JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS
COMPARATIVE ANALYSIS OF THE UNITED KINGDOM AND SOUTH AFRICA

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Abstract

The thesis represents a comparative study of socio-economic rights litigation in two jurisdictions: United Kingdom and South Africa. It examines the role of courts in protecting socio-economic rights and answers the question of whether these rights are better protected if enshrined in a Constitution or rather ordinary mechanisms of administrative law are sufficient.

Within the background of theoretical aspects related to the justiciability of socio-economic rights, the paper will examine the extent to which socio-economic rights in the United Kingdom can be protected through civil and political rights enshrined in the European Convention of Human Rights and incorporated by the Human Rights Act 1998. It further addresses the issue of the strengths and limits of the South African Constitutional Court approach to the adjudication of socio-economic rights and makes recommendations for its improvement. Ultimately, the scope of this comparison is to emphasize that even if the South African approach to the adjudicating of socio-economic rights still needs development, it is preferable to administrative law review.

Introduction

Adjudication of socio-economic rights is a controversial topic. Ever since their emergence in the 19th century, socio-economic rights have been the subject of constant debate about whether or not they can be considered human rights, and if so, how they should be protected and enforced.[1]

Within the human rights discourse the term socio-economic rights is used by way of contrast with the traditional civil and political rights, but it also reflects the connection between the economic and social policy spheres which was intended by the drafters if the International Covenant on Economic, Social and Cultural Rights.[2] The term generally refers either to a set of legal rights enshrined in national and international human rights instruments imposing legal obligations on states or to legally enforceable individual entitlements.[3] However, despite wide normative recognition, socio-economic rights remain judicially under-enforced.[4]

Both at the national and international level, the acceptance of the justiciability of such rights raises questions about the relationship between socioeconomic rights, constitutional law and democratic deliberation.[5] The traditional arguments against the adjudication of socio-economic rights mainly fall into two categories and refer to the lack

[1]Wiktor Osiatynski, *Introduction*, in "Re-thinking Socio-economic rights in an Insecure World", UDOMBANA, Nsongurua, BESIREVIC, Violeta, (ed.), CEU Center for Human Rights, 2006, p. 3.
[2] Ellie Palmer, "Introduction", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 8.
[3] Asbjorn Eide, Catarina Krause, Allan Rosas (eds.), *Economic Social and Cultural Rights: a Textbook*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 2001, p. 29.
[4] Ibid, p. 29.
[5] Cass R. Sunstein, *Designing democracy: What constitutions do*, New York: Oxford University Press, 2001, p. 233.

of democratic legitimacy and institutional capacity of courts to enforce and implement such rights.

The issue of whether courts can effectively contribute to the protection of socio-economic rights with the assistance of constitutional provisions remains controversial, despite the contribution of the South African Constitutional Court to the development of socio-economic rights jurisprudence.

This paper represents a comparative study of the manner in which courts cope with their role in realizing socio-economic rights in two jurisdictions: the United Kingdom (UK) and South Africa and it is placed within the background of "growing academic support for the idea that questions of constitutional legitimacy should be based on evaluation of how courts have approached the resolution of disputes in practice, rather than on more abstract theorizing about the nature and limits of constitutional review."[6]

The two countries have different types of constitutions and judicial review. On one hand, South Africa has adopted a Constitution in 1997 which protects enforceable socio-economic rights and grants expansive powers of judicial review to the judiciary. On the other hand, the United Kingdom has incorporated the European Convention of Human Rights into law in 1998 by the adoption of the Human Rights Act-a statute that accords weak powers of review to courts and does not include socio-economic rights. Nevertheless, South Africa partly shares with the United Kingdom a common law legal system and it has been argued that courts in the UK have been inspired by the South African Constitutional Court as a model of good practice in constitutional interpretation.[7] This has not been however the case where socio-economic rights disputes were

[6] Ellie Palmer, "Introduction", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 5.
[7] Ibid., p. 39.

concerned, on the assumption that the exceptional character of the South African Constitution-its commitment to social justice-limits its usefulness for other countries.

While there are significant differences between the South African Constitution and the Human Rights Act, the adoption of the European Convention of Human Rights into law theoretically changes the interpretative function of the British judges. The issue that rises is whether, in the absence of express constitutional protection of socio-economic rights the negative rights enshrined in the ECHR can be used to impose positive obligations on governments to meet the socio-economic needs of individuals.[8]

The question that this paper will answer is**:** what difference does it make if socio-economic rights are enforceable when it comes to their protection? The aim of this paper is to shed light on whether it is sufficient for courts to rely on civil and political rights and the ordinary mechanism of administrative law-as in the case of the United Kingdom or there are advantages of giving courts the authority to enforce socio-economic rights as in South Africa.

The body of the thesis is divided in three main parts. The first part deals with the theoretical aspects related to the issue of justiciability of socio-economic presenting various arguments related to the constitutional protection of these rights. The second part will analyze, within the background of the British constitutional system, important House of Lords decisions concerning socio-economic rights, before and after the enactment of the Human Rights Act in 1998 and will trace developments in the level of scrutiny exercised by the courts in socio-economic rights disputes. Finally, the third part will look into the approach taken by the South African Constitutional Court in five seminal socio-economic cases adjudicated ever since the adoption of the Constitution: Soobramoney v. Minister of

[8] Ibid., p. 4.

Health Kwa Zulu Natal[9], Government of the Republic of South Africa v. Grootboom and Others[10], Minister of Health v. Treatment Action Campaign[11], Khosa v. Minister of Social Development[12] and Mazibuko and Others v. City of Johannesburg and Others[13]. It will identify its strengths and limits and make recommendations on how it could improve in order to assure a better protection of socio-economic rights.

The material that I use in this paper contains different materials about socio-economic rights adjudication in the two countries, the primary sources being the case-law analyzed in the two jurisdictions. Also very important are books which have contributed significantly to this filed of law. Sandra Fredman's book "Human Rights Transformed, Positive Rights and Positive Duties" is important for the discussion of the artificial division between civil and political and socio-economic rights and how this dichotomy regulates judicial intervention in resource allocation cases. Ellie Palmer's book "Judicial Review, Socio-Economic Rights and the Human Rights Act" which was published in 2007, is used extensively in this paper because it gives valuable insight into the manner in which courts enforce socio-economic rights in the United Kingdom either trough principles of English public law or relying on the powers conferred to them by the enactment of the Human Rights Act 1998. The book is "predicted on a firm belief in the moral and existential overlap and indivisibility of civil and political rights and socio-economic rights" and is set "against the background of global privatization of erstwhile public services and a retreat from twentieth century welfarist ideology".[14] The book edited by Gauri Gauri Varun and

[9] Soobramoney v. Minister of Health Kwa Zulu Natal, KwaZulu-Natal 1998(1) SA 765 (CC).
[10] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC).
[11] Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC).
[12] Khosa v. Minister of Social Development, 2004(6) BCLR 569 (CC).
[13] Mazibuko and Others v. City of Johannesburg and Others, 2009, SA 592 (CC).
[14] Ellie Palmer, "Introduction", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 2-3.

Daniel M. Brinks in 2008 “Courting Social Justice-Judicial Enforcement of Social and Economic Rights in the Developing World” is important for the purposes of this paper because the chapter on South Africa contains analysis of socio-economic rights cases litigated before various provincial and local divisions of the High Court. This novel research contains conclusions regarding emerging trends in South Africa’s socio-economic rights adjudication.

Other materials used are international instruments and legal documents of the two countries, as well as other books and scholarly articles.

Chapter I Theoretical framework

The first chapter of this paper will address the issue of the justiciability of socio-economic rights generically, constituting itself into the theoretical framework for the comparative analysis of the United Kingdom and South Africa. It will give an overview of the main concepts, themes and ideas which heat the debate about the adjudication of socio-economic rights. The literature review analyzed will provide insights into the impact of the traditional classification of rights upon the judicial involvement into the policy process. Reference will be made to the institutional capacity and legitimacy of courts in adjudicating socio-economic rights. The issue of the effect of constitutionalzing socio-economic rights with view to the tensioned relation between socio-economic rights, constitutional law and democratic deliberation will also be tackled.

1.1. Arguments for and against judicial enforcement of socio-economic rights

Justiciability has been defined by Geoffrey Marshall as "the aptness of a question for judicial resolution"[15]. The concept has two meanings: one is related to whether the law recognizes or denies jurisdiction to adjudicate the question and the other to whether a court ought to adjudicate a given issue. When it comes to socio-economic rights, there are three main arguments against their judicial enforcement. The first argument is related to the fact that socio-economic rights are qualitatively different from civil and political rights and this makes them prone to difficult, if not impossible, judicial enforcement. The second one concerns the fact that judicial enforcement of second generation rights is considered to be anti-democratic. Also, the judicial enforcement of socio-economic rights is said not to be compatible with the separation of powers doctrine. [16]

When it comes to recognition by the law, the question of whether socio-economic rights belong in a constitution divides the arguments into practical ones (whether socio-economic rights are judicially enforceable) and philosophical ones (whether placing socio-economic rights in a constitution is consistent with the establishment of a free, democratic, market oriented society).[17] In other words, the first question deals with the dichotomy between positive and negative rights, whereas the second with the kind of society that is most desirable.

[15] Geoffrey Marshall, "Justiciability" in *Oxford Essays in Jurisprudence,* A.G. Guest (ed.), Oxford: OUP, 1961, p.265.
[16] Siri Gloppen, "Courts and Social Transformation: An analytical framework", in *Courts and Social transformations in New Democracies: An Institutional Voice for the Poor,* Ashgate, 2006, p. 39.
[17] Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?* American University Journal of International Law and Policy 1233, Summer 1995.

Socio-economic rights are considered to differ significantly from civil and political rights and due to these differences they are labeled as ill-suited for judicial enforcement, them being quintessentially political by nature. Civil and political rights are considered to give rise only to duties of non-interference or restraint, while socio-economic rights are deemed to impose positive duties on the State. The first generation rights are deemed to be immediately enforceable, cost free and determinate while the second characterized as open-ended standards, programmatic and requiring states to provide resources.[18] Furthermore, there are authors who believe that the existence of constitutionally enshrined rights will remove socio-economic issues from being decided through the democratic process.[19] Also, it is implied that if, even though constitutionally guaranteed, socio economic rights are not fulfilled, the notion of all rights will become depreciated and so would the rule of law itself.[20] If the constitution promises rights that government does not fulfill, then such rights are in reality not guaranteed and should not be called rights. It has also been suggested that the presence of positive rights into the constitution will encourage the sense of entitlement and discourage individual initiative.[21] However, these are mere speculations and there is no evidence to support the idea that the non-enforceability of some rights prejudices the enforcement of others.[22] Instead, by enshrining rights, constitutions offer a standard by which societies can measure their progress toward goals they themselves have set. Constitutional rights also offer grounds

[18] Sandra Fredman, Murray Wesson, "Social, Economic and Cultural Rights" in FELDMAN D. (ed.), *English Public Law*, (2nd ed.), Oxford University Press, Oxford, 2009.
[19] Wiktor Osiatynski, "Introduction", in *Re-thinking Socio-economic rights in an Insecure World*, Nsongurua Udombana, Violeta Besirevic, (eds.), CEU Center for Human Rights, 2006, p. 3.
[20] Ibid., p. 3.
[21] Ibid., p. 4.
[22] Lauren Paremoer, Courtney Jung, *The Role of Social and Economic Rights in Supporting Opposition in Post-Apartheid South Africa*, April 2009, paper presented during the 17th Annual Conference on 'The Individual vs. the State' held at Central European University, Budapest-12-13 June 2009, p. 4.

upon which oppositions can constitute and by which they can offer a critique of government policy with internal legitimacy. By providing the conditions for domestic oppositions to take root, constitutionalism may open up, rather than close down the space of politics.[23]

Nowadays, some commentators reject the clear-cut dichotomy between civil and political and socio-economic rights, such a division being viewed as rather simplistic. It has been proven that civil and political rights also have resource implications and that both set of rights give rise to positive and negative duties alike.[24] The emerging jurisprudence of the European Court of Human Rights (ECHR) demonstrates the evolution of positive duties generated by the civil and political rights enshrined in the Convention.[25] Fredman argues that instead of a division between civil and political rights it would be more useful to focus on the nature of the obligation generated by the different rights.[26] Both rights give rise to various obligations upon the state: duties of restraint, duties to protect the individuals against breach of their rights by other individuals and duties to fulfill the right directly or through facilitation.[27] They both generate clusters of obligations at the primary, secondary and tertiary levels. Therefore, she emphasizes that it

[23] Ibid.,p.37.
[24] For example, the right to vote requires state expenditure to provide electoral machinery- in Sandra Fredman, Murray Wesson, "Social, Economic and Cultural Rights" in FELDMAN D. (ed.), *English Public Law*, (forthcoming), p. 6, see also Cass R. Sustein, *Designing democracy: What Constitutions Do*, New York: Oxford University Press, 2001, p. 222-the author argues that even the most conventional and non-controversial rights such as property rights need significant tax payer support.
[25] Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford; Portland, Or.: Hart, 2004.
[26] Sandra Fredman, *Human Rights Transformed, Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 390.
[27] Ibid., p. 390.

is not the nature of the right, but rather the type of obligation that raises problems of justiciability[28].

Identifying what are the corresponding duties- especially at the secondary and tertiary levels- might become difficult if the content of the right cannot be defined. However, the authors emphasizes that the indeterminacy of socio-economic rights can be overstated and that the difficulties in interpretation are not greater than those facing courts in interpreting civil and political rights such as the right to privacy or the right to life.[29]

So far, the fallacies of civil and political versus socio-economic rights dichotomy have been accepted at the theoretical level. However, the distinctions between first and second generation rights persist in practice. An explanation of this situation might be what Forman calls "the ideological roots of the non-justiciability of socio-economic rights".[30] The author argues that for policy makers and judges, the distinction between pragmatism and ideology has become blurred.[31]

It is by now accepted that the positive/negative duties dichotomy characterizes the liberal, non-interventionist state, which promotes individual autonomy understood as freedom from state interference. The philosophy of the liberal state regarding the relation between the state and the individual is that the state should only protect individual freedoms and private property as well as economic laws that promote free markets as the means to achieve equitable material distribution.[32] On the other hand, socio-economic

[28] Ibid., p. 391.
[29] Sandra Fredman, Murray Wesson, "Social, Economic and Cultural Rights" in FELDMAN D. (ed.), *English Public Law*, (forthcoming), p. 8.
[30] Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice through South African's Right to Health Jurisprudence*, in Medicine and Law, Israel, volume 27, number 3, 2008, p. 664.
[31] Ibid., p.664.
[32] Ibid., p.664.

rights are founded on the notion of "freedom from want and fear"- the state being viewed as essential to the maintenance of liberty and therefore required to take positive action on its behalf. [33] These two notions of freedom are believed to be mutually exclusive.

Pieterse points out that the constitutional guarantee of socio-economic rights is viewed as ideological, because it "politicizes" constitutionalism and the judicial task.[34] Nevertheless, he argues that "neutral constitutionalism" and the judicial deference associated with it serve nothing but to sustain classical liberal values and structures, as well as the inequalities associated with them.[35] Furthermore, the libertarian political philosophy also advocates for civil liberties over socio-economic rights and against transformative adjudication. The inequalities generated by the liberal economy and the societal structures that reinforce them are depicted as normal.[36]

The justiciability of socio-economic rights involves a discussion about what constitutes good decision-making about fundamental rights. Traditionally, it has been the legislature's role to give content to human rights through legal and policy frameworks. However, due to changes in the legislative and executive dynamics, the role of the judiciary in this field-and many others- has changed.[37] Therefore, the separation of powers doctrine is central to the question of justiciability of socio-economic rights.[38] Over time the doctrine has been criticized as too "pure"- being rarely applied in practice

[33] In his famous Four Freedoms speech delivered in 1941, Franklin D. Roosevelt stated that freedom depends not only on the absence of interference on behalf of the state, but also on the extent to which individuals are able to exercise their rights.
[34] Marius Pieterse, *Coming to terms with judicial enforcement of socio-economic rights*, South African Journal on Human Rights, 383, 2004, p. 396.
[35] Ibid, p. 398.
[36] For a harsh criticism related to the responsibility of the American political and legal system for causing poverty, see Lucy A. Williams, "Welfare & Legal Entitlements: The Social Roots of Poverty" in 3 David Kairys (ed.), The Politics of Law: a Progressive Critique, New York, Basic Books, 1998, pp. 569-590.
[37] Marius Pieterse, *Coming to terms with judicial enforcement of socio-economic rights*, South African Journal on Human Rights, 383, 2004, p. 386.
[38] Ibid., p. 390.

and not defended in theory.[39] It has been argued that changes in the political landscape have necessitated the re-thinking of its boundaries. The modern conceptualization of the doctrine has accommodated the institution of rights-based judicial review. [40]

So far, there is no conclusive evidence to suggest that either courts or legislatures are better at protecting individual rights.[41] Lever emphasizes that both proponents and opponents of judicial review value rights and seek to protect them and the issue at stake is not whether rights should be protected but how such protection should be institutionalized.[42] The debate revolves around the proper role of the judiciary and the most serious objection against justiciable socio-economic rights concerns the lack of democratic legitimacy and institutional capacity of courts. On the one hand, the issue of court institutional legitimacy involves a discussion about ideological arguments such as democracy, majoritarianism and judicial accountability; on the other hand judicial competence in socio-economic rights matters relate to limits of the judicial skills and problems posed by polycentricity.

1.2. Court Institutional Legitimacy

Jeremy's Waldron's "legislative legitimacy thesis" has been criticized as depending on an exaggerated importance given to voting as the legitimizing power in a democratic society and also for the idealistic view the author has on democratic participation.[43] Waldron points out that because judges are not elected and thus not

[39] Ibid., p. 386.
[40] Ibid., p. 384.
[41] Annabelle Lever, *Is Judicial Review Undemocratic,* in Public Law Summer 2007, p. 281.
[42] Ibid., p. 282.
[43] Ibid. p. 287.

directly accountable they cannot strike down legislation or policy made by the democratic branches. [44] Moreover, judges themselves oppose the idea of enforcement of socio-economic rights by resort to arguments from the democratic theory. They argue that adjudicating such rights would politicize the judiciary, undermine their ability to generate trust as an independent and impartial arbiter and tempt those in power to interfere with the independence of the judiciary.[45] Mechanisms for holding the judiciary accountable do exist. They refer to the public nature of judicial hearings, judicial reason giving in judgments, the judicial appointment process and the doctrine of stare decisis.[46]

Fredman also criticizes Waldron's theory as being based on the questionable assumption according to which justiciabilty gives judges a non-revisable power.[47] She argues that positive duties can be justiciable in a meaningful way without judges having the last word and gives the British Human Rights Act as the leading example in establishing collaboration in the field of human rights in order to provide better protection and shared responsibility.[48] According to her, positive human rights duties have the potential to strengthen democracy and the real challenge consists in formulating a democratically justifiable role for the courts[49]. The role of the courts can be legitimate to the extent that they can fulfill an auxiliary role in respect to accountability, participation and equality in a democratic society.[50]

[44] Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale Law Journals 1346, 2006.
[45] Siri Gloppen, "Courts and Social Transformation: An analytical framework", in *Courts and Social transformations in New Democracies: An Institutional Voice for the Poor*, Roberto Gargarella, Pilar Domingo, Theunis Roux, (ed.), Aldershot Ashgate, 2006, p. 39.
[46] Annabelle Lever, *Is Judicial Review Undemocratic*, in Public Law Summer 2007, p. 290.
[47] Sandra Fredman, *Human Rights Transformed, Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 103.
[48] Section 3 to section 7 of the Human Rights Act 1998.
[49] Ibid., p. 100.
[50] Ibid., p. 103.

The author argues that courts can enforce the duty of political representatives to account to their electorate by justifying their actions on the basis of arguments. This way, courts can play a powerful role in enforcing positive duties without undermining democracy.[51] She further states that even though courts might regard decisions as too polycentric for judges to handle, in the context of human rights, their very complexity might make it even more important to reinforce the duty of explanation.[52] Furthermore, courts can encourage decision-makers to take decisions in a deliberative manner, by requiring them to lay out the reasons and the process of reaching the decisions and can stimulate participatory democracy enabling people to act and counter vested rights. The legal process compels the state to subject its decisions to public debate- potentially strengthening the democratic process.[53] Another democratic role for the judiciary consists in remedying the lack of representation of minorities in the political process.[54]

1.2. Court institutional capacity

Opponents of judicial review argue that socio-economic rights should not be legal rights because judges would have to adjudicate polycentric issues. In other words, disputes involving claims to health, education, social security or housing are raised in the context of resource allocation which would require judges to get involved in the distribution of limited resources and also to identify what matters are worthy of prioritization.[55]

[51] Ibid., 103.
[52] Ibid, p. 103.
[53] Ibid., p. 105.
[54] *United States v. Carolene Products Co., 304 U.S. 144(1938)*, in famous footnote 4, Justice Stone has established that the function of the judicial review should be "representation-reinforcing".
[55] Jeff A. King, *The pervasiveness of polycentricity*, in Public Law, spring 2008, p. 104.

Lon Fuller argues that resource allocation disputes should not be justicibale, seeing a direct link between policenticity and justiciability.[56] According to his view, adjudicating polycentric issues will result in decisions that would affect unknown numbers of interested parties. Polycentric issues are difficult to adjudicate because they are complex and understood with difficulty. The nature of the judicial proceeding- which involves that only two parties appear before a judge, its adversarial nature, the limits on the quantity and type of evidence before the court- make litigation unsuitable for the resolution of polycentric issues. Therefore, not all affected parties can be part of the proceedings and the consequences of the decisions cannot be foreseen. It would be difficult for courts to know who will be affected by a change in one relationship within an interconnected system. Moreover, because they are not politically accountable, courts are deemed to be ill suited to choose between policy options. They lack the economic expertise in deciding matters with budgetary consequences and are unable to execute findings themselves but are dependant on executive cooperation for its judgments to have credibility and impact.[57]

However, almost all disputes before courts involve polycentric elements.[58]The polycentricity of a dispute cannot rule out judicial involvement completely. There can be degrees of judicial involvement in polycentric matters, depending on the context of each case. Jeff King offers examples from the British tax case-law to show that judges

[56] Ibid., p. 104.
[57] Marius Pieterse, *Coming to terms with judicial enforcement of socio-economic rights*, South African Journal on Human Rights, 383, 2004, p. 393.
[58] Ibid., p.394.

adjudicate polycentric issues in such cases, without questioning their competency to do so but rather viewing themselves as performing an important supervisory jurisdiction.[59]

The author argues that polycenticity is a feature of many areas of adjudication and that the contrast between judicial review of tax law cases and judicial review of social welfare allocation means that the argument of polycentricism is used as an excuse for limiting judicial review.[60] The author believes that there is inconsistency regarding the use of the polycentricity argument in the context of different areas of law. Therefore, there is need for clarifying when it is that a legal issue is polycentric, to explain why courts adjudicate certain polycentric issues and how the negative impact of such a process could be minimized.[61] Although the idea of polycentricity has so far justified judicial restraint in public law, it can no longer be relied upon without noticing its contradictions. By arguing that the interpretation of taxation statutes can have significant ramifications for public revenue and on the operation of markets or large transactions Jeff King has brought a counterargument to Fuller's theory, proving that courts can make decisions that affect the interest of several unrepresented persons. However, even though polycentricity is not relevant to the issue of justiciability, it is still relevant for the standard of review applied in reviewing decisions or policies.

[59] Jeff A. King, *The pervasiveness of polycentricity*, in Public Law, spring 2008, p. 106.
[60] Ibid., p. 106.
[61] Ibid., p. 114.

1.4. A theory of constitutional cooperation

John Rawls believed that democratic governments have the positive duty to respect and protect socio-economic rights as part of its social contract with its citizens.[62] More recently, scholars have called for judicial review of government inaction with regard to socio-economic rights. [63]

The conclusion of a research which aimed at studying the relationship between constitutional commitment to socio-economic rights and the size of government and redistribution policy in 68 constitutions around the world shows that constitutional protection has no meaning for policy when it comes to protecting socio-economic rights[64]. With the exception of a positive correlation between constitutional commitment to social security and contribution rates to social security, the study indicates that the presence of socio-economic rights in the constitutions around the world is meaningless, as they do not influence government policies.

Although there is disagreement in society over the priority to be given to rights based claims and even though they should be resolved according to majoritarian principles of democracy, the democratic processes must be deliberative and inclusive.[65] The legislatures are popularly elected large bodies whose members lack the technical expertise necessary for the effective socio-economic policymaking. Also, the constant variation in legislative membership compromises the consistent formulation,

[62] John Rawls, *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.132.
[63] Ibid., p. 132.
[64] Avi Ben-Bassat, Momi Dahan, *Social rights in the constitution and in practice*, in Journal of Comparative Economics, 36 (2008), p. 118.
[65] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, 5: 391, p.399.

interpretation and enforcement of rights by way of the legislative process.[66] Courts can cover for this shortcoming, since they can come up with individual solutions when there are legislative and executive delays and could lend content to a socio-economic right and impose standards of compliance as they are experts in interpretation. In addition, the legal process is rational and deliberative, producing fair and reasoned decisions.[67]

Dixon explains that government inaction or "legislative blind-spots" can arise out of many reasons. One of them has to do with the fact that legislatures do not foresee the application of laws in rights infringing ways because of the time pressures in the process of legislative deliberation (blind-spots of application).[68] Another reason is that they fail to anticipate the impact of laws on the enjoyment of rights (blinds spots of perspective). [69] Most of the times the elected body is preoccupied with achieving a particular legislative objective and it subject to blind spots as to the ways in which a rights based claim might be accommodated at tolerably low-cost to the relevant legislative objective (blind-spots of accommodation).[70] The legislature can fail to address rights based claims because of other competing legislative priorities (priority driven burden of inertia). Also, the realization of rights is most often hampered by a combination of administrative delay and a lack of legislative oversight of administrative action (bureaucratic burdens of inertia).[71]

The author pleads for a commitment to the idea of constitutional dialogue between courts and legislatures, as "a form of cooperative constitutionalism which acknowledges the full potential and limits of both the legislative and judicial

[66] Marius Pieterse, *Coming to terms with judicial enforcement of socio-economic rights*, South African Journal on Human Rights, 383, 2004, p. 393.
[67] Ibid., 395.
[68] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, 5: 391, p. 400.
[69] Ibid., p.400.
[70] Ibid., p. 400.
[71] Ibid., p.400.

responsiveness in the process of constitutional rights interpretation and enforcement".[72] The theory of constitutional dialogue is not new to constitutional scholars, but has never been applied to the context of socio-economic rights. Her argument is that, in the process of cooperation, courts are regarded as having an important capacity and responsibility to counteracting what the author calls "blind-spots" and "burdens of inertia" in the legislative process, while the legislature is also willing to be active in counteracting the errors of constitutional judgment of courts as support for particular rights based claims.

A theory of constitutional cooperation between courts and legislatures acknowledges that even in well-functioning democracies, majoritarian political processes are subject to "blind-spots" and "burdens of inertia".

Part of the debate over judicial legitimacy revolves around the issue of what kind of judicial review is appropriate when governments fail to deliver on the constitutional promise.[73] Dixon argues that the question is whether courts should use a strong form of judicial review-understood as a strong remedial approach or whether the court should adopt a weak form of judicial review-understood as weak remedial approach but strong substantive approach (giving content to the right in question). [74]

The author explains that if courts adopt a weak rights rather than weak remedies approach, courts will not be able to take part in the process of normative reasoning which could prevent the legislature's "blinds spots of perspective" and "priority-driven burdens of inertia". [75] If, on the other hand, courts adopt a weak remedies rather than a weak

[72] Ibid., p. 391.
[73] Michael Tolley, *The Judicial Enforcement of Socio-Economic Rights in Comparative Perspective*, paper prepared for delivery at the 2008 annual meeting of the American Political Science Association, Boston, Massachusetts, in August 29-31, 2008.
[74] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, 5: 391, p. 391.
[75] Ibid., p. 409.

rights approach, they will not be able to counter legislative inertia such as the coalition-driven and bureaucratic kind. For these types of inertia the remedy employed by the Court has to be time-sensitive to be effective.[76]Otherwise, political officials with other priorities will not feel compelled to give priority to a certain issue. Moreover, the efficacy of judicial intervention will be undermined if bureaucratic burdens of inertia arise and non-coercive relief is adopted. This approach will place the burden on the plaintiff to monitor compliance with the decision, which is an unrealistic thing to do most of the times[77]. Ultimately, whether a court adopts a strong remedies or a strong rights approach is highly dependent on context. However, regardless of the disagreement about the content and priority to be given to constitutional rights commitments, a theory of cooperative constitutionalism is worth developing in the sphere of socio-economic rights, because it acknowledges both the potential and limits of legislative and judicial constitutionalism.[78]

The characteristics of a country's legal and political landscape contribute significantly to whether or not socio-economic rights can be enhanced. The further chapters address the enforceability of socio-economic rights in the United Kingdom and South Africa. The analysis of the variations in these two jurisdictions will answer questions about the institutional conditions that favor judicial involvement in and judicial impact on socio-economic rights.

[76] Ibid., p. 409.
[77] Ibid., p. 410.
[78] Ibid., p. 417.

Chapter 2 Socio-economic rights in the United Kingdom

This chapter will address issues such as: the nature of United Kingdom's constitution, the extent to which socio-economic rights can be protected through civil and political rights enshrined in the European Convention of Human Rights and incorporated by the Human Rights Act in 1998, the approach of the United Kingdom courts to cases involving resource allocation and their response to the potential of protecting socio-economic rights under the European Convention of Human Rights. Although traditionally a primary focus of the socio-economic rights movement in the United Kingdom, labor rights do not constitute a subject of this chapter.[79] The emphasis will be put on those cases which deal with discretionary entitlements to health and welfare benefits.

2.1 The British constitutional framework

The United Kingdom unwritten Constitution is partly made up of general sources of law such as Acts of Parliament, the laws and customs of Parliament and the common law- in the form of decisions of the higher courts. The traditional view in British constitutional law holds that Acts of Parliament are the highest form of law.[80] Parliamentary supremacy is a legal principle; therefore the Acts of Parliament are binding and enforceable through courts.[81]

[79] Sandra Fredman, *The New Rights: Labor Law and Ideology in the Thatcher Years*, 1992, Oxford Journal of Legal Studies, p. 24.
[80] Ibid., p. 39.
[81] J. Alder, "Parliamentary supremacy", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 171.

Welfare and health entitlements have always been considered as belonging to the executive and legislative discretion, being granted mere statutory protection.[82] This legal status, especially within the background of a country with an unwritten constitution, means that courts have the tendency to adopt a deferential approach in cases concerning resource allocation-applying the Wednesbury reasonableness principle of judicial review.[83] In the filed of socio-economic rights, courts have preferred strict statutory interpretation and all of the international conventions dealing with socio-economic rights (Council of Europe's Social Charter, the ILO Conventions or the International Covenant on Social, Economic and Cultural Rights) have been underutilized[84]. However, ever since the adoption of the Human Rights Act 1998 (hereinafter HRA)- which incorporates the European Convention of Human Rights (ECHR) into law- it is no longer possible to regard socio-economic rights as a matter of policy alone. The question which heats much debate is what would be the appropriate role of the courts in furthering such rights.

Not only is the protection of socio-economic rights a delicate matter in Great Britain, but human rights as a legal issue generally[85]. Traditionally, the common law notion of negative freedom, which embodies the liberal perspective that everyone is free to do whatever the law does not specifically prohibit, assumed that all freedoms were of equal

[82] Fons Coomans, "Some introductory remarks on the justiciablity of economic and social rights in a comparative constitutional context", in *Justiciability of Economic and Social Rights, Experiences from domestic systems, Fons, Coomans* (eds.), Intersentia, Antwerpen, Oxford, 2006, p. 3.
[83] J. Alder, "Judicial Review: Grounds of Review, I: Illegality and ultra vires", in *Constitutional and Administrative Law*", Palgrave Macmillan, 2005, p. 362.
[84] Ellie Palmer, "The Role of the Courts in the Protection of Socio-Economic Rights: International and Domestic Perspectives", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 17.
[85] J. Adler, "Human Rights and Civil Liberties", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 419.

value.[86] There was no distinction between rights according to their substance, but only according to their source, priority being given to Acts of Parliament at the expense of common law. Thus, the British constitutional tradition has been built on the principle of liberty-mainly economic liberty. There was almost no recognition of the principle of equality as a constitutional principle. Gradually, through legislation, fundamental social values have also been established, modifying the principles of liberty upon which the common law was founded. This process is believed to have been reversed by the effect of the Human Rights Act, which creates a hierarchy of rights in British constitutional law by reasserting the traditional liberal principles of the Constitution and giving them legal priority. Some scholars suggest that constitutional balance could be achieved if courts would be willing to have regard, in order to develop principles of equality and solidarity, to other international treaties in the interpretation of the European Convention of Human Rights, such as the ILO Convention 87 or the Council of Europe's Social Charter of 1961.

However, the Human Rights Act does have potential to develop a creative interpretation of ECHR obligations in matters of socio-economic rights protection.[87]

2.2. The meaning of the Human Rights Act 1998

When it comes to the debate about human rights in the United Kingdom, there are generally three interrelated issues.[88] These are: the question of what counts as fundamental rights, as well as the questions of what are the legal basis for a statement of fundamental

[86] J. Alder, "Human Rights and Civil Liberties", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 423.
[87] Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, Oxford Legal Studies Research Papers, No. 38/2006, in Public Law, p. 498.
[88] J. Adler, "Human Rights and Civil Liberties", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 419.

rights and who should have the last word in disputes relating to fundamental rights. In other words, what is the best mechanism to protect human rights? For the purpose of this chapter, the Human Rights Act 1998 will be analyzed, in terms of structure and meaning, in order to provide possible answers to the third issue.

The Act is described as a partnership between the three branches of government, its provisions aiming at their collaboration in the field of human rights in order to provide better protection and shared responsibility. Concerning the legislature, courts cannot override an Act of Parliament (section 3 (2) b), parliamentary sovereignty being thus preserved. If an Act of Parliament violates a Convention right, the court can only make a declaration of incompatibility which invites the Parliament or the executive to change the law. As for the executive as public authority, it is liable in the courts for failing to comply with a Convention right unless this is required by a statute or other primary legislation (section 6 and section 7). The courts are required to interpret all legislation "so far as it is possible to do so" in order to comply with convention rights (section 3) and must themselves comply with convention rights. The fact that they count as public authorities (section 6 (3) (a)) means that in addition to the judicial power to interpret legislation in compliance with the European Convention of Human Rights, they have an obligation to develop common law. For example, in a private law dispute, a court is required to apply the law horizontally in order to be compatible with the Convention.[89] One of the most controversial issues that have arisen since the enactment of section 6 is the extent to which

[89] Ellie Palmer, "Courts, the UK Constitution and the Human Rights Act 1998", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 110.

the definition of a "hybrid public authority" in section 6 (3) (b) applies to private actors performing public functions. [90]

Within the background of continuing challenge to the doctrine of parliamentary sovereignty[91], some authors argue that a line must be drawn between acts of legitimate judicial interpretation and those who go beyond the interpretative power, into the sphere of judicial law-making.[92] The issue that section 3 raises concerns the boundaries of interpretative possibility and what should be the proper distribution of power between courts and Parliament for an effective implementation of human rights in the United Kingdom.

Thus, the Human Rights Act redefines the boundaries of legitimate intervention in relation to government's acts and decisions. Although the doctrine of parliamentary sovereignty requires that courts attribute meaning to the legislation by searching the intention of the Parliament in the language of the text, HRA gives them power to adopt a purposive approach. However, there is no judicial power to strike down legislation that does not conform to the Convention, there is only a non-remedial power provided for in section 4, allowing the courts to make a declaration of incompatibility, although this does not affect the validity, operation or enforcement of the provision. Moreover, according to section 2 of the Act courts are invited to take into consideration the Strasbourg case-law but they are not bound to follow it. Therefore, it follows that the jurisprudence of the European

[90] J. Alder, "Human Rights and Civil Liberties", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 438.
[91] Mark Elliot, *United Kingdom: Parliamentary sovereignty under pressure*, in International Journal of Constitutional Law, vol. 2, issue 3, 2004, p. 545.
[92] Ibid, p. 119.

Court on Human Rights on positive obligations and welfare rights- even though not binding- has persuasive authority.[93]

Another important aspect of the Act is that it provides for the availability of effective remedies. Although article 13 of the European Convention has not been incorporated, HRA authorizes a court to grant the relief or remedy or an order which it considers just and appropriate if it found that an act or a proposed act of an authority is unlawful, in that it breaches Convention rights.[94]

It has been argued that the democratic dilemma under the Human Rights Act is different from that of judges faced with the power to strike down legislation and therefore remove the issue from the political process.[95] Courts in the United Kingdom have the potential to feed into the political process by making a declaration of incompatibility that could reopen the political debate, which would be enriched by insights generated by the judicial deliberation. Fears have been expressed that although a declaration of incompatibly creates an opportunity for the legislative or executive branch to correct an infringement upon a right, there is no guarantee that they will take advantage of this opportunity.[96] Nevertheless, the political effect of such a declaration is considered to have been profound. Up to date it is considered that the government has changed most of the questionable provisions in the laws in accordance with such declarations. [97]

[93] Jeff A. King, "United Kingdom", in Malcolm Langford (ed.), Social rights jurisprudence: emerging trends in international and comparative law, Cambridge [UK]; New York: Cambridge University Press, 2009, p. 284.
[94] See Section 8 of the Human Rights Act.
[95] Sandra Fredman, "Justicibility and the Role of the Courts", in "*Human Rights Transformed, Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 101.
[96] Annabelle Lever, *Is Judicial Review Undemocratic?*, in Public Law Summer 2007, p. 294.
[97] Jeff A. King, "United Kingdom", in Malcolm Langford (ed.), Social rights jurisprudence: emerging trends in international and comparative law, Cambridge [UK]; New York: Cambridge University Press, 2009, p. 285.

Until the incorporation of the Human Rights Act into law, courts in the United Kingdom have been analyzing cases related to access to social provisions through ordinary procedures and principles of administrative law.[98] This situation changed when the Act was adopted, because it gave courts the power to scrutinize legislation and decisions of public authorities for their conformity to the standards of the European Convention of Human Rights. Ever since its enactment scholars and judges alike have tested the extent to which, in the absence of express constitutional protection of socio-economic rights, the negative rights of the ECHR can be used to impose positive obligations on governments to fulfill socio-economic needs of the individuals.[99] By now, the Strasbourg court has recognized that "in order to secure to everyone within their jurisdiction the rights and freedoms set out in the Convention" (article 1) the protection of the rights enshrined therein requires a positive action on behalf of the state as well.[100] This chapter will analyze the potential for protecting socio-economic rights through the use of article 3 (the absolute right of not being subjected to torture or to inhuman or degrading treatment), article 8 (the right to respect for his private and family life, his home and his correspondence) and article 14 (prohibition of discrimination).

However, before analyzing the potential of courts to develop socio-economic rights under the Human Rights Act, a short overview of how courts have used the ultra vires

[98]Ellie Palmer, "From need to "choice" in public services: the Boundaries of Judicial Intervention in Prioritization Disputes", in Judicial *Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 197.
[99] Ellie Palmer, "Introduction", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 4.
[100] See K. Starmer, "Positive Obligations under the Convention", in J. Jowell, J. Cooper (eds.), *Understanding Human Rights Principles*, Oxford, Hart, 2001.

paradigm of review[101] to determine the limits of their legitimate intervention in the rationing of health and welfare services under the same Act will be provided.

2.3. Justiciability of socio-economic rights: the role of courts

The purpose of judicial review in the United Kingdom has always been to police the government's power in accordance with the public law principles of irrationality/unreasonableness, legality and procedural property.[102] Its constitutional role has been that of supporting the Rule of Law and parliamentary supremacy.

Although there appears to be no principle in the English law according to which courts are prevented from interfering in cases involving resource allocations, they have traditionally been applying the deferential Wednesbury standard of judicial review in decisions concerning socio-economic issues.[103] However, the adoption of the Human Rights Act is considered to have challenged the ultra vires doctrine and the sovereignty of Parliament as the constitutional foundations of judicial review.[104]

[101] The *ultra vires* doctrine relies on the doctrine of parliamentary supremacy and assumes that because government powers are created by an Act of Parliament, the courts role should be limited to ensuring that those powers are exercised within the limits set out by Parliament, in J. Alder, "Judicial Review: Grounds of review, I: Illegality and ultra vires", in *Constitutional and Administrative Law*, Palgrave Macmillan, 2005, p. 359.

[102] Lord Diplock has classified the three grounds of judicial review in three categories in the famous case of *Council of Civil Service unions v. Minister for the Civil Service [1985], AC 374*: illegality-applies to test if the government acted in accordance with the provisions of the law (para. 16); irrationality/ Wednesbury unreasonableness applies to a decision that "is so outrageous (…) that no sensible person who had applied his mind to the question to be decided could have arrived at it" (para. 17), and procedural property which refers to a failure to comply with a procedural requirement (para. 17).

[103] Ellie Palmer, "The Role of Courts in the Domestic Protection of Socio-Economic Rights: the Unwritten Constitution of the UK", in *Justiciability of Economic and Social Rights, Experiences from domestic systems, Fons, Coomans* (eds.), Intersentia, Antwerpen, Oxford, 2006, p. 144-146.

[104] Elizabeth Palmer, *Resource Allocation, Welfare Rights-Mapping the Boundaries of Judicial Control in Public Administrative Law*, Oxford Journal of Legal Studies, Vol. 20, No. 1, 2000, p. 64.

2.3.1 Socio-economic rights and principles of English administrative law

The classical approach adopted in relation to socio-economic rights has been that they should be fulfilled through social policy, because courts lack the necessary legitimacy to deal with such issues. The ultra vires approach to judicial review emphasizes that parliamentary sovereignty prevails over common law.

The case of R v. Cambridge Health Authority, ex parte B is considered the official position of courts regarding the justiciability of socio-economic rights.[105] The case concerned the refusal of a health authority to provide further treatment to a young girl with leukemia on the grounds that the expenditure involved was not an effective use of resource.[106] The Court of Appeal unanimously held that it was not in a position to take a stance on the correctness of the decision: "Difficult and agonizing 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 criticized for not advancing before the court". [107]

Nonetheless, in the field of health policy and public law there has been support for the judicial contribution to decisions about the allocation of health resources, as a means of promoting and ensuring accountability in public decision making and of developing principles for the creation of an efficient manner of implementation of public policies.[108]Although the position adopted in R v. Cambridge Health Authority, ex parte B has been generally followed, on a number of limited cases courts have utilized and expanded

[105] Ibid., p. 210.
[106] R v. Cambridge Health District Health Authority, Ex parte B [1995] 1 WLR 898.
[107] Ibid., at para. 37.
[108] D. Longley, *Public Law and Health Service Accountability*, Buckingham, Open University Press, 1993.

public law principles to ensure that in the exercise of discretionary powers, national policies and the individual needs of the claimants are considered.[109]

In the case of R (on the application of Rodgers) v. Swindon Primary Care Trust**,** the claimant, who suffered from breast cancer, was refused funding for a drug (Herceptin) which might have been of use in her case, although the health authority had decided to make the drug available without regard to cost.[110] In judicial review proceedings the applicant argued that the application of the policy had been arbitrary since there was no rational basis for deciding what constituted exceptionality in her case. The Court of Appeal differentiated this case from R v. Cambridge Health Authority, ex parte B and since it did not consider it to be one about allocation of scarce resources, Sir Anthony Clarke M.R. considered that the decisions to refuse funding needed to be subjected to "rigorous scrutiny". [111] Although the Court did not order the decision makers to fund the treatment, the case emphasized that health care providers must apply and adopt clear and rational policies when making decisions about the funding of health treatment.

A very important case is R v. North and East Devon Health Authority, ex parte Coughlan because it expands the ordinary principles of judicial review, being illustrative of the capacity of courts to develop existing principles in accordance to their obligations to protect Convention rights.[112] The case concerned Ms. Coughlan and seven other severely disabled people who were moved in a long-term residential facility in 1993 and were promised that the new hospital would be their home for life. However, in 1996 the National

[109] Ellie Palmer, "From need to "choice" in public services: the Boundaries of Judicial Intervention in Prioritization Disputes", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 210.
[110] R (on the application of Rodgers) v. Swindon Primary Care Trust, [2006] EWCA Civ 392.
[111] Ibid., at para. 56.
[112] R v North and East Devon Health Authority, ex p Coughlan, [2002]2 WLR 622.

Health Authority (NHS) closed the new home down out of economic reasons. The Court of Appeal held that the closure of the hospital was in breach of the applicants' legitimate expectation and of article 8 of the ECHR.[113] The Court in this case intervened in a NHS resource allocation decision and used the principle of legitimate expectation to make a public authority keep open a residential center for a disabled person. Some of the points made in the decision show a willingness of the courts to develop judicial review standards that are concerned with the circumstances in which unfairness and arbitrariness of a decision of an authority amounts to an abuse of power.[114] The decision also recognizes the significance of context in determining the boundaries of judicial intervention in public law.[115] The Court applied a more searching standard of review and weighed the "requirement of fairness against any overriding interest relief upon to change the policy".[116] The ruling stressed that high priority must be given to the assessed needs of the vulnerable residents in the consultation process.[117] Therefore, in relation to R v. Cambridge Health Authority, ex parte B, the judgment handed down in Coughlan represents a development of the socio-economic jurisprudence, as it was held that the health authority needed to have an overriding public interest and compelling reasons in order to break the promise made to the applicant. This case is illustrative of the fact that English courts are willing to scrutinize resource allocation cases if a principle of administrative law justifies such a review. It shows that there is flexibility of judicial review. However, although other substantive legitimate expectations

[113] Ibid, at para. 72.
[114] Ibid., at para. 57.
[115] Elizabeth Palmer, *Should Public Health Be a Private Concern? Developing a Public Service Paradigm in English Law*, Oxford Journal of Legal Studies, Vol. 2, No. 4, p. 667.
[116] Ibid., at para. 57.
[117] Ellie Palmer, "From need to "choice" in public services: the Boundaries of Judicial Intervention in Prioritization Disputes", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 214.

cases followed Coughlan, the decision did not allow courts to scrutinize the fairness of resource allocation by public authorities more generally.[118]

The analysis of local authority resource allocation disputes, in which courts have had to interpret the scope of local authority discretionary duties, shows that they are still undecided about which course to take: whether to challenge the failures of the government and local authorities or rather stick to non-involvement in resource allocation matters.[119] Ever since the adoption of the Human Rights Act, it seems that almost all of the challenges founded on breach of local authority statutory duties show the reluctance of courts to exercise their powers of review under section 3 in accordance with fundamental rights in the ECHR.[120]

Although the administrative law model of judicial review is likely to remain the main judicial recourse for protecting socio-economic rights- there are a number of cases in which courts have applied careful scrutiny of statutory provisions and administrative action implicating resource allocation.

2.3.2 Protection of socio-economic rights under article 3 and 8 of ECHR

Lower courts in the UK are divided in what concerns the potential of Article 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment) and Article 8 (the right to respect for his private and family life, his home and his

[118] Ibid., p. 214.
[119] Ellie Palmer, "From need to "choice" in public services: the Boundaries of Judicial Intervention in Prioritization Disputes", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 224.
[120] Ibid., p. 224.

correspondence) of the ECHR to give rise to positive obligations in welfare needs contexts, particularly in cases involving state inaction.[121]

The extent to which article 3 of the ECHR requires states to provide a minimum level of welfare to the destitute has been the subject of controversial cases concerning the scope of section 55 (5) of the Nationality, Immigration and Asylum Act (NIAA) 2002.[122]

Section 55 (1) of the Act prohibits the Secretary of State from providing support to persons who are destitute if they fail to seek asylum as soon as reasonably possible after their arrival in the UK. However, section 55 (5) also permits him/her to provide necessary support in order to prevent a breach of an applicant's Convention rights. In 2006 there were over 650 asylum benefit cases in UK courts. In all of the cases the applicants had failed to claim asylum in time and they became destitute within the meaning of section 95 of the Immigration and Asylum Act 1999.[123]

Relying on article 3 of the ECHR and section 6 of the HRA, which prohibits the Secretary of State to act in a manner incompatible with the rights of the Convention, the courts faced with these cases had to deal with two issues. One was whether the Secretary of State can refuse support to destitute asylum seekers who do not have the certainty of food and shelter, and the other, if such circumstances existed, how they were to be defined and what procedures must be used to ensure that the Secretary of State does not deviate from

[121] Ellie Palmer, "Articles 3 and 8 ECHR: Failure to Provide and Positive Obligations in the Socio-Economic Sphere", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 241.
[122] Ibid., p. 254.
[123] "If he does not have adequate accommodation or the means of obtaining it (whether or not his essential living needs are met), or if he has adequate accommodation or the means of obtaining it, but cannot meet his essential living needs" - Immigration and Asylum Act 1999 at section 95.

them.[124] This situation culminated with the conjoined appeals in the case of R v. Secretary of State for the Home Department, ex parte Limbulea.[125]

It was in this case that the House of Lords considered for the first time the question of state obligations to prevent destitution, especially if it arises as a consequence of the statutory regime.[126] It was unanimously decided that section 55 of the Nationality, Immigration and Asylum Act 2002 implied a duty on behalf of the Secretary of State to take positive measures to ensure that the elementary needs of asylum seekers are met because the decision to withdraw support under section 55 (1) of the Act was an act caused by the Secretary of State, engaging article 3. Lord Scott even drew a distinction between failure to provide minimum level of social support in accordance to a lawful policy and the imposition of a statutory regime "on an individual, or on a class to which the individual belongs, barring that individual from basic social security and other state benefits to which he or she be entitled,

[124] Ibid, at section 95.

[125] Regina v Secretary of State for the Home Department (Appellant) ex *parte* Adam (FC) (Respondent), Regina v Secretary of State for the Home Department (Appellant) ex *parte* Limbuela (FC) (Respondent), Regina v Secretary of State for the Home Department (Appellant) ex *parte* Tesema (FC) (Respondent), [2005] UKHL 66.The two cases which conjoined Limbuela concerned: Adam, a Sudanese national who arrived in the United Kingdom on 15th of October 2003. He applied for asylum the following day, but the Secretary of State did not consider that he did so soon enough and denied him the financial support. Until he was granted interim relief, he spent almost a month in the Refugee Council. He had to leave the Council during the evenings, so he would spend his nights in a sleeping bag in a car outside the Council. His mental and physical health deteriorated and he claimed to have felt humiliated by having to live in a car park. By the time the case reached the House of Lords Mr. Adam had been recognized as a refugee. Being no longer an asylum-seeker, he had no claim for asylum support according to section 55 (5) of the 2002 Act. The case of the Tesema, the Ethiopian national, was similar, in that he arrived in the United Kingdom on 13 of August 2003, claiming asylum the day after, but the Secretary of State did not grant financial support because he applied too late. He applied immediately for judicial review, and he was granted it on 16th of February 2004. The appeal was decided in the applicant's favor. When the joined case reached the House of Lords he no longer had a claim for asylum support as he had been recognized as e refugee.

[126] Ibid. Mr. Limbulea was an Angolan national who sought asylum at the Home Office on 6 May 2003, claiming to have arrived in the UK the same day. He was initially provided with emergency accommodation by NASS, but it was withdrawn in accordance to section 55 (1) by the Secretary of State, considering that he had not claimed asylum as soon as possible. After being evicted from his accommodation, Limbulea slept outside a police station. He found a bed in a homeless shelter. He was asked to leave and applied for judicial review of the Secretary of State's decision.

were it not for that statutory regime"[127]. Moreover, the House of Lords made it clear that there can be no strict rules to determine the severity of deprivation that would constitute a breach of article 3 and refused to establish a minimum core standard. Therefore, it was held that the withdrawal of support from the destitute asylum seekers constituted "treatment" for the purpose of article 3. Although the Convention does not stipulate a right to a minimum standard of living it was held that if the statutory regime did not make provision for destitute asylum seekers, exclusion of late applicants constituted treatment under article 3.

In the Court, the appeals of the Secretary of State were dismissed. [128] The majority of opinions rejected the "wait and see" approach adopted by the lower courts, which requires an asylum seeker to prove severe illness and suffering before a breach of article 3 is recognized (a status called by courts as the Pretty threshold)[129]. General evidence that financial support was not going to be granted and that the individual was to be subjected to degrading treatment was considered to be enough.

This case is of crucial importance for the development of the United Kingdom case-law because it undermines the traditional distinction between negative and positive obligations. The House of Lords referred to the dissenting opinion of Laws LJ in the Court of Appeal, who was critical of the judicial intervention of the court into the political arena and the lack of legal analysis of the difference between positive and negative obligations in the context of article 3 ECHR.[130] His argument followed the classical distinction between positive and negative obligations, stating that while state violence cannot be justified unless

[127] Secretary of State for the Home Department v *Limbuela* & Others, [2005] UKHL 66, paragraph 67.
[128] Secretary of State for the Home Department v *Limbuela* & Ors [2004] EWCA Civ 540 (21 May 2004).
[129] "Where treatment humiliates and debases an individual showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear anguish or inferiority capable of breaking an individual's moral or physical resistance it may be characterized as degrading and also fall within the prohibition of article 3", in *Pretty v the United Kingdom*, application no. 2346/ 02, Strasbourg 29 April 2002, at para. 52.
[130] Secretary of State for the Home Department v *Limbuela* & Others, [2005] UKHL at para. 49.

it is lawful, the acts or omissions of the state which generate violence can be justified, if they arise in the execution or administration of lawful governmental policy. The House of Lords asserted that the question is not one of legal classifications of the circumstances which can give rise to positive or negative obligations, but rather one concerning whether the state is responsible or not for the harm caused.[131]

In deciding whether there has been a breach of Article 3 the Law Lords made an analysis of the legal structure as a whole. They reached the conclusion that denial of rights to a particular group was discriminatory (although article 14 of the ECHR was not used) and severe enough to be considered degrading and humiliating. They also drew attention to the fact that when failure to provide support, either by a statute that excludes or one that directly oppresses amounts to active treatment, the state can no longer argue that the matter belongs to the political branch, but it is open to judicial scrutiny.[132] As a result of the formulation of section 55 (5) of the NIAA 2002, courts did engage in a controversial policy dispute about government's responsibility to provide for the basic needs of vulnerable individuals.

The case of Anufrijeva v. Southwark London Borough Council deals with the potential of article 8 ECHR (right to respect for his private and family life, his home and his correspondence) to impose positive obligations in welfare needs contexts.[133] The three conjoined appeals raised the question of whether failure by public authorities to comply with

[131] Ibid, at para. 92.

[132] PALMER, Ellie, *Articles 3 and 8 ECHR: Failure to Provide and Positive Obligations in the Socio-Economic Sphere,* in "Judicial Review, Socio-Economic Rights and the Human Rights Act", Hart, Oxford and Portland, 2007, p. 270.

[133]*Anufrijeva v Southwark London Borough Council*, [2003] EWCA 1406. The three applications concerned individuals who came to the UK to seek asylum.The first case involved the Anufrijeva family, who claimed that Southwark Borough Council had infringed upon article 8 of the ECHR because it failed to meet the special accommodation needs under section 21 of the National Assistance Act (NAA) 1948. The second case concerned an asylum seeker from Libya who had been granted refugee status after 2 years after arriving in the UK. He claimed that due to late regognition, he had received inadequate financial support and suffered psychiatric injury. In the third case, the applicant claimed that the three year delay between his attainment of the refugee status and the granting of permission for his family to be reunited with him, infringed his right to respect for family life under article 8 of the ECHR.

statutory duties which entitled individuals to welfare benefits constituted a breach of article 8 ECHR. The Court had to decide whether maladministration by public authorities might constitute a breach of the same article.[134] Althouh Lord Woolf stated that article 8 could give rise to a positive obligation on the state to provide accommodation where family life was threatened (paragraph 11), he did not consider it was the situation in this case. He emphasized that if the law of the state imposes a positive obligation, the breach of that positive obligation will constitute breach of article 8 only if the impact in family life was serious and exceptional.[135] The claims examined in Anufrijeva were denied for failure to be sufficiently exceptional.

Although the Law Lord admitted that some developments in the European Court's jurisprudence existed, establishing potential liability for a breach of positive obligations under article 8 as a result of administrative failure, he concluded that the cases regarding welfare disputes brought under article 8, even if they concern failure by the local authorities to meet statutory obligations, can be excused on grounds of lack of resources. His reasoning was meant to discourage the use of article 8 to impose positive obligations on public authorities as a result of administrative failures, claiming that such a development would impact negatively the administration of justice. His main concern therefore was to limit the use of courts for claims of HRA damages in disputes with public authorities and to restrict the number of claimants as much as possible[136]. He emphasized that damages are already

[134] The first claimant alleged that the local authority had misinterpreted its duties to provide accommodation adapted to special needs. Also, it was emphasized that the denial of adequate shelter in one case and a substantial delay in admitting the refugee family in another constituted maladministration by public authorities.

[135] *Anufrijeva v Southwark London Borough Council*, [2003] EWCA 1406, at para. 81.

[136] Jeff A. King, "United Kingdom", in Malcolm Langford (ed.), Social rights jurisprudence: emerging trends in international and comparative law, Cambridge [UK]; New York: Cambridge University Press, 2009, p. 289.

available for breach of statutory duty in judicial review, by addressing the Ombudsman or an MP.

In both of the cases discussed above the issues at stake was the potential of Articles 3 and 8 to impose positive obligations on the state to protect individuals in welfare need contexts. The human rights framework of ECHR positive duties helped the Court to determine the scope of the government's duty to provide basic food shelter for destitute asylum seekers in the case of Limbuela. The underlying idea of the judgment was that the state can be held to account for failure to meet the basic needs of people in its jurisdiction if their poverty is generated by deficiencies in the national legal structures.[137] Although in Anufrijeva the House of Lords did not find a breach of Article 8, the case raised questions about whether or not it is appropriate for courts to intervene in policy disputes of the kind and found that given the limited court resources they should not.

2.3.3 Protection of socio-economic rights under article 14 of ECHR

Esping-Andersen has divided welfare capitalism systems into three models, characterizing the United Kingdom as belonging to the liberal welfare regimes.[138] This regime is characterized by liberal values such as self-responsibility and the market as provider of welfare. It has a residual character, meaning that schemes are means-tested and directed to the poor. There is a division of population into minority of low income dependents who are granted entitlements associated with stigma and the majority of people who afford private insurance. Thus, the welfare history of the UK has been

[137] PALMER, Ellie, *Articles 3 and 8 ECHR: Failure to Provide and Positive Obligations in the Socio-Economic Sphere,* in "Judicial Review, Socio-Economic Rights and the Human Rights Act", Hart, Oxford and Portland, 2007, p. 274-276.
[138] Gosta Esping-Andersen, *The three worlds of welfare capitalism*, Cambridge, UK, Polity Press, 1993.

traditionally characterized by a distribution of goods and services in accordance with the needs of the society rather than by the belief that there should be equality of outcome in the distribution of individual entitlements. However, ever since the enactment of HRA, individuals have relied on Article 14 (prohibition of discrimination) of the ECHR taken in conjunction with Article 1 of Protocol 1 (the right to peaceful enjoyment of one's possessions) or with Article 8 of the Convention to challenge what they considered as inequalities in the distribution of goods.[139] It is relevant noting that Article 14 is not a self-standing right but refers to discrimination in relation to the rights and freedoms enshrined in the European Convention of Human Rights.

The cases of R (on the application of Carson) v. Secretary of State for Work and Pensions[140] and R (on the application of Reynolds) v. Secretary of State for Work and Pensions[141], which reached the House of Lords as conjoined appeals, provided an opportunity for the Law Lords to establish the approach of the United Kingdom courts towards Article 14 of the ECHR.

The first case concerned an alleged discrimination in relation to the applicant generated by the policy of the UK government to pay a different amount of state retirement pension to citizens living in the UK in comparison to citizens living in other states (in the case of Carson, South Africa). On one hand, the state recognized her entitlement to a pension by virtue of her contributions to the National Insurance Fund while on the other hand it refused her the same pension as paid to UK residents, though she had made an equal contribution. The question was whether the state's policy

[139] Ellie Palmer, "Article 14 ECHR and the Unequal Distribution of Public Goods and Services in the United Kingdom", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 277.
[140] *R (on the application of Carson) v Secretary of State for Work and Pensions*, [2005] UKHL 37.
[141] R (on the application of Reynolds) v Secretary of State for Work and Pensions, [2003] EWCA Civ 797.

constituted a breach of Article 14 taken in conjunction with Article 1 of Protocol 1 ECHR[142]. The Reynolds case raised the same question, applied to the situation where the applicant, aged less than 25 years old, received a smaller amount of money for job-seeker's allowance in comparison to persons who were over the age of 25. In both cases, the Court of Appeal denied that there has been breach of any of these rights, so the two conjoined appeals reached the House of Lords.

The House of Lords has been reluctant to recognize that the pension and the benefit entitlements of the applicants constituted possessions within the meaning of Article 1 of Protocol 1 of the ECHR.[143] Instead, in analyzing the purpose of Article 14 it preferred to draw a distinction between disputes which involve established discrimination grounds (such as sex, race, and disability) and cases in which the rationality of policy choices is questioned, which leads to the discrimination of a particular individual or group of individuals.[144] Lord Hoffman made a rather forced distinction between grounds of discrimination that offend the respect for the individual human being and those which only require a rational justification from the government.[145] The majority of opinions in the House of Lords considered it permissible to draw such a distinction. Lord Walker even stated that although not precisely formulated in these terms, the European Court of Human Rights jurisprudence also refers to "weighty reasons" which are required to justify discrimination on sensitive grounds.[146] In both cases, the Law Lords considered it

[142] Article 1 of Protocol 1 provides for the rights to the peaceful enjoyment of one's possessions.
[143] *R (on the application of Carson) v Secretary of State for Work and Pensions,* [2005] UKHL 37, at para. 11.
[144] Ibid, at para. 29.
[145] Ibid, at para. 17.
[146] Ibid, at para. 58.

was for the Parliament to decide in such matters, because the duty to provide social security benefits was "national in character".[147]

In the case of Carson, the House of Lords stated that the denial of social security on grounds that the applicant lived in South Africa was not done on the basis of her sex or race, nor did it amount to disrespect for her as an individual. By moving abroad, the claimant put herself out of the scope and purpose of the security system. Although some argued that since contributions necessary to qualify for their pensions were paid, Lord Hoffman emphasized that "social security benefits are part of an intricate and interlocking system of social welfare which exists to ensure certain minimum standards of living for the people in this country, and an expression of what has been called as social solidarity-the duty of any community to help those members who are in need".[148] This judgment is relevant for the fact that not even the jurisprudence of the ECHR, which recognizes entitlements as possessions, has had any impact on the traditional thinking about the welfare regime in the UK. The interpretation that the Court gave to Article 1 of Protocol 1 has been interpreted by the House of Lords as "artificial".[149] Rather, the Law Lords preferred to defer to the competence of the legislative to deal with such an intricate social security system, emphasizing that there should be no expectation that payment should be linked to the level of contribution, especially in a country where the rationale of the state pension system is that it is means-tested based. Payment of contributions is not a sufficient condition to entitlement, within the background of such a policy choice.

Similarly, in the case of Reynolds, it was enough to ensure that there was an objective justification for the difference in the treatment of claimants under 25 years old.

[147] Ibid, at para. 18.
[148] Ibid, at para. 18.
[149] Ibid, at para. 11.

The only thing that the House of Lords considered in both cases was whether the appropriate level of scrutiny has been applied by the Court of Appeal when considering the Secretary of State's justification for enactment of disputed provisions.[150]

As opposed to the cases of Limbuela and Anufrijeva, none of these cases involved vulnerable groups, state dependents or posed the question of respect for the human dignity of the individuals. Although Lord Hofmann recognized that courts must be sensitive to the shifts in the values of society, implying that the scope and purpose of article 14 should expand in time, its interpretation in these cases was a narrow one. This approach is illustrative of the idea that "by interpreting rights either more narrowly or more broadly, UK courts have often sought to arrive at decisions that are more compatible with UK policy and law than with principled developments in Strasbourg cases"[151]. It has been further suggested that the House of Lords decision in Carson has reduced the likelihood of further challenges against perceived inequities in the distribution of social security benefits founded on Article 14.[152]

2.4 Concluding remarks

This chapter has made an analysis of important socio-economic rights cases litigated before and after the enactment of the Human Rights Act in 1998, in order to trace developments in the level of scrutiny exercised by courts when it comes to resource allocation disputes. The question at stake was whether courts could meaningfully

[150] Ibid, at para. 26.
[151] Ellie Palmer, "Courts, the UK Constitution and the Human Rights Act 1998", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 150.
[152] Ellie Palmer, "Article 14 ECHR and the Unequal Distribution of Public Goods and Services in the United Kingdom", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007 p. 302.

contribute to the protection of socio-economic rights in lack of their express constitutional protection.

The case of R v. North and East Devon Health Authority, ex parte Coughlan is illustrative of the fact that English courts are willing to scrutinize resource allocation cases in order to provide for the needs of disadvantaged groups if a principle of administrative law justifies such a review. Therefore, in a number of small cases (Swindon is another example); the Court has used public law principles and applied a more searching standard of review to protect the welfare needs of vulnerable individuals. However their impact and frequency remains limited.[153]

The judicial review model in the United Kingdom has been criticized for being weak and for not providing an efficient system of protection for rights.[154] It has been suggested that the application of a more searching standard of review, one that goes beyond the Wednesbury reasonableness would enable the legislature and the executive to remain the primary decision-makers but would also ensure that they justify their decisions. The enactment of the Human Rights Act increased the powers of courts, making it possible to scrutinize legislation and public authority decisions concerning the provision of welfare for their conformity with the standards embodied in the European Convention of Human Rights. Sections 3 and 6 of HRA and the development of positive obligations in the ECHR had made it possible for courts to adopt a purposive approach in the interpretation of socio-economic rights disputes. However this remains a difficult process and courts mainly remain faithful to the ultra vires paradigm of judicial review.

[153] Ellie Palmer, "Introduction", in *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart, Oxford and Portland, 2007, p. 34.
[154] Annabelle Lever, *Is Judicial Review Undemocratic?,* in Public Law Summer 2007, p. 295.

As the Limbuela case shows, a cautious form of protection of some economic and social rights is emerging through the application of HRA, by a creative judicial interpretation of a number of provisions of the ECHR that imply positive obligations for the state. Nevertheless, despite the collaborative constitutional safeguards embedded in the Act, the UK courts have often deferred to the other branches of the government. This applies to the HRA obligation to read legislation in conformity with the ECHR and the reserved manner of scrutinizing executive and public authority action in administrative law disputes.[155]

The non-justiciability doctrine has been replaced with a variant of judicial deference which means that courts will continue to draw a line between cases of extreme or exceptional nature involving highly vulnerable groups and those that raise demand on state finances. It has been argued that until the United Kingdom adopts or incorporates social rights (it has already been mentioned that the country is not party to most of the international instruments for the protection of these rights) courts will feel restrained in reviewing resource allocation decisions for lack of clear constitutional mandate.[156]

The question that arises is if it would be desirable for the UK to include socio-economic rights in a Bill of Rights and if there are any advantages in doing so.

[155] COOMANS, Fons, "Some introductory remarks on the justiicabilty of economic and social rights in a comparative constitutional context", in COOMANS, Fons (ed.), COOMANS, Fons, Justiciability of Economic and Social Rights, Experiences from domestic systems, Fons, Coomans (eds.), Intersentia, Antwerpen, Oxford, 2006, p. 12.

[156] Jeff A. King, "United Kingdom", in Malcolm Langford (ed.), Social rights jurisprudence: emerging trends in international and comparative law, Cambridge [UK]; New York: Cambridge University Press, 2009, p. 292.

Chapter III Socio-economic rights in South Africa

The South African experience of adjudicating socio-economic rights became meaningful in the filed of comparative constitutionalism, fueling further debate- this time informed by practice-about the role of courts in protecting such rights. This chapter makes an analysis of five landmark socio-economic rights cases decided by the Constitutional Court ever since the adoption of the Constitution in 1997. It identifies the strengths and limits of the Court's approach and considers whether and how it could be improved in order to achieve a better protection of socio-economic rights.

3.1 The South African Constitution

South Africa's pre-constitutional legal culture has been characterized by extreme judicial deference[157]. Before the adoption of the Constitution on 4 of February 1997 courts were little predisposed to adjudicate socio-economic rights. It was the introduction of the Bill of Rights that changed the role of the judiciary within the country's constitutional and political order, due to the extensive powers granted to courts by the constitutional text.[158]

[157] The system of parliamentary sovereignty- entrenched in the Union Constitution of 1910- has contributed- alongside a conservative judiciary- to the political injustices of the apartheid area, in Marius Pieterse, *Coming to terms with judicial enforcement of socio-economic rights*, South African Journal on Human Rights, 383, 2004, p. 416.

[158] Courts can enforce constitutional socio-economic rights- directly- by hearing challenges to the constitutionality of any rule of statutory, common or customary law, whether the state or a private party relies on it. If a statutory rule is found unconstitutional, it is overturned and the legislature is obliged to enact new legislation. If a rule of common law is successfully challenged, a court will employ its power to develop common law to change it, or develop new rules to make the common law position consistent with the Constitution. Moreover, courts can decide challenges that state or private conduct is inconsistent with a

However, even though courts gained legitimacy in adjudicating socio-economic rights cases, the fact that there was little guidance from other jurisdictions regarding the principles to be considered in such cases made their task a difficult one. By the time the first socio-economic case reached the South African Constitutional Court, the legal and philosophical communities across the world had failed to provide a clear understanding of what the content and scope of socio-economic rights was, who the duty holders were and what their duties entitled. [159]

Furthermore, the drafters of the South African Constitution did not give any clear indications about what the nature and scope of judicial review should be in relation to the socio-economic rights, either in terms of how the interpretative and enforcement authority would be divided between the courts, the legislature and the executive or in terms of the content that should be given to them.[160]

The fundamental law commits the government to overcome the apartheid socio-economic legacy and to adopt legislation in order to assure access to housing (section 26), health care (section 27), food, water, social security (section 28) and child protection

socio-economic right. If state conduct is successfully challenged, it would be overturned and the court will come up with a constitutional remedy to vindicate the right in question. If private conduct is successfully challenged, a court will attempt to find a remedy in the existing statutory or common law that can be adapted to vindicate the right in question, and in the absence of such existing remedy, will develop the common law to provide such a remedy. It is up to the court to determine the appropriate relief in every case, which requires a creative judicial engagement with the remedial function. Also, during the course of litigation, one party can argue that the other party relies on a law that is inconsistent with the "objective value system" in the Bill of Rights. If the court accepts such presumption it would interpret the statutory provision as to give effect to the "spirit, purport and objects" of the Bill of Right, indirectly adapting the existing law to the Constitution, in Danie Brand, Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale, in F. Coomans (ed.) *Justiciabilty of Economic and Social Rights: experiences from domestic systems*, Intersentia, Antwerp, 2006, p. 208-209.

[159] Octavio L.M Ferraz, *Poverty and Human Rights*, Oxford Journal of Legal Studies, Vol. 28, No. 3, 2008, p. 585.

[160] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, 5: 391, p. 396.

(section 29). Therefore, the realization of socio-economic rights plays a crucial role in advancing the transformative goals of the Constitution.

In order to achieve social justice, the Bill of Rights not only places negative restraints on governmental interference with liberty but also imposes positive duties on the state to combat poverty and promote social welfare. The state is under the general obligation to "respect, protect and fulfill" and its positive obligations concerning socio-economic rights are contained in the text of each individual provision[161]. Therefore, the South African Constitution recognizes that all rights - be they civil and political or social and economic-give rise to both positive and negative obligations and invites to a rethinking of the legal method, analysis and reasoning within the adjudicative process so that it meets the transformative goals of the Constitution. Moreover, other provisions in the Constitution come to enhance the protection of socio-economic rights: section 8(2) provides that any "provision of the Bill of Rights binds a natural and juristic person if and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the state" and section 39 that requires every court, tribunal or forum to promote "the values that underline an open and democratic society based on human dignity, equality and freedom"[162] and the "spirit, purport and objects of the Bill of

[161] Section 7 of the Constitution; *the duty to respect* implies a negative obligation requiring the state and others not to interfere with people's rights. When the interference cannot be avoided, the state must take steps to mitigate the impact of the interference. Mitigation of the impact can be done by the adoption of second tier socio-economic rights (statute law) but also on the basis of constitutional rights which makes possible the invalidation or reinterpretation of laws allowing interference in the enjoyment of socio-economic rights. The state needs to provide alternative access to that right, which might involve financial expense and policy adjustment. *The duty to protect* requires the state to protect the existing enjoyment of these rights against third party interference. This can be done by regulating private control of access to land, housing, health and services, food, etc; standard setting in respect of safety and quality in the provision of services and products; by regulating private interference in the existing enjoyment of socio-economic rights; through interpreting legislation and developing the common law in the course of ordinary legislation (section 39 (1)). *The duty to promote and fulfill* requires the state to adopt and implement measures to enhance access to socio-economic rights.

[162] Section 39 (1) (a).

Rights" in every matter involving the interpretation of legislation and the development of common and customary law.[163] According to the same section of the Constitution, international law must also be considered.

The Constitutional Court expressed its position over the jusiticability of socio-economic rights early during the certification proceedings, when it rejected the argument that socio-economic rights should not be justiciable because they will have budgetary consequences and will thus imply judicial encroachment upon legislative and executive prerogatives. It emphasized that the concerns about institutional legitimacy of courts characterize not only socio-economic rights but rights based judicial review more generally.[164] In other words, the Court refused the idea that the enforcement of socio-economic rights cases conferred upon courts a task which was different from the one performed in other rights based claims.

Nevertheless, in defending the justiciability of socio-economic rights the Court focused on duties of restraint: "The fact that socio-economic rights will almost inevitably give rise to budgetary implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion".[165] This statement seems to be establishing a rigid distinction between negative and positive duties as part of the Court's approach to socio-economic rights adjudication.

The uncertainty about the extent of the justiciability of socio-economic rights and the enforceability of positive duties was dealt with by the Court in five major cases which will be the focus of the next section of this chapter.

[163] Section 39 (2) (b).
[164] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 CC, at para. 77.
[165] Ibid., at para. 78.

3.2. Soobramoney v. Minister of Health Kwa Zulu Natal

The first socio-economic rights case that the Constitutional Court had to adjudicate upon involved the right to health.[166] Section 27 of the Constitution stipulates that everyone has the right to have access to health care services; including reproductive health care and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. Also, no one may be refused emergency medical treatment.

The case concerned a challenge by a patient against the decision of a state owned hospital authority to refuse him life-prolonging dialysis treatment. Mr. Thiagraj Soobramooney was diabetic, suffering from ischemic heart disease and cerebral-vascular disease as well as irreversible chronic renal failure. The policy of the hospital in relation to the use of limited dialysis resources was that only those patients suffering from treatable renal failure were eligible to receive it. Moreover, the patient had to be free of any significant vascular or cardiac disease in order to get the kidney transplant.

Before the Constitutional Court, the applicant challenged the hospital's refusal on the basis of section 11 (right to life) and the guarantee that no one may be refused emergency medical treatment (section 27(3)). However, the Court held that the patient's claim lied outside the negatively framed right enshrined in section 27 (3). The case was decided on the basis of section 27(2) - the state's positive obligations with respect to the right to health care access-emphasizing the difference between the state's duty to immediately fulfill a right and the duty of progressive realization within available

[166] Soobramoney v. Minister of Health Kwa Zulu Natal, KwaZulu-Natal 1998(1) SA 765 (CC).

resources. It held that the hospital's policy was reasonable and had been applied fairly and rationally.

The Court's approach in this case was one of judicial restraint: "a court will be slow to interfere with rational decisions taken in good faith by the political and medical authorities (...)".[167] It was also emphasized that the right to access to health care services does not impose an obligation upon the state to provide everything to everyone: "there will be times when managing limited resources will require the state to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society"[168]. Therefore, the approach recognized the necessity of balancing competing rights and chose to resolve the conflict in favor of majoritarian principles.[169] It also refused to issue an order for the provision of dialysis, accepting the hospital's defense of limited resources without scrutinizing the budgetary allocation or the way it was spent at the provincial level.[170] The guidelines were found to be a good way to maximize the number of people who could access dialysis.

The approach taken by the Court in this case resembles very much the stance taken in the United Kingdom in R v. Cambridge Health Authority, ex parte B., where a health authority refused to provide treatment to a young girl with leukemia on grounds that the expenditure involved was not an effective use of resource. If one thinks about the outcome for the two applicants in these cases (the denial of a health service), it appears

[167] Soobramooney v. Minister of Health Kwa Zulu Natal, KwaZulu-Natal 1998(1) SA 765 (CC), at para. 29.
[168] Soobramooney v. Minister of Health Kwa Zulu Natal, KwaZulu-Natal 1998(1) SA 765 (CC), at para. 31.
[169] Lauren Paremoer, Courtney Jung, *The Role of Social and Economic Rights in Supporting Opposition in Post-Apartheid South Africa*, April 2009, paper presented during the 17th Annual Conference on 'The Individual vs. the State' held at Central European University, Budapest-12-13 June 2009.
[170] Danie Brand, Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale, in F. Coomans (ed.) *Justiciabilty of Economic and Social Rights: experiences from domestic systems*, Intersentia, Antwerp, 2006, p. 223.

that making the right to access to health care constitutional makes little difference in the lives of plaintiffs. In the case of Mr. Soobramooney (who died one year after the judgment was handed down), the Court refused to see any correlation between the right to life and the right to access to health care services. It disregarded the particular circumstances of the applicant, who was too poor to afford private health care. Instead of making the right of the plaintiff the core of its analysis, the Court applied a rational test to the hospital's policy and found it constitutional.

3.3 Government of the Republic of South Africa v. Grootboom and Others

The second socio-economic rights case that reached the Constitutional Court is considered to have established key principles relevant for the enforcement of socio-economic rights in South African context.[171]

The case concerned the illegal occupation of land by homeless people. The applicant - Irene Grootboom - initially lived under very poor conditions, without any basic services, in an informal settlement outside the City of Cape Town. Many of the residents in this place had been on the waiting list for low income housing for many years, but had lost hope that they would be granted any by the municipality. As winter was approaching, a group of approximately 900 people moved to vacant land which was privately owed and started to build shacks and shelters. The private owner obtained an eviction order and the building materials were destroyed. Since the evicted community had nowhere to go, they moved into a nearby sports field and started erecting temporary structures. The municipality council was notified that it had the constitutional obligation

[171] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

to provide temporary accommodation but there was no response. An application was lodged before the Cape High Court and eventually the case reached the Constitutional Court.

The issue before the Court involved section 26 of the Constitution which provides that that everyone has the right to have access to adequate housing (section 26 (1)) and the state needs to take reasonable and other legislative measures, within its available resources, to achieve the progressive realization of this right (26 (2)). Moreover, the right to housing also implies that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions (26 (3)).

Before Grootboom reached the Constitutional Court, the Government had understood its obligations under section 26 (2) to consist only in the progressive provision of permanent residential structures for which it had already enacted legislation and created a program.[172] However, the program was found unconstitutional because it did not provide emergency housing for the poor. The Court ruled that even though section 26 of the Constitution does not entitle every person - as of a right - to housing at state expense, section 26(2) does require it to devise and implement within available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing, which must include measures to provide relief for poor people. The judgment emphasized that, although the state has the obligation to create the

[172] Murry Wesson, *Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 2004, p. 287.

conditions so that people at all economic levels could realize their rights to housing, the needs of the poor require special attention.[173]

The Court analyzed the meaning of "reasonable and other measures" within the available resources of the state and found that it required the state to devise a comprehensive and workable plan to provide for short, medium, long-term as well as crisis needs.[174] Reasonableness required programs to be balanced and flexible, with national government having the responsibility to adopt sufficient laws and policies to fulfill their obligations.[175] The state needed to make financial and human resources available for the implementation of the program, allocate responsibilities and tasks and retain oversight of programs implemented at the provincial and local levels. [176]

Compared to the position in the Soobramoney case, the Court took a more proactive stance and issued a declaratory order in favor of Mrs. Grootboom, but refused to indicate what would constitute a reasonable time-frame for implementing measures that would bring the state's program in accordance with the Constitution.[177]

Immediately after the decision was delivered, some scholars characterized it as being a pragmatic and democracy-sensitive approach to the enforcement of socio-economic rights by the judiciary, in a way that fulfilled the transformative goals of the Constitution while at the same time being considerate about concerns related to judicial competence and democratic legitimacy.[178] Despite this enthusiasm, it took the

[173] Section 6 of Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC).
[174] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 13.
[175] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 40-43.
[176] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 39.
[177] The Court order referred to a settlement between the local authority and the squatters, in order to provide the latter with basic shelter and services. Also, the order declared the state's program unconstitutional and stated that there was an obligation to devise and implement within its available resources a comprehensive program to realize access to adequate housing.
[178] Cass R. Sustein, Social and Economic Rights? Lessons from South Africa, 11 Const Forums 123, 2000.

government four years to adopt a housing program that addressed the gaps identified by Grootboom and even longer to implement it. With time, it became clear that the Court's decision had been weak as it did little to change the access of people to basic emergency shelter[179].

3.3.1 The reasonableness approach versus the minimum core debate

It has been pointed out that the decision in Grootboom was weak both at a substantive and remedial level.[180] But there seems to be no agreement on how much stronger the Court's approach could legitimately have been without overstepping judicial competence and legitimacy in the area.[181] The ongoing debate takes place between the advocates of the reasonableness review model and those of the minimum core approach.

In Grootboom, the Court preferred to develop and apply the reasonableness review as the standard for assessing state compliance with socio-economic rights.[182] It refused to embrace the minimum core approach recognized by international human rights law.[183] In objecting the latter approach it basically argued that the content of minimum

[179] David Blichitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance*, South African Law Journal, 2002, 3, 484.
[180] Mark Tushnet, "Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law", Princeton, Princeton University Press, 2008, p. 53.
[181] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, p. 392.
[182] The reasonableness judicial standard is a means end test used by the Court to ask whether or not the measures taken by the state in a certain context are reasonably capable of achieving the realization of the right in question. Reasonableness review is recognized in sections 26 (2) and 27 (2) of the South African Constitution - in relation to the state's positive obligations regarding the right to housing and the right to health care, food, water and social security, but also in section 33 concerning the right to just administrative action and section 36 (1) - the general limitation clause**.**
[183]The United Nations International Covenant on Economic, Social and Cultural Rights entered into force in 1976. (ICESCR). The Committee on Economic, Social and Cultural Rights has gradually established that certain classes of needs enjoy priority over others and that states party to the Covenant are obliged to realize these core needs immediately, as a matter of individual right and as starting point for the progressive realization of socio-economic rights, see in Murry Wesson, *Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 2004, p. 298. This development was due to the fact that the practice of states party to the ICESCR

core obligations are difficult to define, that a fixed definition would not reflect the diverse needs of differently situated people and groups and also that courts lack democratic legitimacy and institutional capacity to define these obligations.[184] Nevertheless, even if the Court did not adopt the minimum core approach, it did not completely reject it, stating that where evidence in a particular case shows it, it could be considered in order to evaluate the reasonableness of state measures.[185] In other words, the minimum core in the South African context should function as a reference point in assessing the reasonableness of policy and not as guarantee of basic services to which everyone is entitled.

These two approaches having been introduced, a short discussion about their advantages and disadvantages is needed. After all, beyond all academic stipulations, the approach of the Court needs to be improved in a way that benefits the individual plaintiff in each case, in light of the values of human dignity, equality and freedom enshrined in the Constitution. As Sandra Liebenberg has put it "the question is which one of the two approaches advances the transformative commitments of the Constitution".[186]

As mentioned above, the judgment in Grootboom developed a substantive set of criteria for assessing the reasonableness of the state's policy. Although initially the Court considered that it was only entitled to ask the question of whether the measures adopted

revealed an overlapping consensus among countries as to the minimum core content of the Covenant. In no way was it derived from a conceptual understating of the moral priority to be given to certain rights based claims over others. See in Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, p. 414.

[184] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 39, at para. 27-33.

[185] Ibid., at para. 34.

[186] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 305.

by the Government had been reasonable[187], it ended up by ordering the state to change its preferred policy and allocate additional resources. However, the problem with the reasonableness model of review is that it does not bring specific, concrete remedies to the individual plaintiff. The Court focuses its analysis on the compliance of the government program with the Constitution and not on whether the rights of the particular plaintiffs have been infringed. [188] This model of review does not involve a two-stage approach to constitutional analysis. It does not begin with a principled focus on the content and scope of the right and situation of the claimants and with a further consideration of possible justifications for the infringements.[189]

The reasonableness test only requires that the government's policies have to provide for the needs of the vulnerable individuals. This requirement is done in the name of the value of human dignity.[190] Therefore, in Grootboom, the only reference to constitutional values such as human dignity is done in order to develop the

[187] "A court considering reasonableness will not enquire whether other more desirable or favorable 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 recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met", in Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 39, at para. 41.

[188] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 304.

[189] Ibid., p. 321.

[190] Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 39, at para. 83. "(…) it is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasize that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen."

reasonableness test. Nevertheless, the Court has been rightly crticized for failing to use the underlining values of the Constitution to develop the substantive right to housing.[191]

Although the reasonableness approach appears to some authors a flexible and context-sensitive test for evaluating socio-economic rights claims - allowing the government to design and implement its own policies - it has more often been attacked for being just an administrative law model of review, not engaging with the substantive analysis of the content of socio-economic rights and the obligations they impose.[192]

Basically, through the reasonableness approach analysis, the Court in Grootboom did no more but to reaffirm the nation's commitment to the transformation of society, identify the areas of government failings and suggest the government to advance the transformative goals of the constitutional text. However, as already stated, the judgment brought no actual benefit to the plaintiff. This is because by applying the reasonableness approach the Court makes an analysis of the content of the legislative and other measures aimed at achieving "the progressive realization" of a socio-economic right, not the content of the right in question. This is a paradox, since it remains difficult to asses whether the measures adopted by the state are reasonable without an understanding of the content of the right.

Could the adoption of the minimum core approach benefit the plaintiffs more and advance the transformative goals of the Constitution? Is it possible to give a more clear content to socio-economic rights if this approach is adopted? After all, the main criticism

[191]Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 322.

[192] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 319.

of the minimum core advocators regarding the reasonableness approach resides in the lack of clarity of the content of this standard which leads to a weak enforcement of rights.[193]

The next part of this section will present the advantages and disadvantages of the minimum core approach and will show that the disadvantages outweigh the advantages and that the likelihood of the minimum core approach advancing the transformative goals of the Constitution is limited.

David Blichtz's claim is that the minimum core approach can offer a better understanding of the content of socio-economic rights; make it easier to identify who the duty holders are and what their duties entail. His main idea is that the obligations deriving from the minimum core would protect people's urgent threshold interests in survival. Fulfilling the minimum core should be a priority both in social policy making and judicial enforcement due to the needs it is meant to protect.[194] The failure to meet the minimum core would require a "heightened scrutiny".[195]

At first sight, the minimum core appears to be a more practical analytical framework within which decisions about the content of rights can be taken: it directs resources where they are needed, gives clarity to the Court's jurisprudence and instructs the state over its priorities, as well as formulates more clearly the concept of progressive realization, converting programmatic socio-economic rights into individual entitlements.[196]

[193] Octavio L.M Ferraz, *Poverty and Human Rights*, Oxford Journal of Legal Studies, Vol. 28, No. 3, 2008, p. 585.
[194] David Blichtz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press, Oxford, 2007, p. 187.
[195] Ibid, pp. 210-213.
[196] Murry Wesson, *Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 2004, pp. 299-300.

Nevertheless, it has also been criticized for possibly diverting state resources to temporary, emergency type measures that do not constitute long-term investments, failing to fulfill this way the transformative goals of the Constitution.[197] Moreover, discussions about the minimum core have overlooked the complicated relationship between core and non-core needs and the difficulty of balancing against each other.[198] Basically, there is no clear-cut division between core and non-core needs and one cannot "ground core priority obligations in a single metric".[199]

The problem with the minimum core is that it seeks to establish a "normative essence" of socio-economic rights which rules out any debate upon the issue.[200] However, as already argued, there is a need for an intersectional approach to the definition of rights in sections 26-27, which would allow South Africans to have different views as to the priority to be given to diverse rights-based claims. Any abstract agreement about the content of the minimum core would deny this opportunity.[201] Furthermore, it would close the deliberative process over the implementation of socio-economic rights. Also, the minimum core approach would stifle the collaboration between the branches of government and exclude the needs of groups that do not fit into the definition of core obligations.[202]

[197] Ibid, p. 299-300.
[198] Ibid., p. 303-305.
[199] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 313.
[200] Ibid., p. 313.
[201] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law*, 2007, 413.
[202] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 313.

The strongest argument against the minimum core approach remains the fact that there is no clear definition of "survival needs" and therefore priority claims in the context of socio-economic rights adjudication cannot be easily set. It has been rightly argued that threats to life can be short term, medium term or long term, being difficult to differentiate between them and give them content.[203] Also, linking the minimum core to biological survival encourages reductionism and minimalism and does not promote social justice and fulfill the transformative aims of the Constitution.

As already argued, both the reasonableness review model and the minimum core approach have advantages and disadvantages, but what remains important is that they both fail to address the content of socio-economic rights, establish who the duty holders are and what their responsibilities entail. Theoretically, the minimum core can provide clarity where the content of these rights is concerned, but as shown above such an assertion does not stand close scrutiny. The minimum core implies a rigid approach to socio-economic rights adjudication, which rules out openness and context-sensitivity analysis on a case to case basis and consideration of the values underlining the Constitution.

The reasonableness approach, if improved, stands a better chance to advance the transformative goals of the Constitution and benefit individual plaintiffs. Before addressing the issue of how the Court could improve the reasonableness review model it has chosen to adopt, it is important to see how it has used it in three other socio-economic rights cases, in order to emphasize its strengths and limits.

[203] Ibid., p. 313.

3.4. Minister of Health v. Treatment Action Campaign (TAC)

The third socio-economic case that reached the Court challenged the constitutionality of the state policy to limit the provision of Nevirapine[204] to a restricted number of health facilities.[205] It was filed on the background of the Government's refusal to provide any forms of AIDS treatment in the public sector. This attitude was influenced by president Mbeki, who not only denied that HIV causes AIDS but viewed antiretroviral drugs as toxic. In August 2000, responding to increased social pressure, the Minster of Health and nine provincial health representatives decided that Nevirapine be tested for two years at two pilot sites in all nine provinces in order to asses the challenges of introducing a national program and to build the capacity and infrastructure needed.[206] By 2001, when legal action against the Minister of Health was initiated, the mother-to child transmission (MTCT) research sites were not operating. Treatment Action Campaign (TAC) argued that the state's delays and refusal to make Nevirapine available in the public sector violated section 27 and children's right to basic health care services[207]. Therefore, the issue before the Constitutional Court was whether the measure of confining Nevirapine in public health facilities, where testing and counseling were available and the drug medically required and provided for free, was reasonable within the meaning of section 27 (2) of the Constitution related to the right to access to health care services.[208]

[204]Nevirapine is an antiretroviral drug given to pregnant mothers in order to combat mother-to-child transmission of HIV.
[205] Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC).
[206] Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice through South African's Right to Health Jurisprudence*, in Medicine and Law, Israel, volume 27, number 3, 2008, p. 668.
[207] Ibid., p. 668.
[208] Paragraphs 28 to 34 of Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC).

The judgment in TAC does not represent a development of the approach adopted in Grootboom, but is rather a confirmation of it.[209] The Court adopted both a narrow, reasonableness based approach to defining the scope of the right of access to health care services in section 27 (2) of the Constitution over the minimum core approach as well as declaratory relief over broad forms of injunctive time specific relief.[210]

The Court held that "the policy of confining Nevirapine to research sites failed to address the needs of mothers and their new-born children who do not have access to these sites".[211] Similarly to the situation in Grootboom, the Court found that a disadvantaged and vulnerable group in the society - HIV positive pregnant women and their children- was excluded from basic health care services and the government was required to give reasons.[212]After an analysis of the Government's arguments, the Court found that they were not sufficient to support a finding that non-provision was reasonable in the circumstances.[213]

In the 2002 unanimous judgment it was held that women and children had been unjustifiably excluded from the policy. This fact made it inconsistent with the duty to adopt reasonable and other measures in order tot comply with the obligation imposed by section 27 (2) and the Government was ordered to extend the provision of the drug

[209] Davis M. Dennis**,** *Socioeconomic rights: Do they deliver the goods?* in International Journal of Constitutional Law, July 7, 2008, p. 693.
[210] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong v. Weak-form Judicial Review Revisited", *International Journal of Constitutional Law,* 2007, p. 396.
[211]Paragraph 67 of Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC).
[212] Paragraph 68, quoting Grootboom at paragraph 43 and 44 in Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC), see also Murry Wesson , *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 2004, p. 295.
[213] In relation to efficacy and safety arguments there was scientific contradictory evidence and the drug had also been approved by the Medicines Control Council and World Health Organization. The arguments related to resource constraints were also rejected because the drug was made available for free by the producing company.

without delay in the entire public sector as well as testing and counseling services to the hospitals and clinics which were not research sites.[214]

It can be argued that the order was much broader and detailed than the Grootboom one, although the Court has been criticized for refusing to exercise supervisory jurisdiction. As opposed to Grootboom, the Court's decision in TAC seems to be a more assertive approach to the justiciability of socio-economic rights, because it declares a breach of section 27 and orders a remedy of the Government's program. However, it is considered that what actually separates Grootboom from TAC is not greater assertiveness on the part of the Court, but the fact that extending the entitlement had limited cost-implications and the government itself had decided to make Nevirapine available.[215] This also seems to be the explanation of why the TAC case, as opposed to Grootboom seems to be extending individual entitlements to a group, since HIV positive woman were able to claim-as a right - a dose of Nevirapine.[216] Therefore, the mandatory order was a consequence of the fact that state inaction was motivated by political rather than resource-based considerations.[217]

Following the pattern established in Grootboom, it is argued that the judgment reiterated the Court's role in guaranteeing that the democratic process is protected so as to ensure accountability, equality, openness and responsiveness.[218] By asking the government to prove that its arguments related to safety were based on evidence, the Court held the government accountable for its policy. The equality component was also

[214] Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC) at para. 80.
[215] Murry Wesson , *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 2004, p. 296.
[216] Ibid., p. 296.
[217] Sandra Fredman, *Human Rights Transformed, Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 119-120.
[218] Ibid., 118.

present, as those excluded from the policy were poor people who could not afford to buy the drug. Moreover, the state was required to act in a transparent manner, by making known the measures adopted both during their conception and once conceived. [219] The deliberative element is also present due to the activity of the Treatment Action Campaign which used legal and political strategies alike to win the case, and which saw litigation as one of the elements of a broader campaign.[220]

Nevertheless, what remains a shortcoming is the fact that the Court refused to engage with the content and scope of the right to access to health care services. Its only purpose was to make an analysis of the unreasonableness of the government's policy. The Court also failed to give an explanation of why is it important that Nevirapine should be part of the South African health care services. For example, Liebenberg argues that one such explanation is related to the fact that access of women to the drug in the public sector can be an integral part of the right to reproductive health care and that "such treatment addresses the constitutional values of human dignity and equality in the context of gendered burden of child care"[221].

This approach is similar to the one in Grootboom, where the Court, even if it tried to explain what the right of "access to adequate housing" entailed[222], it did not engage with an analysis of the purposes that the right to housing was meant to protect.

[219] Minister of Health v. Treatment Action Campaign 2002**,** SA 721 (CC) at para. 33.
[220] Lauren Paremoer, Courtney Jung, *The Role of Social and Economic Rights in Supporting Opposition in Post-Apartheid South Africa*, April 2009, paper presented during the 17th Annual Conference on 'The Individual vs. the State' held at Central European University, Budapest-12-13 June 2009, p. 24.
[221] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 323.
[222]**"**The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.

3.5 Khosa v. Minister of Social Development

The fourth case analyzed in this chapter - Khosa v. Minister of Social Development - concerned a challenge against a provision of the Social Assistance Act 1992, which excluded people with permanent residence status from access to social assistance. The Court held that the exclusion of certain permanent residents from access to statutory social assistance was inconsistent with the prohibition on unfair discrimination in section 9 of the Constitution as well as infringed upon right to access to social assistance in section 27.[223]

In this judgment, as opposed to the ones in Grootboom and TAC, the Court indicates that the reasonableness approach should be applied more intensely: "In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is also necessary to have regard to the impact that this has on other intersecting rights. In the present case, where the right to social assistance is conferred by the Constitution on "everyone" and permanent residents are denied access to this right, the equality rights entrenched in section 9 is directly implicated".[224]

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, and 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. A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society", in Government of the Republic of South Africa v. Grootboom 2001 (1) SA 46 (CC) at para. 35.

[223] Khosa v. Minister of Social Development, 2004(6) BCLR 569 (CC) at para. 45.

[224] Ibid, at para. 49.

The Court questioned the arguments put forward by the state, founding them unconvincing. [225] As a consequence, the Court ordered the state to extend social grants to all permanent residents who meet the relevant criteria. Although the Court is this case did not engage with the content and scope of the right to social security in section 27 of the Constitution, the decision represented a development of the jurisprudence because the Court was willing to apply a strict standard of scrutiny and also because it emphasized the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion of permanent residents from the legislation.[226]

3.6 City of Johannesburg v. Mazibuko (The Phiri Water case)

City of Johannesburg and Others v. Mazibuko and Others[227], was decided by the Constitutional Court on 8 October 2009 and concerned the proper interpretation of section 27 (1) (b) of the Constitution which stipulates that everyone has the right to have access to sufficient water.

It arose as a consequence of the implementation by the City of Johannesburg and its Water Service Company of Operation Gcin' amanzi (save the water) project in Phiri, Soweto. The area is populated mostly by poor, black people who have been subjected in the past to the apartheid racist policies. The reason for the development of the plan was the significant water losses.[228] Its aim was to reduce the unaccounted amount of water

[225] The state argued that its primary obligation was towards its citizens, that the financial burden of extending grants to permanent residents would be too heavy and also that the state should not encourage self-sufficiency, in Khosa v. Minister of Social Development, 2004(6) BCLR 569 (CC) at para. 50-67.
[226] Khosa v. Minister of Social Development, 2004(6) BCLR 569 (CC) at para. 72.
[227] City of Johannesburg and Others v. Mazibuko and Others, 2009 (3) SA 592 (CC).
[228] The reasons for the water losses had to do with: the corrosion of the pipes installed during the apartheid area, the fact that the "deemed consumption" water system used by the City was not grounded in reality - since more water per month was used than the amount estimated. For example, before the plan was

and the water demand and improve the rate of payment.[229] The "deemed consumption" system of water service was abolished and the residents of Phiri were offered a choice between three levels of water provision: Service Level 1[230], Service Level 2[231] and Service Level 3- a pre-paid meter and residents pay according to their usage.[232] Service Level 2 was based on section 9 of the Water Services Act which stipulates that that the minimum standard for basic water supply is 25 liters per person per day or 6 kilolitres per household per month.

According to the City's policy, the residents of Phiri were required to select between Level Service 2 and a pre-paid meter. On 17 March 2004, one of the applicants in this case - Ms. Mazibuko - was informed that the pipes were to be replaced. She refused to have a prepaid meter installed and was allegedly not informed of possibility of Service Level 2. From the end of March until October when Ms. Mazibuko applied for a pre-paid meter, the water supply was cut-off.

The first issue before the Constitutional Court was whether the City's policy in relation to the supply of free basic water, the decision to supply only 6 kilolitres of free water per month to every accountholder, was consistent with section 27 (1) (b) of the Constitution read in conjunction with the right to equality in section 9. The second issue was whether the installation of pre-paid water meters was lawful[233].

implemented, residents of Phiri were charged on a monthly consumption of 20 kiloliters of water per household, but the real consumption was of 67 kiloliters per month. Also, as part of the resistance to the apartheid local government, the residents had developed a culture of non-payment.

[229] City of Johannesburg and Others v. Mazibuko and Others, 2009 (3) SA 592 (CC) at para. 13.

[230] Service Level 1 consisted of a communal tape-200 meters in each dwelling- for which residents need not pay.

[231] Service Level 2 consisted of 2 standpipes-6 kiloliters of water monthly for which a fixed fee needed to be paid.

[232] City of Johannesburg and Others v. Mazibuko and Others, 2009 (3) SA 592 (CC) at para. 14.

[233] Ibid., at para. 6.

The applicants had argued from the beginning that the shift from the old system of water supply to the new one conflicted with the state's constitutional obligation to progressively realize the right to have access to sufficient water.

Before reaching the Constitutional Court, the applicants won the case in the Court of Appeal, due to a progressive judgment. 234It was held that the installation of pre-paid meters in poor communities infringed upon the right to access to sufficient water because it did not take into account the fact that the residents were unable to pay, their specific needs as well as rules of administrative justice. The Court ordered that the City should provide each accountholder with 42 liters of water per day-which it deemed to be the sufficient amount in order to be compatible with section 27 (1) of the Constitution.

After an assessment of the process by which the water supply systems had been introduced, the Court concluded that it violated the right to lawful and procedurally fair administrative action stipulated in section 33 of the Constitution. It compared this situation to the one of residents in wealthier suburbs who were entitled to notice leave and court proceedings when the water cut off occurred. The Court concluded that the situation of the Phiri residents amounted to unfair discrimination on the basis of the geographical area as well as indirect discrimination on the basis of race. Furthermore, it stressed the fact that South Africa was a patriarchal society where women perform most of the domestic tasks and that the installation of pre-paid meters in Phiri unfairly discriminated against poor black women.

By contrast, the Constitutional Court held that the City's Free Basic Water policy was reasonable and not in conflict with section 27 of the Constitution or with national legislation regulating water services. It argued that evidence brought up by the City

[234] City of Johannesburg and Others v. Mazibuko and Others, 489/08) [2009] ZASCA 20.

showed that its water policy had been under constant review and revisited in order to assure progressive realization of the right. [235]

The case represents a development of socio-economic rights jurisprudence only to the extent that the Court expressly states that the role of socio-economic rights litigation is to enable citizens to hold governments to account for the manner in which it achieves the progressive realization of these rights[236]. It notes that the Mazibuko case is a good example of how the government can give a detailed account regarding its water policy. Socio-economic rights are therefore viewed as broadening the democratic process.[237] The judgment recognizes the fact that the government has the duty to constantly review its policy and set targets in order to be accountable, responsive and open.

However, in relation to the progressive judgments delivered in the High Court[238] and the Court of Appeal, as well as stances taken in the previous socio-economic rights cases, the Constitutional Court ruling in the Mazibuko case was conservative. It represents a step back from previously held decisions concerning socio-economic rights, especially where the development of the reasonableness approach is concerned.

Just like in the previous socio-economic rights cases, the Court refused to embrace the minimum core approach in the interpretation of the right to access to sufficient water in section 27 (1) (b). From the start, the applicants in the case argued that it was the task of the Court to determine what constituted "sufficient water" for the purposes of section 27 of the Constitution and suggested 50 liters per person/per day as a

[235] City of Johannesburg and Others v. Mazibuko and Others, 2009 (3) SA 592 (CC) at para. 169.
[236] Ibid., at para. 59.
[237] Ibid., at para. 71.
[238] Mazibuko and Others v. the City of Johannesburg and Others, 06/13865, April 30 2008. The High Court decided that the installation of pre-paid water meters was unconstitutional and unlawful, the Court ordering that the City must provide residents in Phiri with 50 liters per person per day and with the option of metered water supply, based on the rights to just administrative action and the right to everyone to access to sufficient water in section 27.

fair amount.[239] But the Court argued that section 27 (1) (b) must be read together with section 27 (2) which requires that the state takes reasonable legislative and other measures to progressively realize this right.[240] While it admitted that the applicants' argument is similar to the minimum core argument in other cases, it emphasized that it went beyond it, since they asked for a quantified standard of 50 liters per person/per day and not a minimum core. [241] It defended instead the reasonableness approach: "fixing a quantified content might, in a rigid and counter productive manner, prevents an analysis of context. The concept of reasonableness places context at the center of the enquiry and permits an assessment of the context to determine whether a government's policy was reasonable."[242] It argued that the right of access to sufficient water will mean different things in different contexts. Also, that the Court is ill-suited to determine what constitutes "sufficient water".[243]

Even though the Court expressed its preference for the reasonableness approach and for its supposed advantages, it failed to develop and apply it in a constructive manner; taking into account, like the Court of Appeal, the specific circumstances of the applicants (that they were unable to pay), their needs as well as rules of administrative justice. In relation to the arguments of unfair discrimination, the Court held that although the group affected was a vulnerable group, the government's purpose and objective was legitimate.

[239] City of Johannesburg and Others v. Mazibuko and Others, 2009 (3) SA 592 (CC) at para. 43.
[240] Ibid., at para. 46.
[241]Ibid., at para. 56.
[242]Ibid, at para. 60.
[243] Ibid., at para. 60.

3.7 The way forward

The South African socio-economic rights jurisprudence shows that the Court has made progresses in the evaluation of state policies related to these rights, by developing a more substantive set of criteria for assessing government acts and omissions. However, the reasonableness approach must be improved in such a way as to engage with the analysis of the content of socio-economic rights which should take into consideration the underlining values of the Constitution.

While the reasonableness approach model should preserve the openness and context sensitivity which represents its strength, it must also borrow from the minimum core ideal and adopt a heightened scrutiny in cases involving basic needs. Above all, this standard of review should make clear the purposes and interests which socio-economic rights protect and promote the values of human dignity, equality and freedom.

Sandra Liebenberg emphasized that "in determining what constitutes a basic social need the Court needs not be guided by a single standard such as biological survival; it is of critical importance that it engages in a context sensitive assessment of the impact of deprivation on the particular group. In assessing the severity of the impact, the courts should consider the implications of the lack of access to resources or service for the intersecting rights and values such as the right to life, freedom and security of the person, equality and human dignity".[244] In other words, the reasonableness approach should include a more principled and systematic interpretation of the content of the various socio-economic rights, the values at stake in particular cases and the impact of

[244] Sandra Liebenberg, Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate, in Stu Woolman & Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, PULP, 2008, p. 324-325.

the denial of the right on the complainant or on the group. Considering the state's justificatory arguments first should also be avoided as such an approach mostly degenerated into an unprincipled, deferential standard of review.

In its analysis, the Court should separate the issue of whether the measures adopted by the state to realize the right in question are reasonable and the issue of deliberating over the content of a right.

Severe impact of state measures upon the applicants, as well as the implications of the denial of access to basic socio-economic needs for the enjoyment of other rights and values should trigger a high standard of justification. The Court should also be aware of the manner in which the denial of access to the particular right reinforces patterns of inequality. Therefore, another aspect of the reasonableness approach which requires development is the standard of justification to be applied in various types of socio-economic rights cases. Deprivation which leads to grave impact should warrant a strict proportionality test required by section 36 of the Constitution.[245]

The socio-economic rights jurisprudence in South Africa shows that despite constitutional provisions, the Court has most often failed to take into consideration the relevant international law or other jurisdictions as required by section 39 (1) (b) and (c)

[245] Despite the fact that section 36(1) (the general limitation clause) applies to infringements of all constitutional rights, courts do not apply this section when they must decide if failures by the state to give effect to the positive duties to protect, promote and fulfill socio-economic rights can be justified. Instead, the Court has used, for the purposes of analysis, the internal limitation clause of each socio-economic right- a special standard of reasonableness scrutiny.[245] Whether or not the justification of an infringement of a socio-economic right is considered in terms of section 36(1) or in terms of the special limitation clause determines the degree of intensity with which a court operates, as the standard of scrutiny that is applied under the two tests is different. The standard of justification or scrutiny required by section 36(1) is a proportionality test. Although the focus on the reasonableness stage of the inquiry in socio-economic rights adjudication is equivalent to the focus on proportionality in most rights adjudication, infringements of positive duties imposed by socio-economic rights are usually evaluated by the Court against a more lenient standard of scrutiny than that which applies to other infringements in terms of section 36(1), in Fons Coomans (ed.), *Justiciability of Economic and Social Rights, Experiences from Domestic Systems*, Intersentia, Antwerpen, Oxford, 2006, p. 283.

of the Constitution.

Conclusion

The express constitutional mandate to adjudicate socio-economic rights cases, gave the South African Constitutional Court the power to evaluate the arguments against socio-economic rights adjudication, differentiating between legitimate and illegitimate concerns. This serves as an example for other jurisdictions, that courts can evaluate theoretical arguments against the justiciability of socio-economic rights within specific judicial and constitutional cultures.

The comparative analysis of socio-economic rights litigation in the United Kingdom and South Africa shows that courts in both jurisdictions remain cautious in reviewing resource allocation decisions. While in the United Kingdom the impact and frequency of these cases remains limited, a moderate success is noticed in the South African Constitutional Court judgments.

Although socio-economic rights litigation in South Africa has done little for the poor in reality, in terms of delivery of goods and services, this paper has advocated that there are possibilities for socio-economic rights to be realized. The Constitutional Court needs to develop its reasonableness review model so that it engages with a more principled and systematic analysis of the content of various socio-economic, the constitutional values at stake in particular cases and the impact of the denial of the right on the complainant or on the group.

It is more likely that patterns of inequality will be reinforced if an administrative law review model is used to the adjudication of socio-economic rights is used because of the limited impact of individual cases and narrow remedies, as well as lack of broad legal mobilization by civil rights organization. By contrast, the example of South Africa shows that constitutional review has benefited poor people who did not have the means to litigate (HIV positive women). Although Grootbroom did not lead to a long term solution to the housing needs of the Wallacedene community, it led to the establishment of emergency housing funds in many municipalities and was used to protect large numbers of informal settlers from eviction orders.[246]

Constitutionalization of socio-economic rights can also enhance the democratic process, a thing which is not to be taken for granted. Socio-economic rights litigation has enhanced democratic deliberation and entrenched the concept of government accountability and has played an important role in opening up the political space of oppositional politics in South Africa.[247] Court cases have produced evidence and arguments that have become part of the public record and enhanced democratic deliberation. Despite the Court's conservatism, social rights litigation has produced a formal and contemporary record of government failures in conceptualizing and implementing social policy.[248] Research shows that the legal process has produced more productive analysis of social policy and deliberation on the nature of South African democracy than comparable parliamentary debates during 1994-2004.[249]

[246]Varun Gauri and Daniel M. Brinks (eds.), Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World, , Cambridge University Press, 2008, p. 340.
[247] Lauren Paremoer, Courtney Jung, *The Role of Social and Economic Rights in Supporting Opposition in Post-Apartheid South Africa*, April 2009, paper presented during the 17th Annual Conference on 'The Individual vs. the State' held at Central European University, Budapest-12-13 June 2009, p. 5.
[248] Ibid., p. 12.
[249] Ibid., p. 37.

Constitutional socio-economic rights protection gives courts the power to become relevant actors in the design and implementation of social public policy, in a world that is characterized more by individualism than by solidarity.

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