coherent theoretical paradigm

Poverty and inequality negate the capabilities of millions of people to live meaningful lives.[1] For many, the transformative ethos of the Constitution thus exists only on paper. The enjoyment of socio-economic rights constitutes a critical prerequisite for the transformation of South African society and the unlocking of the potential of its people.[2] Administrative law often serves as a conduit for the realisation of socio-economic rights, since the implementation of socio-economic legislation and policy occurs through administrative processes. The right to just administrative action thus entails that socio-economic goods should not simply be delivered to passive beneficiaries, but should rather occur through administrative processes that are lawful, reasonable and procedurally fair.[3] Given that the procedural and substantive elements of these rights are often inextricable, coherent development across both these spheres of law will be conducive to the project of transformative constitutionalism.

Resources are critical for the combatting of systemic socio-economic disadvantage and vulnerability. However, resources are finite. Difficult allocative choices must thus be made in an effort to alleviate poverty and inequality on multiple, intersecting levels. The fulfilment of different rights, and short-term and long-term poverty alleviation programmes and policies, all vie for resources. This dissertation aims to make a modest contribution to scholarship concerning the ways in which the law can be utilised to aid the alleviation of poverty and socio-economic vulnerability. It does this by proposing a theoretical paradigm which can both justify and facilitate the judicial review of State resource allocation decisions.

7 2 The value of a capabilities paradigm

Where an unequal distribution of resources threatens the very values on which our constitutional democracy is built, accountable, efficient and transparent resource allocation becomes essential. In this dissertation it was argued that the judiciary can fulfil a meaningful role in extracting constitutionally compliant allocative decisions from

[1] A Sen *Development as Freedom* (1999) 74.
[2] Preamble to the Constitution.
[3] S 33(1).

the State. Where different rights and other interests compete for limited resources, Sen's and Nussbaum's capabilities theory can be developed to create a framework in which diverse rights and other factors can be weighted and ranked. It was argued that the purpose of socio-economic rights is to recognise and protect important human capabilities. These underlying capabilities – which resonate with the founding constitutional values of human dignity, equality and freedom – can contribute to developing the normative content of the relevant socio-economic rights provisions in the Constitution.

Government, civil society organisations, Chapter 9 institutions and courts all interpret the meaning and content of rights. The capabilities approach represents an exceptionally fruitful means through which socio-economic rights can be imbued with substantive content. Content can be determined by asking what specific capabilities need to be realised to achieve the normative functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The social and historical context may indicate that a group who suffers from patterns of class- and race-based disadvantage require increased allocation of socio-economic provisioning to bring them into a position of substantive equality with others who have not suffered from similar patterns of disadvantage. The factual context or lived reality of those in need of socio-economic resource allocation may further identify precisely which important capabilities need to be realised in order to achieve the functioning outcome described above. Once the content of a socio-economic right has been established in a particular context, weight can be assigned to its importance. A measure now exists whereby a relevant State resource allocation decision that impacts on socio-economic rights can be assessed.

Sen's and Nussbaum's capabilities theory can therefore be developed to constitute an appropriate theoretical approach to justify and practically aid the judicial review of State resource allocation decisions impacting on socio-economic rights. If constitutional rights in general, and socio-economic rights in particular, are conceptualised as protecting the capabilities or substantive freedom to choose meaningful lives, State resource allocation decisions are placed into normative perspective. When poverty is viewed as a deprivation of basic capabilities[4] such as those related to health care and education, allocative decisions can consequently be

[4] A Sen *Development as Freedom* (1999) 20; for a discussion of why poverty should be viewed as capability deprivation rather than in terms of low income, see further 87-110 and chapter two part 2 2 2 1 1.

judged against the measure of capability realisation. Furthermore, resources should be allocated progressively beyond the minimum so as to fulfil basic capabilities as well as promote the realisation of more complex functioning outcomes such as meaningful social, political and economic participation.[5]

In chapter two it was demonstrated that a capabilities approach to economic policy justifies a wide interpretation of "available resources".[6] A capabilities approach to development perceives economic and macro-economic stability as *instrumental* to capability realisation. This implies that capabilities should be central to any evaluation of economic progress. In the context of adjudication, capabilities theory justifies an evaluation of State resource allocation decisions extending beyond the envelope of already allocated resources. At the same time, it contributes to allaying concerns that the judiciary lacks the constitutional competence to engage with matters related to resource allocation and macro-economic policy.

7 3 A paradigm for valuation and prioritisation

Importantly, the development of the capabilities approach for adjudication can facilitate the weighting and ranking of rights and other factors that will often be demanded from a reviewing court where the allocation of limited resources is at issue. This is especially true since the realisation of socio-economic rights will require the State to prioritise its resources. Allocative trade-offs between different socio-economic rights, socio-economic rights and other rights, or short-term *versus* long-term measures will frequently be the challenging reality with which the State – and the subsequently reviewing court – is faced. In this respect, Nussbaum's scholarship has focused to a greater extent than Sen's on the important role that national constitutions and the judiciary can play in capability realisation.[7] The further development of a capabilities-based review paradigm can therefore aid adjudication and help mitigate concerns that courts lack the institutional competence to review allocative decisions.

Our transformative Constitution has identified the capabilities our society regards as worthy of legal recognition and protection. It is primarily incumbent on the legislative and executive branches of government to further elaborate and specify the content and

[5] For the importance of allocating resources beyond minimum thresholds, see chapter two part 2 2 2 1 2.

[6] Chapter two part 2 2 3.

[7] MC Nussbaum *Creating Capabilities* (2011) 170; chapter two part 2 3 1.

normative purposes of constitutional rights. The interpretation of the meaning of rights should occur in collaboration with civil society organisations and Chapter 9 institutions – and, in appropriate cases, the courts. The Constitution can thus be regarded as having created an initial focal space or partial ordering where preliminary values have been assigned to justiciable rights. However, these values may need to be judicially adjusted and further weighted and ranked when rights and other interests vie for resources. Such a weighting exercise can only occur where courts are willing to imbue socio-economic rights with content drawn from the normative, social, historical and factual context of the case at hand.

As emphasised throughout this dissertation, the overarching normative purpose of socio-economic rights can be conceptualised as the achievement of the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The factual context (along with the social and historical context) of the particular case can then elucidate what concrete capabilities should be realised to achieve this complex, normative functioning outcome. Once the content of the right is established, weight can be assigned to the importance of the various capabilities represented by the right in a given context. In this way, the partial ordering created by the inclusion of abstract socio-economic rights in the Constitution is further refined.

However, it will be necessary for a court to assign weight to other relevant factors, such as considerations of resource constraints or competing socio-economic purposes the State seeks to achieve. By assigning weight to various relevant considerations, a court determines a range of weights. Where a court finds that the purpose and content of a right is particularly important (for example, where basic capabilities are at stake), and the deprivation resulting from an inadequate allocation of resources is severe, the range of weights should be significantly narrowed. The weight assigned to the importance of the right and the severity of capability deprivation resulting from its non-realisation should thus determine that the intensity of scrutiny applied to the State's justificatory arguments should be sharpened. Thereafter, the court can apply the various steps of the proportionality analysis to the impugned allocative decision.[8] The proportionality analysis culminates in the balancing enquiry, where the court will balance the weight assigned to the importance of the right and the severity of the

[8] Legitimacy, suitability and necessity or the least restrictive means test. See chapter five part 5 3 3.

capability deprivation with the weight assigned to the justificatory arguments raised by the State.

For example, a claimant group may argue that the State has allocated insufficient resources for the realisation of the right of access to health care services.[9] They may show that the realisation of this right is necessary for them to attain the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. The social and historical context may indicate that this particular group has suffered from class- and race-based patterns of disadvantage, which has deprived them of health care services that historically privileged groups enjoy. The factual context or lived reality of the group may further indicate that unless they possess the capabilities to access safe, hygienic health care facilities and essential medicines such as those prescribed for the treatment of tuberculosis or HIV, they will never enjoy a good state of health. If they do not possess the capability to enjoy a good state of health, they will, in turn, not be able to achieve the functioning outcome of living an autonomous, dignified life in a position of substantive equality with others. A court can thus ascribe weight to the purpose (the functioning outcome) and content (the various capabilities that must be realised for the functioning outcome to be achieved) of the right of access to health care services.

Once this step of the weighting exercise is completed, a reviewing court can consider the impugned resource allocation decision. If the State claims it is diverting resources from health care to realise the right of access to housing, the court will assign weight to the State's purported policy objective. If the State avers that it simply lacks the resources to realise the claimant group's right, the court will assign weight to the consideration of resource constraints. However, the weight assigned to the purpose and content of the right, and the gravity of the capability deprivation that results from insufficient resource allocation, will determine the level of scrutiny to which the State's justificatory arguments are subjected. If the court assigns significant weight to the right, it may apply a standard of robust proportionality to the State's arguments. The State will then have to show that its resource allocation decision is proportionate to the importance of the purposes and content of the right of access to health care services in the context of the case at hand.

[9] S 27(1)(a) of the Constitution.

7 4 The role of the judiciary in a two-stage adjudicatory process

A capabilities-based weighting exercise can effectively aid the adjudication of complex allocative decisions only if a two-stage adjudicatory process is followed. The assignment of normative content and weight to the socio-economic right at stake constitutes a crucial first step that determines what level of scrutiny should be applied to an impugned resource allocation decision. Only then, as a second step, should the selected level of scrutiny be applied to any justificatory argument of resource constraints raised by the State.[10] Given the role of constitutional rights as "priority setters"[11] for government, it is imperative that the judiciary accepts its constitutional responsibility for the adoption of a two-stage capabilities-based weighting exercise. A capabilities approach to adjudication under a transformative constitution obliges a court to engage in substantive reasoning and incorporate the perspectives of a wide range of stakeholders in reaching a decision. Automatic resort to judicial deference is therefore not appropriate in terms of this approach.

In implementing a capabilities approach to the adjudication of State resource allocation decisions, courts should strive to facilitate participation. Without discounting the problems associated with fostering participation in the courtroom,[12] this dissertation has demonstrated how courts can serve as one (amongst many) deliberative platforms by adhering to the capabilities tenet of "informational broadening".[13] Courts should thus serve as *fora* for the public reasoning necessary to rank competing rights, capabilities and other interests by expanding the information and diverse interests before it to the greatest extent possible. Where socio-economic capabilities are vindicated through adjudication, people become equipped with the capability sets necessary to participate meaningfully in society.

Furthermore, courts must promote a culture of justification under a transformative constitution. This implies that in adopting a capabilities approach to the adjudication of State resource allocation decisions, courts must observe the capabilities tenet of "explicitness" by engaging in substantive reasoning.[14] Courts are therefore mandated

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[10] Chapter two part 2 3 2 2.

[11] C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 252; chapter two part 2 3 4 4.

[12] Chapter two part 2 4 3.

[13] A Sen *Development as Freedom* (1999) 253, 286.

[14] 75; chapter two part 2 4 4.

to require cogent justification from the State for their allocative decisions that impact on socio-economic rights, and must simultaneously justify their own weighting and ranking judgments.

7 5 The instructive value of a comparative perspective

Difficulties in reviewing complex, polycentric resource allocation decisions are bound to arise in practice. Domestic courts may draw from the judicial experience of reviewing complex matters such as resource allocation decisions in other common-law jurisdictions. In this way, our courts can adapt and incorporate the strengths of foreign adjudicative approaches while avoiding pitfalls encountered in other jurisdictions. Cognisance should thus be taken of the comparative perspective offered in chapter three, and its implications for the adoption of a capabilities approach to adjudication.

In this dissertation, a normative-dialogical and functionalist methodology was adopted to analyse the similarities and differences between the judicial approaches in the United Kingdom and India in respect of the shared problem of the review of State resource allocation decisions. Differences in review strategies can usually be ascribed to the different constitutional designs prevalent in the jurisdictions under scrutiny. However, where similarities are identified, it must be asked whether the normative assumptions underlying foreign judicial strategies should be shared by our judiciary, which operates under a supreme, transformative constitution.[15]

7 5 1 The United Kingdom

The judicial approach in the United Kingdom constitutes an aversive example of how formalistic reasoning and an overwhelming awareness of parliamentary sovereignty under a rigid separation of powers doctrine can hinder a judicial contribution to capability realisation.[16] The difficulties caused by the adherence to a narrow test for *Wednesbury* unreasonableness[17] in the United Kingdom should be

[15] For the argument that constitutional difference should constitute the starting point for a comparative analysis, see chapter one part 1 6 4 3 1 above.

[16] Chapter three part 3 2.

[17] From the well-known English decision of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA) 233-234. See further chapter three part 3 2 3 1.

avoided by South African courts in their application of reasonableness review both in socio-economic rights and administrative law cases. Whereas our pre-constitutional model of administrative law review was inherited from the United Kingdom, a more unified standard of constitutional review should be developed in order to contribute to our project of transformative constitutionalism. If our judiciary fails to develop a substantive test for reasonableness review across the fields of socio-economic rights and administrative justice jurisprudence, it risks encountering the same problems that are apparent from the analysis of the position in the United Kingdom. Most significantly, if our judiciary reverts to a thin conception of judicial review, important capabilities may be imperilled and socio-economic rights may not enjoy sufficient protection.

Furthermore, the normative assumption that underlies UK courts' reflexive resort to deference and the application of restrictive standards of scrutiny to government's allocative decisions is that the will of the legislature is supreme. Courts in the United Kingdom thus ascribe their constitutional and institutional incompetence to review resource allocation decisions to the system of parliamentary sovereignty prevalent in that jurisdiction. Whereas this assumption is questionable in the United Kingdom,[18] it is clearly inappropriate in South Africa's system of constitutional supremacy. In South Africa, the judiciary is obliged to contribute to the transformation of society through its interpretation and enforcement of constitutional rights.

Moreover, South African courts should recognise the focal space created for the weighting of capabilities by the inclusion of socio-economic rights and the right to administrative justice in the Constitution. A similar partial ordering of important capabilities does not exist in the United Kingdom. However, a move towards rights-based review following the adoption of the Human Rights Act, 1998, is instructive to the extent that it illustrates that the normative purposes of rights justify judicial involvement in complex matters.[19] In addition, calls from leading academics in the United Kingdom to adopt proportionality review as a uniform head of review should be acknowledged by the South African judiciary.[20] Proportionality as a robust manifestation of reasonableness review resonates strongly with the weighting exercise required by a capabilities approach to the adjudication of resource allocation decisions.

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[18] See, for example, the academic calls for judicial reform in the United Kingdom discussed in chapter three part 3 2 2 above.

[19] See further chapter three part 3 2 2.

[20] P Craig *Administrative Law* 7 ed (2012) 668-673; chapter three part 3 2 4.

7 5 2 India

The judicial approach in India serves as a more positive comparative example than that of the United Kingdom. The normative assumption that underlies innovative judicial strategies in India is that of a supreme constitution aimed at the egalitarian socio-economic transformation of society. This normative assumption is therefore congruent with that which underlies our own constitutional enterprise.

The Indian Supreme Court's innovation of Public Interest Litigation demonstrates that the institutional and structural characteristics of the judiciary can be adapted in order to bring capabilities into focus in the judicial process.[21] The Indian example illustrates that procedures can be relaxed, and the adversarial model can be altered, so as to partially overcome objections that courts lack the constitutional and institutional competence necessary to review complex resource allocation decisions. Furthermore, the separation of powers doctrine has to a large extent been reconceptualised in India as a more collaborative endeavour that sets social justice as a common goal for all branches of government.

However, the Indian Supreme Court has not been immune to the challenges presented by the need to adjudicate complex, polycentric issues such as State resource allocation decisions. This has been reflected in a lack of coherence in the Supreme Court's jurisprudence, which hinders the incorporation of the capabilities approach tenet of explicitness into its adjudicative approach. A similar problem can be avoided by South African courts by adopting the theoretical paradigm espoused in chapter two.

The Indian Supreme Court's recent unprincipled resort to judicial deference is also problematic, especially in cases where economic or developmental policy was challenged. This pitfall can be avoided by South African courts by adhering to a capabilities approach to adjudication that requires explicit, substantive reasoning as postulated in chapter two.[22] Furthermore, in this dissertation it was argued that deference-related concerns should not influence the weighting process required by a capabilities approach to adjudication. Instead, concerns regarding the judiciary's

[21] Chapter three part 3 3 2 3.

[22] Chapter two part 2 4 4.

constitutional and institutional competence to review State resource allocation decisions should be addressed at the remedial stage of adjudication.[23]

Yet another characteristic of the Indian legal system that should be avoided in South Africa is the fragmented nature of administrative law review. This problem can be partly ascribed to the fact that India, like South Africa, inherited its model of administrative law review from the United Kingdom. Instead of allowing judicial review to develop along the parallel lines of common-law judicial review and constitutional review, a unified standard of review is desirable from the perspective of capability realisation. This dissertation has shown that administrative justice can often not be extricated from socio-economic rights, and additionally serves as a critical conduit for the realisation of these rights.[24] In South Africa, reasonableness review holds the potential to be developed across both the fields of socio-economic rights and administrative justice to constitute a uniform head of review that shares many similarities with a capabilities-based standard of review. The unified, substantive development of reasonableness review within and beyond administrative law is thus necessary, and to the extent that Indian law eschews such development it should not be followed.

7 6 The need for a coherent approach in our jurisprudence

Proportionality as a context-sensitive standard of review has not been consistently applied or adequately developed by the South African Constitutional Court. Instead, a variable standard[25] of reasonableness review has developed across the spheres of socio-economic rights and administrative justice jurisprudence. Because socio-economic rights are often realised through the medium of administrative action, it is important for this common standard of review to be developed coherently.

In chapter four, it was argued that a pressing need for development of a capabilities-based standard of scrutiny exists. It was demonstrated that the Constitutional Court has placed excessive focus on the reasonableness of the State action at issue, as

[23] See, for example, chapter four parts 4 2 3 and 4 3 2; chapter five part 5 2 1 3; chapter six parts 6 3 1 and 6 3 2.

[24] See chapter two part 2 2 2 2 3 for the futility of attempting to separate matters of procedure from substance, since these are often intertwined – especially where socio-economic rights are at issue.

[25] Reasonableness review encompasses a spectrum of different levels of scrutiny ranging from “weak” rationality scrutiny, “medium” reasonableness scrutiny, and “robust” proportionality scrutiny.

opposed to the rights at stake. By failing to interpret the substantive content of socio-economic rights, the Constitutional Court has not adhered to the capabilities tenet of engaging in explicit, substantive reasoning.[26] Where courts do not engage in substantive reasoning, it is difficult to evaluate and challenge judgments through a subsequent process of public scrutiny.

Moreover, the Court's approach hitherto has by and large collapsed the interpretative and justificatory stages of adjudication. If the value of the theoretical paradigm composed of a capabilities approach to adjudication is recognised, a two-stage adjudicatory process must be consistently applied in the future. The normative content and purposes of socio-economic rights must thus be determined, as a first step, in order to establish what level of scrutiny should appropriately be applied to the State's resource allocation decisions as a second step.

Furthermore, by failing to allow the content of the rights at issue to determine what resources should be allocated for their realisation, the Court has at times adopted a narrow definition of "available resources".[27] If a capabilities approach to the adjudication of resource allocation decisions is adopted, "available resources" should be interpreted widely so as not to limit the normative content or remedial potential of socio-economic rights.

Nevertheless, the Constitutional Court has evinced the competence to adjudicate State resource allocation decisions in certain cases analysed in chapter four.[28] An approach to reviewing resource allocation decisions which focuses on the critical capabilities represented by socio-economic rights is to be commended and should be continued in the future. In particular, the Court has demonstrated that it is constitutionally and institutionally competent to adjudicate intricate, polycentric policy matters.[29] There is therefore no reason why a similar weighting exercise cannot be conducted where complex resource allocation decisions that implicate critical capabilities fall to be adjudicated. The Court has also on occasion subjected the State's justificatory arguments regarding constrained resources to robust scrutiny where socio-economic rights were imperilled by the allocation of inadequate resources.[30]

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[26] Chapter four part 4 2 1.

[27] Chapter five part 4 2 2.

[28] Chapter four part 4 3.

[29] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC); chapter four part 4 3 3.

[30] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC); chapter four part 4 3 4.

A capabilities approach to adjudication requires that these promising developments be consistently elaborated and applied in cases where capability deprivation may result from unreasonable allocative decisions. As was illustrated in the analysis of the Constitutional Court's jurisprudence in chapter five, this goal can best be achieved by employing proportionality as a standard of review where socio-economic capabilities are imperilled by constitutionally deficient resource allocation.[31]

7 7 A capabilities-based standard of review

A capabilities approach to adjudication requires that courts engage with the normative content and purposes of socio-economic rights with reference to the capabilities these rights represent and the fundamental values that they seek to foster.

A capabilities-based standard of review can address the problematic aspects of the Constitutional Court's approach to adjudication identified in chapter four. Where diverse capabilities, or short-term *versus* long-term capability realisation vie for resources, the weighting exercise required for the ranking of capabilities and other factors can be carefully adapted for judicial use. Proportionality review, as a robust, context-sensitive manifestation of reasonableness review, can be developed to constitute a judicial tool for the capabilities-based judicial review of State resource allocation decisions.[32] Proportionality review constitutes an inherently normative balancing test that allows the content of rights to determine the level of scrutiny to which impugned resource allocation decisions are subjected. In addition, proportionality review is congruent with the values underlying a culture of justification, in that it elicits responsiveness, openness and accountability from the State and the reviewing court.[33]

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[31] Proportionality as a standard of review was foreshadowed in the minority judgment of *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) and further elaborated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45. Proportionality has also been accepted as an appropriate standard of review where socio-economic rights overlap with the right to equality. *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC). See chapter five part 5 2. The Constitutional Court has also subjected the violation of the "negative" aspect of socio-economic rights to the strict limitations test under s 36 of the Constitution, which incorporates a proportionality analysis. *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC). See further chapter four part 4 2 4.

[32] Chapter five part 5 3.

[33] Chapter five part 5 4 1.

In its application of proportionality as a capabilities-based standard of review, a reviewing court should guard against reflexively adopting a posture of deference. It should instead observe the capabilities tenet of explicitness by engaging in substantive reasoning.[34] This means that a court should clearly indicate what weights it assigned to various considerations, and why it came to its evaluative conclusions. Furthermore, courts should engage with all evidence presented, and not only evidence adduced by other branches of the State. In this way, a court can give due consideration to a wide range of relevant perspectives.

Moreover, courts should endeavour to ensure that State resource allocation decisions, regardless of their complexity, pass muster when judged against specific capabilities-based review criteria.[35] First, a reviewing court should require the State to demonstrate its awareness of the normative content and purposes of socio-economic rights in allocating resources for the fulfilment of these rights. Next, in reviewing allocative decisions, courts should interpret "available resources" widely so as to prevent the State from attempting to limit the extent of its obligations by allocating inadequate resources to the right in question. Courts should thus assume the competence to evaluate evidence of disproportionate resource allocation between different votes horizontally,[36] or spheres of government vertically,[37] and of wasteful expenditure or under-spending generally. In addition, a reviewing court must extract explicitness from the State by requiring it to clearly indicate the rights- and capabilities-centred allocative process it followed.

The court can rely on the explicitness required from the State to compare the capabilities-based benchmarks elicited from the State and other institutions with the results actually achieved. This will ensure that allocated resources are not only reasonable in scope, but are also effectively implemented.

Finally, courts should foster participatory processes through informational broadening. This implies that courts should consider a broad range of perspectives by, for example, encouraging *amici curiae* interventions or considering other expert evidence. Courts should also require the State to meaningfully engage with diverse stakeholders in order to tailor its allocative decisions in the light of the capability needs identified through engagement processes. By applying a capabilities-based standard

[34] Chapter five part 5 4 1.

[35] Chapter five part 5 4 2.

[36] In terms of the relevant Appropriation Act.

[37] In terms of the relevant Division of Revenue Act.

of review, the courts can nudge the State to ensure that future allocative decisions effectively advance critical socio-economic capabilities.

7 8 A capabilities approach to remedies

If a capabilities-based standard of review finds judicial acceptance, a congruent approach to remedies should be developed.[38] A capabilities approach to remedies requires effective relief. The need for an effective remedy is underscored by the grave impact that socio-economic capability deprivation can have on the fundamental values of freedom, dignity and equality. The effectiveness of a remedy can thus be assessed by its ability to realise the capabilities underlying the infringed socio-economic right. The structural interdict can be designed to promote the central capabilities tenets of explicitness, informational broadening and, ultimately, effectiveness through the retention of supervision. Where all three of these principles are observed, remedies are capable of ensuring reasonable and proportionate resource allocation decisions at a systemic level.

In future, courts should provide explicit normative guidelines outlining what a reasonable resource allocation decision will encompass in order to remedy the infringement of a socio-economic right in the light of the socio-economic capabilities at stake. Furthermore, courts should ensure that a process of informational broadening occurs by including the perspectives of the widest range of stakeholders practicable in designing an appropriate remedy. In addition, the retention of supervision is crucial to ensure an effective remedy. The retention of supervision will be appropriate where the importance of the socio-economic capabilities at issue demands structural relief.

Moreover, a capabilities approach to the design of structural interdicts is capable of addressing concerns that courts are constitutionally and institutionally incompetent *fora* for the adjudication of complex, polycentric resource allocation decisions. While requiring the State to broaden the information at its disposal when devising allocative policies, the court grants the State sufficient latitude to devise its own allocative plans within its spheres of competence. Although a court provides normative guidelines according to which remediation should take place, it leaves the details of allocative decisions to the branches of government best equipped to deal with matters of resource allocation. In addition, the flexibility inherent in a participatory remedy coupled

[38] Chapter six.

with on-going judicial supervision enables polycentric consequences to be dealt with as they arise. A capabilities approach to remedies thus aims at institutionalising reasonable resource allocation decisions to ensure capability realisation at a systemic level.

7 9 Future developments

This dissertation aims to catalyse further debate and scholarship regarding the important role that the capabilities approach can play in constitutional adjudication. However, it is by no means a comprehensive or final exposition. Whereas this dissertation postulates a capabilities paradigm for the judicial review of State resource allocation decisions impacting on socio-economic rights, a capabilities approach to adjudication can be fruitfully developed for socio-economic rights adjudication in general, and expanded further for all aspects of constitutional review.

7 9 1 A capabilities approach to administrative justice

This dissertation recognises and addresses the important instrumental value of administrative justice for the realisation of socio-economic rights. Nevertheless, given the extensive scope and inherent importance of administrative justice in our constitutional democracy, a capabilities approach for administrative law in particular can be elaborated.

The distinction that Sen draws between the “opportunity” and “process” aspects of freedom cannot be supported.[39] Sen argues that the opportunity aspect of freedom relates to the opportunities that people have to live the lives they have reason to value, given their social circumstances. In contrast, the process aspect of freedom concerns the nature of the processes through which choices are made. Sen concludes that the capabilities approach only applies to the opportunity aspect of freedom, and that its scope does not allow for a focus on fairness of procedures.[40] This position is unsound, since the procedural and substantive facets of rights are often indivisible.[41] Reasonable, fair procedures thus constitute part of the lives we have reason to value.

[39] A Sen *The Idea of Justice* (2009) 228-230; chapter two part 2 2 2 2 3.
[40] A Sen *The Idea of Justice* (2009) 295.
[41] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.

A pressing need exists to further analyse and develop the inextricable links that often exist between procedure and substance.

Once this *lacuna* in Sen's capabilities theory is sufficiently addressed, a capabilities approach to administrative law review – and administrative law in general – can potentially hold significant benefits for the coherent development of this field of law in congruence with the ethos of a transformative constitution. However, this important project falls outside the scope of this dissertation.

7 9 2 A wider comparative and international law perspective

This dissertation has expounded a limited comparative perspective which focuses on the judicial approach to the review of resource allocation decisions and analogously complex policy matters in the United Kingdom and India. The selection of jurisdictions was partly motivated by a historical and classificatory methodological approach, given the extensive influence of English law on the legal systems in India and South Africa.[42]

Again, expansion of this contribution to encompass a wider comparative perspective that focuses on recent developments in, for example, Canada and Columbia, is necessary. In Canada, indirect protection is afforded to socio-economic rights by the application of the equality provision in the Canadian Charter of Rights and Freedoms.[43] Although the Canadian Supreme Court has shown deference to government's socio-economic resource allocation,[44] it has nevertheless required that government justify its allocative choices where vulnerable groups are excluded from social benefits. The approach of the Canadian Supreme Court therefore merits closer scrutiny.

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[42] For a further exposition of the rationale for the selection of the comparative jurisdictions as well as the methodological approach adopted, see chapter one part 1 6 4.

[43] S 15 of the Canadian Charter on Rights and Freedoms. See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 125 for a discussion of the indirect protection of socio-economic rights afforded by the application of values such as equality in the Canadian context. See also M Jackman & B Porter "Canada: Socio-economic Rights under the Canadian Charter" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 209; S Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 *SAJHR* 163 for a discussion and criticism of the application of the values of substantive equality and dignity in *Law v Canada* [1999] 1 SCR 497 and *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

[44] M Jackman & B Porter "Canada: Socio-economic Rights under the Canadian Charter" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 209 219.

In Columbia, the role of public reasoning to evaluate and rank diverse capabilities and rights calls for analysis, as does the structural measures employed by the Columbian Constitutional Court. For example, in decision T-025 of 2004 the Court issued wide-ranging structural orders in an attempt to remedy a systemic breach of human rights flowing from forced displacements on a massive scale coupled with State inaction that required structural reform and inter-governmental agency co-operation.[45]

Furthermore, a capabilities approach to the enforcement of States' resource-related obligations in terms of relevant international human rights treaties may yield significant results, and contribute further to the theoretical justification for enforceable obligations in the international sphere.[46] In this regard, the body of existing scholarship regarding rights and resources at international law can be built on.[47]

7 9 3 Beyond the judiciary

Finally, this dissertation has focused on the role of the judiciary in adjudicating State resource allocation decisions impacting on socio-economic rights. The judiciary undoubtedly fulfils a critical role in realising the ideals of transformative constitutionalism, but its role is by no means exclusive or sufficient. If the capabilities-based review paradigm espoused in this dissertation finds judicial acceptance, it is to be hoped that the same paradigm will be assimilated by the administration in its original decision-making processes. Scholarship should continue to focus on the role of various actors, including the need for State accountability measures and the contribution that Chapter 9 institutions and civil society organisations can and do make. A capabilities approach to the conceptualisation and refinement of a collaborative partnership between all branches of the State and other stakeholders, holds the potential to place

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[45] See generally C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669.

[46] For example, a capabilities approach may inform the reasonableness test incorporated in Art 8(4) of the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights GA Res 63/117, 10 December 2008, A/RES/63/117 for the examination of State party communications. B Griffey "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 *HRLR* 275. What, if any, effect South Africa's recent ratification of the International Covenant on Economic, Social and Cultural Rights (1966) (on 12 January 2015) will have on domestic socio-economic jurisprudence, remains to be seen.

[47] See, for example, R O'Connell, A Nolan, C Harvey, M Dutschke & E Rooney *Applying an International Human Rights Framework to State Budget Allocations* (2014).

competence-based issues of complexity into a perspective that resonates with the constitutional project of realising freedom, dignity and equality for all.

7 10 Significance of dissertation

This dissertation seeks to demonstrate that a capabilities approach to adjudication can advance the project of transformative constitutionalism. In particular, it develops a capabilities review paradigm to allow courts to review complex, polycentric State resource allocation decisions. It further shows that the proportionality doctrine can be adapted for the judicial review of resource allocation decisions that require the weighting and balancing of diverse rights and other considerations. However, it cautions that a capabilities-centred weighting exercise is only feasible where courts are willing to substantively interpret socio-economic rights. It contends that this challenge can be met by identifying the important capabilities that these rights seek to protect in the lived reality of litigants and other vulnerable members of society.

Thus, courts can extract accountability, responsiveness and openness from the State by requiring it to justify its allocative choices in the light of the normative content and purposes of socio-economic rights. Where reasonable resource allocation decisions are required, courts can help ensure that the State directs its resources to socio-economic capability realisation at a systemic level. Where resources are allocated to realise capability needs, it becomes possible for the socio-economically disadvantaged members of our society to unlock their potential and choose to live meaningful lives. In this way, a society characterised by freedom, dignity and equality for all becomes a realistic prospect.

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