Argumentative Strategies of Constitutional Courts in Cases Related to Social and Economic Rights

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Abstract

The thesis examines how the German, Hungarian and South African constitutional courts cope with the separation of powers principle by using different arguments in cases concerning social and economic rights. The comparative study shows the German court has a limited reflection on the broader context of a case, but it developed an activist role when relying on *Existenzminimum* stemming from a very little textual basis combined with an even stronger evidence-based review. The Hungarian court had initially shown activism by developing concepts that met the philosophy of market capitalism and rule of law. However, later it turned to be deferential without looking at the reality behind the doctrinal considerations. The South African court embeds strong moral references while continuously tries to give meaningful interpretation to the transformative elements of the constitution such as the reasonableness review, even combined with deliberative elements.

Introduction

Both academics and the case law at national level take different views on the leeway of the litigation concerning social and economic rights. In the 1990s, after the collapse of the socialist bloc and the apartheid regime, the enforceability of social and economic rights (SER) became particularly important, given the strong claim to legitimacy of societies reorganised on new legal foundations. In such a changing social and political context, the role of institutions like constitutional courts, which represent the integrity and stability of a state based on rule of law, is being enhanced. However, in cases before the constitutional courts there are not always doctrinally clear answers, especially not in SER cases. It is the interpretation of the courts that gives meaning to SER and to the role of the constitutional courts too.

Statement of Problem

The starting point of my research is that I assume that there is a tension between constitutional courts and the different branches of government in a constitutional review, and that this tension is particularly intense in SER cases, where the use of state's financial resources is the most directly examined by the courts, compared to other types of fundamental rights litigation. In my research, by 'argumentative strategies' I examine the arguments that constitutional courts use in SER cases, assuming that the wording of the constitution allows courts to choose between several interpretations, and that the choice of arguments takes place in the context of and with reflection to the tension and the general social and political framework of the case.

Theoretical Framework

Based on theories on judicial role models improved by Mark Tushnet and Roberto Gargarella, and with a reflection on methods of review described by Katie Boyle and Kathrine G. Young, I developed my own framework in which I examine how actively the constitutional courts in three countries develop substantive or rather procedural arguments in SER cases, and what kind of relationship to other branches is mirrored in their arguments. By examining the case law, I seek to answer the questions of (1) what arguments, not specifically social rights focused, are used by the courts in SER cases, beyond that, (2) to what extent the courts focus on procedure of the decision maker, and (3) to what extent the courts can be considered deferential while adjudicating SER cases.

Methodology

My research questions aim at comparing national law, more precisely the practice of constitutional courts in three states. As part of the analysis, I would like to compare how the courts respond to nearly identical problems. At the outset of the research, I conducted theoretical research and reviewed the literature on the role models of constitutional courts and the methods of their decision making. On this basis, I identified the main problems related to SER litigation and selected the cases to be examined. In my research normative and empirical research elements are present. The research can be considered normative as the analysis could not be performed without an overview of black letter law of each state since these give the textual basis for the decisions of the constitutional courts. In other respects, however, the research is more empirical as the main focus is to identify the different extratextual arguments the courts used while adjudicating SER cases.

Consequently, my thesis might form part of constitutional studies pursuant to the terminology made by Ran Hirschl.[1]

Choice of Jurisdictions

I chose the constitutional courts of the three countries partly on theoretical and partly on practical grounds. From a theoretical point of view, the three countries have in common that, after 1990, they have undergone, to varying degrees, social change in which addressing inequalities between groups in society or between parts of the country has been a challenge for the constitution. While the unification of Germany, or more precisely the accession of East Germany to the West, did not lead to any substantial changes in the constitution's catalogue of fundamental rights or the federalist structure of state, in Hungary the 1949 Soviet-style socialist constitution was completely recodified, and in South Africa a new constitution was adopted to eliminate apartheid. As regards the relationship between the three legal systems, it is noteworthy that German jurisprudence has served as a point of reference for the post-transition public law in the two other states. A practical consideration in my choice of comparators was the accessibility of the decisions of the constitutional courts in the languages I command.

For the purpose of my research, I chose eleven cases in Germany, seven cases in Hungary and seven cases in South Africa that were identified in the secondary literature as key cases after 1990.[2]

[1] Hirschl, Ran (2019) Comparative Methodologies in Masterman, Roger - Schütze, Robert (eds.) The Cambridge Companion to Comparative Constitutional Law, Cambridge: Cambridge University, pp. 11-39

[2]The secondary literature based on which I selected the cases:
Germany: Rechtsprechung zum Sozialstaatsprinzip und zu sozialen Grundrechten in Deutschland (WD 6 - 3000 - 200/14, Sachgebiet WD 6 für Arbeit und Soziales) issued on 3 November 2014 by Die Wissenschaftlichen Dienste des Deutschen Bundestages and Däubler, Wolfgang (2010) Der Schutz der sozialen Grundrechte in der Rechtsordnung Deutschlands, in Iliopoulos-Strangas, Julia (ed.) Soziale Grundrechte in Europa nach Lissabon, Nomos, pp. 127-128
Hungary: Badó, Katalin - Téglási, András (2019) A szociális biztonsághoz való jog alkotmányos tartalma Az Alkotmánybíróság szociális tárgyú döntéseinek tükrében (1990–2016), Budapest: Dialóg Campus
South Africa: Liebenberg, Sandra (2010) Socio-economic rights: adjudication under a transformative constitution, Claremont:Juta

In the case of Hungary, it must be noted that the seven selected cases consist of the 1995 comprehensive austerity package with eleven formally separate but interrelated constitutional court decisions. The selected decisions concern mainly social rights in different areas of the law (tax law, social benefits, law social insurance, civil law), but what they have in common is that they raise the issue of the social responsibility of the state, and how the financial burden is shared between the state and the individual.

Chapter 1: Theories on Judicial Role Models

In this chapter, I present considerations on judicial decision making in SER cases in general, and then the possible judicial role models distinguished by scholars will be discussed. It will become clear how intensively the academy has dealt with the difficulties of SER adjudication and how varied the solutions have been to solve these controversies.

1. 1. The Nature of Judicial Review

The judicial review over legislation and the executive in cases related to state redistribution and state budgeting is particularly divisive. Scholars have intensively examined the nature of the judiciary and the institutional challenges primarily in the context of SER.

The source of problems with the judicial adjudication of SER cases is the theoretical distinction between policymaking and law. According to this doctrinal demarcation, courts make their decisions in a non-political space, solely on the basis of norms set by legislature. However, norms rarely contain exact instructions for different situations of life, so judicial interpretation gives content to each norm. This is especially true in the field of human rights, such as SER, as the content of rights is often formulated only as very abstract concepts or general principles. The lack of very specific, well-defined norms pushes judicial interpretation into dangerous domains, a field where judicial review has come under several criticisms.

As Alexander Bickel analyzed the theoretical foundations of the Supreme Court of the US, i.e. the nature of the judicial review, he made clear the immanent contradiction of the third branch. Bickel argues that the courts can be considered as countermajoritarian in their relation to the legislature. He added that '(b)esides being a counter-majoritarian check on the legislature and the executive,

judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process. Judicial review expresses, of course, a form of distrust of the legislature.'[3]

According to Katie Boyle, critiques of SER adjudication in the literature have emerged in two waves.[4] Perhaps the most voiced element of the first wave of criticism is the anti-democratic nature of SER-adjudication. These criticisms emphasize inter alia that SER entails imperfect obligations and have no clear duty-bearer. In addition, claims invoking SER are resource dependent and the adjudication of SER runs contrary to the principle of separation of powers.[5] Boyle listed in the first-wave criticism those opponents of SER who emphasise their indeterminacy by claiming that these rights are vague and lack exact content. The incapacity critique also belongs to the first wave criticism. According to these criticisms, SER adjudication can easily lead the judiciary to usurp the powers of other branches. And this could lead not only to confusion in the state organization, but also to a situation where courts undertake a task for which they have neither the capacity nor the expertise.[6] While the common feature of the first wave of critiques is that they had been formulated before SER adjudication, the second wave was much more formulated as a response to judicial decisions dealing with SER. The latter criticisms consider SER adjudication not so much from an institutional perspective but rather from the viewpoint of right holders. SER adjudication is unable to help those who should be protected, and even follows a kind of majority logic in favor of the less vulnerable parts of the society. The pro-hegemonic critique as labeled by Boyle states

[3] Bickel, Alexander (1962) The Least Dangerous Branch, The Supreme Court at the Bar of Politics, New Haven, CT: Yale University Press, p. 21

[4] Boyle, Katie (2020) Principles of ESR Adjudication. In: Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication. Routledge Research in Human Rights Law. London: Routledge, p. 12

[5] Ibid p. 19

[6] Ibid p. 21

that SER adjudication is not suitable for reaching its own purpose, the only way to protect these rights is to take part in political struggles.[7]

While presenting criticism, SER-proponents Sandra Liebenberg and Katharine G. Young highlight the polycentricity of SER cases following Leo Fuller's theory as an additional difficulty.[8] According to this criticism, the SER affects so many parties that it would be impossible for them to be involved in a court proceeding. Thus, in SER cases, legally binding decisions are delivered in such a way that the overwhelming majority of the parties concerned does not have the opportunity to present their arguments or appeal against the decision.

Cass Sunstein also stresses the institutional limitations of judicial protection of SER rights.[9] While it is true for all fundamental rights decisions that go against the 'will' of elected representatives or even of citizens, this is much more true for the SER, as such cases require a review of the courts over a multitude of bureaucratic institutions.

As it can be seen from the critics briefly mentioned above, some of the problems relating to SER issues are strongly connected to the institutional boundaries of the judiciary as the third branch, while others to the alleged lack of capacity and expertise necessary. In the following, I would like to concentrate mainly on the challenges of institutional constraints in the context of the different branches of the state.

[7] Ibid pp. 21-22

[8] Liebenberg, Sandra - Young, Katharine G. (2015) Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help? in Social and Economic Rights in Theory and Practice: Critical Inquiries, Helena Alviar Garcia et al. Eds., Routledge, p. 238

[9] Sunstein, Cass R. (2001) Social and Economic Rights? Lessons from South Africa, John M. Olin Program in Law and Economics Working Paper No. 124, p. 3

In evaluating the decisions delivered as reaction to the governmental austerity package during the starting period of the Hungarian Constitutional Court (HCC), András Sajó is equally aware of the criticisms of the SER adjudication outlined above, namely the critical considerations related to democratic theory, separation of powers doctrine, and the prudential nature of SER issues. However, while demonstrating the tensions between the court and the legislature, he proved that the court had seeked to protect majority interest when it had annulled some elements of the austerity program of 1995.[10]

By analyzing the same decisions as Sajó in the context of international money lender organisations, Kim Lane Scheppele sees the controversial nature of the judiciary as a possible institutional correction on the imperfect lawmaking process. To illustrate her view she gives the following analogy: '(...) as state intervention is justified in realist economic models as a way of correcting market failures, court intervention in democratic state institutions is similarly justified as a way of correcting the democratic failures that occur when political institutions do not adopt policies that attract popular support.'[11]

Like Scheppele, Karl Klare also points out that the doctrine of separation of powers is theoretically incapable of reflecting on the imperfections of democratic decision-making because it does not take into account the everyday operation of the legislature. By relying on John Ely's concept, he argues that the judiciary can help to eliminate the negative results of shortcomings in the lawmaking process such as corruption, exclusion of minorities or other vulnerable parts of the

[10] Sajó, András (2006) Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court, in Gargarella, Roberto - Domingo, Pilar - Roux, Theunis (eds.), Courts and Social Transformation in New Democracies: an institutional voice for the poor? Hampshire:Ashgate, p. 84

[11] Scheppele, Kim Lane (2004) A Realpolitik Defense of Social Rights, University of Texas Law Review, vol. 82, no. 7, p. 1929

society. Klare suggests reconsidering the meaning of separation of powers doctrine and under progressive constitutions to understand it rather as 'complementarity' or 'coordination of powers.'[12]

Sandra Liebenberg's understanding on separation of powers resembles this approach. She confirms that a tension exists between the different branches of power, and in fact, this tension is inevitable.[13] However, Liebenberg does not see this tension as a problem, but simply as a matter of conception of democracy. In her view, the real problem is caused by the idealistic and static understanding of the separation of powers doctrine. The purpose of this concept is to arrange the division of duties among the branches and to create the scheme of mutual control between them. These purposes, in Lindenberg's view, can be accomplished not only in the classical conception of doctrine, but in a much more reflective way as a response to the contemporary challenges of modern constitutions.[14] She critically observes that the traditional understanding of separation of powers could serve as an excuse for not act against the legislature: '(i)n its idealized, static form, the separation of powers doctrine may be ritually invoked by the courts as a way of avoiding their constitutional mandate to interpret and enforce constitutionally guaranteed rights.'[15] As this judicial attitude is, in her view, especially true in the case of social rights, she advocates a dynamic understanding on separation of powers, according to which the different branches engage in dialogue with each other.

[12] Klare, Karl (2014) Critical perspectives on social and economic rights, democracy and separation of powers, in Alviar García, Helena - Klare, Karl - Williams, Lucy A. (eds.) Social and Economic Rights in Theory and Practice, Routledge, p. 21

[13] Liebenberg, Sandra (2010) Socio-economic rights: adjudication under a transformative constitution, Claremont:Juta, p. 63

[14] Ibid p. 67

[15] Ibid

1. 2. The Possible Roles of Courts in SER Cases

After shedding light on the theoretical problems of SER adjudication, I would like to make a brief overview of the possible judicial paths suggested by scholars. Regarding the possible leeway of courts, Sajó highlights on the one hand that the terminological phrasing of SER in constitutions is less decisive than expected, on the other hand ambiguous provisions cannot serve as guidelines for adjudicating welfare claims.[16] As the concrete provisions in different constitutions around the world do not necessarily make clear instructions on how to handle SER, the literature is not uniform about the possible solutions either. As Boyle points out, scholars have not agreed on the procedural or the substantive elements of SER adjudication, therefore, the questions of it are still unsettled.[17] In the following, I will present several solutions that respond to the tension between the branches.

Recognising the importance of tensions stemming from the doctrine of separation of powers, Bickel warned the court to keep itself restrained in the already mentioned counter-majoritarian dilemma. According to him, to maintain its strength and legitimacy on a long term basis, the court has to temper its own tendency of activism in order to be able to make powerful decisions when the time comes to do so. The suggested doctrinal solution for this kind of self-tempering, as Bickel calls 'passive virtues,' can be a reference to political question doctrine or non-justiciability of the case.[18]

Mark Tushnet makes a theoretical distinction between weak and strong courts based on their deference to other branches of government. The weak courts rely more on methods such as

[16] FN 10 p. 85
[17] FN 4 p. 35
[18] FN 3 Chapter 4

reasonableness tests or issue interpretations which can guide the stakeholders to determine the specific content of the right. According to him, '(w)eak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance.'[19] By contrast, strong form reviews leave other branches less leeway. At this point Tushnet emphasizes the time element of judicial decision making. While a strong review forces the government to a path where the latter can revise the judicial interpretation slowly, the weaker forms are more permissive and let the other branches react for the judicial interpretation in a short period of time. In conclusion, he advocates a weaker form of review in SER cases because it could better comply with the requirement of modern constitutionalism than the strong one. In his view, a weaker form of review provides a mechanism in which the different institutions of the state can specify the meaning of abstract constitutional provisions in a competitive way.[20]

Boyle frames the leeway of courts with reflection on the ground for review and the intensity of the review as well.[21] As a starting point of her view, she states that SER can be adjudicated the same way as civil and political rights. She distinguishes three basic grounds for review. The first one is the illegality ground based on which the court checks the lawfulness of the reviewed act in a substantive way. The second ground for review is the rationality of the decision, more precisely, whether the legislative or governmental decision does meet the requirement of reasonableness. This kind of review can be either substantive or procedural as the court can check the reasonableness of the whole decision-making process and the reasonableness of its outcome. The

[19] Tushnet, Mark (2008) 'Weak Courts, Strong Rights:' Judicial Review and Social Welfare Rights in Comparative Constitutional Law, Oxford: Princeton University Press, p. 23
[20] Ibid p. 238
[21] FN 3 pp. 29-30

third ground labelled by Boyle as procedural impropriety is when the court focuses on decision-making's procedural fairness, or whether the decision-making body did comply with rules on procedure. Boyle draws attention to the fact that these grounds for review can be used in the same case and her listing is not exhaustive, further developments in grounds are conceivable. The second aspect of review highlighted by Boyle is the intensity of review which can vary from a basic reasonableness test to the question of substantive fairness.[22] Other methods with various intensity are the analysis of proportionality, procedural fairness and anxious scrutiny. She also outlines two approaches regarding the substantivity of rights that the court can use while adjudicating SER claims. Both of these approaches focus on the outcome of the decision, i.e. how the rights holder's life conditions look like in contrast to the normative provisions on SER.[23] In the first case, the court reviews whether the conditions satisfy the minimum level of rights, the concept of human dignity as a 'social minimum threshold.' In the second case, the court makes instructions towards the decision maker and specifies the exact threshold that it should have reached in order to comply with SER.

By reflecting on the stances that SER adjudication have made Young develops a five elements typology of review.[24] She makes clear that her typology cannot be set on a scale based on the power of judicial review because of the multidimensional nature of review and the coexistence with several institutional responses.[25] The first stance she describes is the traditional deferential review where courts give as much freedom as possible to elected bodies to determine the content of the SER-based obligation. When deciding for a deferential attitude, the judiciary 'give[s]

[22] Ibid p. 31
[23] Ibid p. 35
[24] Young, Kathrine G. (2012) Constituting Economic and Social Rights, Oxford University Press, pp. 142-166
[25] Ibid p. 143

credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to, the legislative and executive branches.'[26] The second stance is the conversational review where the judiciary takes part in an interbranch discussion. During this dialogue the court has a more powerful role as in the case of deferential review but still remains only as a partner of the different branches. Young argues that '(b)y allowing the legislature to disagree with the court, as long as this disagreement is reasonable and clearly expressed, both actors share the role in elaborating constitutional norms.'[27] A third type of review is the experimentalist review, which is strongly interconnected with the concept of deliberative democracy. The experimentalist review is an advanced form of the conversational, in which the court facilitates a participatory process for the purpose of structural reforms. In contrast with conversational review, according to the experimentalist approach, not only the government but also other actors, not necessarily those in power, can be involved in this process. Young's fourth review is which she describes as managerial. In the managerial review courts examine the alleged violation of rights and after declaring that a state body failed to ensure the right properly, they make clear instructions how to give substance and implement the right at stake. So, the distinctive element of this review is that the judiciary has to have to some extent a supervisory role over the government. In this scheme, judges are entitled to set deadlines and scrutinize the feasibility of governmental plans. In order to be able to evaluate the activities of the government in a well-founded manner, the courts may even involve external stakeholders and experts in the evaluation. The last type presented by Young is the peremptory review, which resembles the conventional judicial decision-making with its binary nature as the courts either uphold or strike down the legislation. This approach is based on the superiority of the judiciary and resulted in 'rigorous scrutiny' over the acts of other branches. Even

[26] Ibid
[27] Ibid p. 147

if the court decides not to overrule the legislation, by upholding it, the judiciary may 'amend' the law with 'curing words,' i.e interpret the law to be constitutional.

The experimentalist version of judicial review, which is closely related to the concept of deliberative democracy, has already been mentioned above. Roberto Gargarella explains in detail how it would be important to rethink the role of the court in such an understanding of democracy. In his theoretical consideration, he contrasts pluralist and participatory democracy with deliberative democracy. A common feature of the former is stability as a core element of their constitutional design that courts have a much more deferential role towards the legislature.[28] Gargarella argues that the court could play a more powerful role in a deliberative democracy when adjudicating SER cases. Even if the involvement and active participation of people is the most emphasized in this conception of democracy, the courts can play a much more active role in defending social rights, too. And people's participation in decision-making takes place in a dialogic framework, where the role of the judiciary differs fundamentally from that of a pluralist or participatory democracy. The deliberative model rejects the binary nature of classical litigation and wants to avoid making judgments resulting in complete invalidation or absolute deference. Instead of making 'all or nothing' decisions with legally binding consequences, the court is given an active role in the process itself. According to Gargarella, this is due to its 'unique institutional position: obliged to listen and attend to these complaints and to respond with answers justified based on public reasons.'[29] He argues that a deliberative model in the judiciary would be able to alleviate the tension stemming from countermajoritarian criticism. In addition, he highlights two

[28] Gargarella, Roberto (2006) "Theories of Democracy, the Judiciary and Social Rights" in Gargarella, Roberto - Domingo, Pilar - Roux, Theunis (eds.) Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? Aldershot, UK: Ashgate, pp. 13-34
[29] Ibid p. 108

important qualities of this approach. The deliberative method would solve the problems that Gargarella identifies as 'missing viewpoints' of people excluded from the traditional adjudication and minimizing 'naked interests' of powerful groups in favour of public interest.[30] However, Gargarella recognizes the practical limitations of this theory. The system of checks and balances is not based on argumentation or mutual dialogue, but rather on bargaining between different interests. According to him, this institutional environment is therefore not suitable for a dialogue, as it consists of bodies that are in 'war' with each other.[31]

[30] Ibid pp. 108-109
[31] Ibid p. 113

Chapter 2: An Extra Element in Adjudication: Transition and Transformation

In addition to the general theoretical framework described above, a decisive factor could be the transitional social and political environment in which courts must deal with SER cases. The changing context of judicial decision-making can obviously have a serious impact on court proceedings and decisions. The question therefore arises as to what the role of a constitution is in changing social circumstances. In this chapter I show how the three constitutions provide a general framework for SER adjudication.

2. 1. Features of Different Types of Constitutions

Scholars make a distinction between classical liberal constitutionalism and transformative constitutions.[32] The former is typically identified with the Global North, while the latter is attributed to the constitutions of the Global South.[33] Whereas the main virtue of classical liberal or preservative constitutions is their ability to ensure the stable functioning of the political system and negative rights, a transformative constitution can be characterized as having the explicit aim of promoting social change through the means of constitutional law.[34] The term transformative constitution comes from Karl Klare, who used the term in connection with the South African constitution of 1996. According to Klare, '(t)ransformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'[35]Cass Sunstein also distinguished between 'preservative' and transformative constitutions. The latter are 'set out certain aspirations that are emphatically understood as a challenge to

[32] Dann, Philipp - Riegner, Michael - Bönnemann, Maxim (2020): The Southern Turn in Comparative Constitutional Law. An Introduction, in Dann, Philipp - Riegner, Michael - Bönnemann, Maxim (eds.): The Southern Turn in Comparative Constitutional Law, Oxford University Press, p. 21
[33] Ibid
[34] Ibid
[35] Klare, Karl (1998): 'Legal Culture and Transformative Constitutionalism,' South African Journal on Human Rights, vol. 14, no. 1, p. 150

longstanding practices.'[36] A transformative constitution contains a wide range of social and collective rights as well, and the constitutional court is given a much more active role than by the classic liberal constitutions.[37] According to Liebenberg, in the case of transformative constitutions, instead of the separation of the different branches, their cooperation is essential in SER cases.[38]

2. 2. Constitutions of Germany, Hungary and South Africa

In the framework of my research, only the constitution of the Republic of South Africa can be considered transformative, while the constitutions of the Federal Republic of Germany and Hungary can rather be considered as classically liberal. What the German Basic Law and Hungarian constitution adopted in 1989 have in common is that they had been both intended to be transitional, yet the Basic Law is still in force today, and the 1989 Hungarian constitution served as Hungary's fundamental document for more than two decades.

There are basically no transformative elements in the German Basic Law, only a provision for an active role of the state in the elimination of existing gender inequalities.[39] As regards SER, the Basic Law contains even fewer provisions. There are no social rights enshrined in the constitution, but the reference to the social state is prominent among the constitutional principles.[40] However, scholars emphasise also the role of Basic Law in shaping social and economic conditions into a more egalitarian society.[41] The Federal Constitutional Court (FCC) found in 1961 that even the social state principle would not empower the state to arbitrarily shape social welfare.[42] Besides the

[36] FN 9 p. 4
[37] FN 32 p. 21
[38] FN 13 pp. 29-30 and 70-71
[39] Basic Law Article 3(2)
[40] Basic Law Article 20(1)
[41] FN 32
[42] BVerfGE 12, 354 (Volkswagenprivatisierung) para 48

narrow incorporation of social rights in the text of the constitution, social policies formulated by the state bodies must be consistent with the provisions of the Basic Law and therefore the FCC has the power to review these.

In Hungary, the parties and intellectuals participating in the peaceful transition of power carried out a comprehensive revision of the 1949 Soviet-style constitution.[43] As a result of the heated debates, a compromise was finally reached whereby the 'social market economy' was only included in the preamble of the Constitution, which was intended to be transitional.[44] According to the Preamble, the Constitution of 1989 was to 'facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy.' The preamble therefore shows that the aim of the constitution was to facilitate the transition, both in political and economic terms. The practical significance of the Preamble is that this introductory provision could serve as a reference point for the interpretation of the provisions of the Constitution. Although the aim of the constitution of 1989 was to facilitate the transition and to change the legal and economic environment from state socialism to democracy and capitalism, it could not be considered as transformative in terms of Klare's or Sunstein's understanding, since both the structure of the state and the fundamental rights mirrored the liberal conception of the state: its design can be characterised as promoting a minimalist state that avoids state interventions and lacks deliberative or participatory elements in decision-making. Beyond the outlines of the Preamble, the Constitution contained a catalog of rights attached to the constitutional body under Chapter XII. In this part some social rights were declared as a right, while others as a state objective. In the decisions examined, the transition from state socialism to

[43] Act XX of 1949 on the Constitution of the Republic of Hungary

[44] Kollonay-Lehoczky, Csilla (1999): The Hungarian Constitutional Court and Social Protection, In Studi sul Lavoro. Scritti i n Onore di Gino Giugni. Tom. II , Cacucci Editore, Milano, p. 1454

market economy argument appears in several cases of the HCC, which I will present later. The Constitution of 1989 was replaced in 2011 and the role and values of state have been explicitly altered. However, the new law has not changed the wording of SER drastically. The fact must be also noted that whereas the new Fundamental Law of 2011 contains several illiberal elements, these did not change the basic functions of the state body and the listing of SER. The text of the current Hungarian constitution still lacks deliberative or participatory elements, or provisions and institutions that would aim at reducing any form of inequalities in society.

In contrast to the other two constitutions briefly presented above, the South African constitution can be seen as explicitly transformative. The transformative elements can be discerned at several points in the Constitution of 1996. The Preamble refers to the past of the country and sets as a purpose to 'establish a society based on democratic values, social justice and fundamental human rights.' In addition, the introduction to the Constitution makes it clear that the Constitution is adopted for the purpose of improving 'the quality of life of all citizens and free the potential of each person.' The dynamic nature of the Constitution, however, is not only reflected in the Preamble, but also in certain sections. The provisions on property, housing and health care, food, water and social security all contain a clause prescribing that the state is responsible for taking 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of such rights.[45] These provisions therefore clearly distinguish the South African Constitution from the constitutions of the other two countries.

[45] Sections 25:5, 26:2. and Section 27:2

Comparison of Arguments used by the Constitutional Courts

During the research, I was looking for answers to the question of which arguments are used by constitutional courts in their decision-making. Are these arguments, whether they are phrased rights, principles or concepts, derived from the text of the Constitution or not? By using these arguments, what relationship between the legislature and the court is mirrored in the reasonings? To this end, I identified several arguments and grouped reasonings of the courts according to this scheme. Thus, I have identified some 'non-rights' arguments, the applicability of civil and political rights, the procedural understanding of the cases, arguments supporting judicial deferentialism and in contrast with deferentialism, instructions of courts to the legislature. In the following I will show how constitutional courts have relied on these in their argumentations related to SER cases.

Chapter 3: 'Non-rights' Arguments

In this chapter, I present the arguments that can be considered as abstract concepts in the reasoning of the courts, rather than explicit references to social rights. Therefore, I show references to the historical and social background of the cases, how courts use justice as an argument, and the application of the concept of dignity.

3. 1. Historical and social background

The historical and social perspective that the court has adopted might have several functions. On the one hand, it could demonstrate that the court does not interpret the cases before it as a mere legal-doctrinal assignment, but as a problem having deep roots in society and that it is aware of the fact that its decision will have social implications. With this kind of historical reasoning, constitutional courts thus can give a historical role to their own decision and enhance their legitimacy too. On the other hand, explaining the historical and social context makes the

reasonsings underlying the decision more transparent and understandable, so that the court can increase people's interest in law and their access to justice.

Historical and social references can be found in the reasoning of all three constitutional courts, but to a different extent. Regarding the historical and social references South Africa stands out among the compared countries. As Liebenberg points out, a 'relational, context-sensitive adjudication' is one of the distinctive features of judicial approaches stemming from a transformative constitution.[46] In the South African constitutional court decisions, such references are found in all cases, and in a prominent place, in the introduction to the reasoning. In these decisions, the court has sought to place the problem it is called upon to decide in a historical context. A constant element in arguments of the court is the law's relationship with the apartheid era and the responsibility of the new Constitution to eradicate the consequences of apartheid. In one of its first judgements, the court addressed the problem of access to health services in a case of a man who unsuccessfully sought treatment free from the dialysis program of a state-funded institution, by saying the following: '(w)e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty.'[47] Although the court assessed the social circumstances of the case, it ended up with a restrained decision that basically left the decision on treatment to the hospitals. This kind of deferentialism is no longer present in later decisions. What makes the South African arguments even more distinctive is that, unlike the other two constitutional courts, their historical approach has a strong moral content and clearly intends to convey values in a plain language and in line with the Constitution. In *Port Elizabeth*, however, the court went beyond the historical and social framing of the case and set as a guiding principle

[46] FN 13 p. 279

[47] Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) para 8

for the judiciary that the courts are obliged to 'balance out and reconcile' different claims by 'taking account of all the interests involved and the specific factors (...).'[48] In this case, therefore, the court not merely contextualised the case, but also defined a new kind of judicial function that does not resolve conflicts over SER by only doctrinal methods but by applying a broader and more social focus for adjudication.

Compared to the South African argumentations, historical and social references are much less common in Hungarian SER cases. Such references have appeared in the first years of the HCC, rather only in the case of decisions with major social importance. In contrast to the South African approach, the historical references in the HCC do not generally refer to the socio-historical background of the country, but specifically to the changes of role of and relation between the state and the economy. These arguments stress the nature of economic transition. In contrast to the South African arguments, the Hungarian decisions do not aim at the elimination of inequalities, but at an organic transition from state socialism to market capitalism, in which both the state and society have to adapt to the new circumstances. The prevailing approach to state and economy in the reasonings is well illustrated by a dissenting opinion of Géza Kilényi, which he added to a 1991 decision declaring the substantial increase of interest rates on long-term housing loans by law to be constitutional. Kilényi has observed that '(n)either the rule of law nor a market economy can be created overnight; both are a longer process that requires, among other things, the creation of new legal institutions and a major overhaul of the previous legal system.'[49] The HCC's attitude promoting the transition to market economy, while at the same time urging the legislator to be

[48] Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) para 23

[49] Dissenting opinion of Géza Kilényi in the Decision of the HCC No. 32/1991. (VI. 6.) (an increase by law in the interest rates on long-term housing loans)

more restrained and cautious, was reflected in several decisions later.[50] However, from the second half of the 1990s onwards, the focus on the social context of SER-claims and the court's historical assessment have disappeared and the court limited itself to doctrinal considerations.

Compared to the South African and the early Hungarian reasonings, the German decisions examined make fewer historical references and focus rather on the legislative history of a law. This can probably due to the fact that the Basic Law had already been consolidated in the period in question, unlike the other two newly enacted constitutions. Thus, the judges had less need to look for earlier points of reference, since the FCC had well-established powers and practices by 1990. Prominent among its decisions, however, is the *Grundfreibetrag* decision, in which the FCC examined whether the basic tax allowances incorporated into the income tax scale including the general tax allowance are compatible with the Basic Law in terms of their amount.[51] Before striking down the law, the FCC traces the personal income tax laws back to the 19th century and, consistent with its later conclusion in judgement, states that German income tax traditionally burdens only disposable income and exempts from taxation, in one form or another, the income necessary to finance basic needs for existence.[52] The FCC takes a similarly broad historical overview in its *Hartz IV Sanctions* decision before striking down the law that sets radical benefit reduction as sanction to non-cooperation,[53] and in *Berliner Mietendeckel* where the court presented the whole legislative history of German tenancy law.[54]

[50] Decisions of the HCC on 56/1995. (IX. 15.) (sick leave II), 77/1995. (XII. 21.) (financing of health services at municipality level), 79/1995. (XII. 21.) (tuition fee in higher education)
[51] BVerfGE 87, 153, 169 (Grundfreibetrag) paras 2-7
[52] Ibid para 2
[53] BVerfGE 152, 68-151 (Hartz IV Sanctions) paras 4-9
[54] Decision of March 25, 2021 2 BvF 1/20 para 110-131

3. 2. Justice as argument

The three countries have different constitutional approaches to the concept of *justice*. While the South African constitution contains several references to both justice and injustices, the German Basic Law and the Hungarian Constitution of 1989 refer to it only once. In contrast to the South African Constitution, which refers to justice in several areas of law, including *social justice* in the Preamble, the other two constitutions refer to justice only specifically in one and two area of law: *Gerechtigkeit* as one of the foundations of human rights as the basis of the human community,[55] and *igazság* in the field of academic freedom and in the context of fair trial as well.[56] The Hungarian Fundamental Law adopted in 2011 mentions the concept of justice in the Preamble, but like the Preamble as a whole, the concept of justice has not been referred to in practice.

Among the decisions examined, there can be found SER cases - mostly from South Africa - in which judges relied on the concept of justice in their reasoning. In *Soobramoney,* already characterised as deferential, after the Court addresses the growing inequalities in South Africa and identifies the main areas of injustices such as employment, social security, access to clean water or to adequate health services, found that '(t)hese conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'[57] Such moral arguments are present in other South African judgements as well. For example in *Grootboom*, where the Court adjudicated the case of homeless people who had been evicted, before

[55] Basic Law Article 1(2)
[56] Articles 57(1) and 70/G(1) of Act XX of 1949 on the Constitution of the Republic of Hungary
[57] Soobramoney para 8

conducting a reasonable test, it takes a strong moral position when saying '(t)he issues here remind us of the intolerable conditions under which many of our people are still living.'[58] Later, in *Port Elizabeth* the court had to interpret a statutory law on housing and to define what justice and equity mean in the context of housing rights. The court held that these values form part of 'constitutional matrix,'[59] and while adjudicating an eviction claim, the court must act as a *manager* and to take into account different factors such as the vulnerable position of the occupiers, the negotiations before eviction and the offers they got. By examining these factors, the court might be able to decide whether the governing principles of justice and equity had prevailed, the constitutional court found.[60]

A similar moral finding can hardly be found in the reasoning of the Hungarian Constitutional Court. In the SER case law of the HCC I could identify only once reference to the concept of *justice*. In the context of the general austerity package of 1995, the Court struck down several provisions of the omnibus bill aiming to reshape the state budget by altering the tax system and by cutting most of the welfare benefits that had been transferred unconditionally in state socialism. At that year the HCC issued a series of judgments concerning the different provisions of the bill. The HCC took its decisions in three waves. In the first half of the year, decisions were taken that focused more on the legislative deficiencies of the austerity package. In the early summer of that year, the HCC dealt with the rule of law considerations and the concept of legal certainty, and in the second half of the year on the substantive examination of the provisions concerning wide

[58]Government of the Republic of South Africa and Others v. Grootboom and Others, 2000(11) BCLR 1169 (CC) paras 1-3
[59] Port Elizabeth para 14
[60] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008) para 30

ranges of public policy.[61] In the most famous of the rulings, the HCC annulled the enacting provision of the legislation, as only two weeks would have elapsed between the promulgation and entry into force of the legislation, which fundamentally transformed the family support system. This decision was accompanied by a concurring opinion of János Zlinszky. In his concurrence, he acknowledged that the competencies of the Court are limited to constitutional review but held that a more strict tone would have been necessary in the judgement towards the legislature. By putting the perception of subjects of the law, i. e. the society into to context, he finds that the 'Court does not wish to tie the hands of the legislator in the search for the right solutions, but it must remind the legislator, in a more explicit form than that set out in the decision, that only by choosing and demanding austerity solutions that are constitutional, in keeping with society's sense of moral and social justice, can it count on the social consensus and cooperation that is an indispensable precondition for the success of reforms.'[62] However, Zlinszky's invocation of justice is only an exception among the HCC's reasoning.

Whereas the quoted thoughts have a clear moral embeddence, the arguments in the German cases are much more moderate and seem to be more elaborated of different kinds in the case law. In the judgments striking down the tax laws that endangered the minimum conditions of living, the FCC relied on *Steuergerechtigkeit*, the constitutional principle of horizontal justice in taxation.[63] In a decision upholding the risk structure compensation in the statutory health insurance system, the FCC invoked *Beitragsgerechtigkeit* and *Startschanengerechigkeit*,[64] while in a decision on Hartz

[61] Kerekes, Zsuzsa (1996) Áldás vagy átok? Az Alkotmánybíróság hatodik éve, in Magyarország Politikai Évkönyve, 1996. Demokrácia Kutatások Magyar Központja Alapítvány, pp. 161-165
[62] Decision of the HCC No. 43/1995. (VI. 30.) (maternity allowances I - legal security)
[63] BVerfGE 99, 246 (Kinderexistenzminimum I) para 69, BVerfGE 82, 60 (Steuerfreies Existenzminimum) paras 117-119
[64] BVerfGE 113, 167 (Risikostrukturausgleich) paras 195 and 227

IV on *Bedarfsgerechtigkeit* and *Teilhabegerechtigkeit.*[65] In the majority of the German judgments examined, however, justice as an abstract concept does not play as significant a role in the reasoning as in the South African judgments.

3. 3. Human dignity

The concept of human dignity has gained importance for all three constitutional courts in SER cases to different degrees. Looking at the texts of the constitutions, while the Hungarian constitutions recognise human dignity as a right closely linked to the right to life,[66] the German Basic Law makes it the duty of the state to protect and respect it.[67] In contrast, the South African constitution relies on dignity at several points. On the one hand, the constitution sees dignity as a fundamental and democratic value of the constitution,[68] as a right of the individuals,[69] and on the other hand, it prescribes it to the courts as a means of interpretation.[70]

Despite the fact that the Basic Law does not contain a provision on the precise meaning and content of human dignity, the FCC was able to infuse it with a content that has become decisive for other constitutional courts too. The concept of human dignity in the context of the *Sozialstaat* had already been developed before the period under my research. The FCC relied on the concept of human dignity when recognizing the subjective right to be granted the benefits necessary for subsistence.[71] In its judgment, the court found in 1975 that the Sozialstaat 'necessarily includes

[65] BVerfGE 125, 175 (Hartz IV) paras 153 and 184
[66] Article 54 of Act XX of 1949 on the Constitution of the Republic of Hungary, Articles II and XVII of the Fundamental Law of Hungary
[67] Article 1 of the Basic Law
[68] Chapter 1 on Founding Provisions
[69] Chapter 2 section 10
[70] Chapter 2 section 39 on the Interpretation of Bill of Rights
[71] Däubler, Wolfgang (2010) Der Schutz der sozialen Grundrechte in der Rechtsordnung Deutschlands. In Iliopoulos-Strangas, Julia (ed.) Soziale Grundrechte in Europa nach Lissabon, Nomos, pp.127-128

social assistance for fellow citizens who, because of physical or mental infirmity, are hindered in their personal and social development and are unable to support themselves. The state community must at any rate ensure for them the minimum requirements for a dignified existence (...).[72] This line of FCC's argumentation has permeated essentially all of its decisions in which the basic needs of an individual have been the focus of constitutional scrutiny. Upon the reunification in 1990, the FCC delivered a judgement by invoking these arguments developed in *Waisenrente II*. In *Steuerfreies Existenzminimum*, the FCC declared a law to be incompatible with the Basic Law and found in its reasoning that '(i)nsofar as the family's income is needed to guarantee it the minimum requirements for a dignified existence, it is not disposable - irrespective of the family's social status - and cannot be the basis for tax capacity.'[73] This finding regarding the *Existenzminimum* was reiterated two years later in *Grundfreibetrag* and eight years later in *Kinderexistenzminimum I*, where the FCC set that a tax legislation must leave to the income recipient at least that part of his income which it makes available to the needy person from public funds for the satisfaction of his existential needs.[74] The case *Pflegeversicherung I* concerned a constitutional complaint raising the question of whether persons who have voluntarily insured themselves against the risk of illness with a private health insurance company may be required by law to conclude a private long-term care insurance contract. The FCC dismissed the complaint by partly emphasizing the social tasks of the state and the state's duty to safeguard 'the dignity of the person in such a situation of need of assistance (...).'[75] The court found that the compulsory system does not breach the freedoms of persons obliged to bind themselves by a contract. In contrast with the HCC' approach to the trade

[72] BVerfGE 40, 121, 133 (Waisenrente II) para 44
[73] BVerfGE 82, 60, 85. (Steuerfreies Existenzminimum) para 111
[74] BVerfGE 87, 153 (Grundfreibetrag) and BVerfGE 99, 246 (Kinderexistenzminimum I)
[75] BVerfGE 103, 197 (Pflegeversicherung I) para 85

union case, which I present later in this part, the FCC did not consider the provision of compulsory care contracts primarily to be a matter of dignity but of general freedom.

In a recent judgement from 2010, which I will discuss in detail later, the FCC declared the Hartz IV system of financial allowances unconstitutional. The Court relied again on the conjugation of *Sozialstaat* and human dignity and stated that '(t)he right to a guarantee of a subsistence minimum that is in line with human dignity (...); each member of a joint household – including children – has an individual right to this, and it presumes a need that is absolutely necessary.'[76] By following the same argumentation the court declared the incompatibility of laws on allowances of asylum seekers in 2012 and on Hartz sanctions reducing the benefit in 2019.[77] In the former judgement, the FCC found a violation of the Basic Law in the case of *Asylbewerberleistungsgesetz* as the law had not provided a proper amount of benefit for asylum seekers. The court not only invoked a respective provision in the Basic Law but it characterized dignity as a very basic human right.[78] The German cases show that the FCC has derived the concept of the *Existenzminimum* from human dignity and principles of *Sozialstaat*. Although this concept is not enshrined in the constitution, it has become the most relevant shield of social rights before the FCC.

In contrast to the FCC, the practice of the Hungarian Constitutional Court has been less uniform with regard to social and economic rights. After the HCC was established, one of its first decisions dealt with human dignity in the area of economic rights. The court found unconstitutional a provision of the Labour Code inherited from socialism, according to which trade unions could act in the interest and on behalf of the employee, but without the latter's specific authorisation. In this

[76] BVerfGE 125, 175 - 260 (Hartz IV) para 158
[77] BVerfGE 132, 134 (Asylbewerberleistungsgesetz) and BVerfGE 152, 68-151 (Hartz IV Sanctions)
[78] BVerfGE 132, 134 (Asylbewerberleistungsgesetz) para 63

case, human dignity was considered by the court as 'general right to personality,' therefore as an 'umbrella right' or - as the HCC named it - 'mother right,' that the 'courts can invoke in any case to protect the autonomy of the individual if none of the specific fundamental rights mentioned applies to the facts of the case.'[79] Since the text of the Constitution of 1989 did not explicitly recognise the right to self-determination, the HCC considered the right to self-determination as a subset element of human dignity. The HCC's flexible interpretation of dignity at the dawn of the transition to a market economy, when thousands of jobs were lost, led to the elimination of the procedural rights of the trade unions in order to protect workers' dignity. As László Sólyom explained later looking back to the early years of the court that 'the Constitutional Court has used this petition to explain and publish its conceptual understanding of the general right of personality as a mother right (...).'[80] Despite this activist finding of the court right after starting its operation, the HCC remained reluctant to invoke human dignity in SER cases. Long after the 1995 government austerity package, in 1998 the HCC reviewed a case involving social aid imbursed by the local government. The applicant complained about the inadequate amount of the benefit. Even though the court had already dealt with the issue of welfare benefits in several cases, most intensively in 1995, it was only in this decision that the HCC included human dignity in its analysis. The court found '(t)he right to social security enshrined in (...) the Constitution provides the very basic conditions of life that are ensured by all means of social care and are necessary for human dignity.'[81] In doing so, the court essentially recognised that the state cannot leave its citizens in an undignified situation, and that the level of social benefits must therefore reach a minimum level. As to what exactly this minimum level might mean, the HCC neither defined nor

[79] Decision of the HCC 8/1990. (IV. 23.) (representation of employees)
[80] Sólyom, László (2001): Az alkotmánybíráskodás kezdetei Magyarországon, Osiris, p. 524
[81] Operative part, Decision of the HCC No. 32/1998. (VI. 25.) (unemployment benefit)

developed a method of assessment that could have served as guidance for the review. Therefore no evaluation criteria has been developed by the court as to whether the state ensured a level required by human dignity or not.

Within two years after the 1998 judgement, the parliamentary commissioners for fundamental rights turned to the HCC and asked the court to give an interpretation of social rights, more precisely on housing rights. In this judgement incited by the commissioners the court reiterated its own concept on human dignity in the context of SER. The HCC rejected the petition for a declaration of unconstitutionality of the failure to guarantee the right to housing. To demonstrate its detachment from the right to housing, the court placed this right in quotation marks when it stated in the operative part of the decision that no such right existed under the 1989 Constitution. The court therefore found that the state has neither an obligation nor any responsibility in the area of housing for its citizens. The HCC based its highly dismissive finding on the fact that the state is only obliged to set up and to some extent operate a system of social care. The social system is made up of a number of elements, which the state is free to shape and change the emphasis of each element. In this respect, the court has simply repeated its previous case law from the early 1990s. However, here the HCC highlighted its understanding of social rights in a very clear way: '(t)he constitutional yardstick - by including the right to human dignity - has thus been transformed from the abstractness of Article 70/E (1) (maintenance of a social care system to provide the necessary care for subsistence) to the concrete in terms of quality: the care to be provided within the framework of the social institutional system must provide a minimum level of care that ensures the realisation of the right to human dignity.'[82] According to the HCC, the bottom line is therefore human dignity. However, contrary to the practice of the FCC, the minimum conditions of dignified

[82] Decision of the HCC No. 42/2000. (XI. 8.)

life should not be judged in the light of subsidies individually, but in the context of the social system as a whole. If the totality of these does not ensure a dignified existence for an individual, then the state has failed in its constitutional duty. In all other cases, however, the state has fulfilled its constitutional obligation to maintain the institutions. While the HCC states in principle that the system as a whole 'must meet the general yardstick: the right to human dignity,' which the court understands as 'an indivisible and inalienable fundamental right, forming a unit with the right to human life, and which is the source and condition of many other fundamental rights,'[83] the court failed to set any terms or aspects that guide individual petitioners to challenge the inefficiencies of the welfare system. By turning back to housing, the court shed light on the case in which the state eventually should provide some shelter. Here the court makes a distinction between accommodation and housing. In a case when a life is endangered by the lack of shelter, '(i)n this ultimate situation, therefore, the state is obliged to provide (accomodation) for those who cannot provide the basic conditions of human existence on their own.'[84] So, unlike the German FCC, the HCC essentially tied the matter of social security to the right to human life, but rejected the view that the Court could examine the individual applications (regarding certain allowances, aids) per se, and did not develop any method of reviewing a system that shall ensure dignity. In doing so, the court has in essence made lip service to the most important right enshrined in the constitution, and it has given the legislature a completely free hand. As long as the state is running a system for social services, a constitutional complaint cannot be successful before the HCC.

In the South African case law, human dignity has played a partly major and partly minor role. On the one hand, as has been explained above, human dignity is a value that, like other 'democratic

[83] Ibid
[84] Ibid

values' such as equality and freedom, permeates the entire constitution and serves as a means of interpretation. On the other hand, the South African constitution's bill of rights is much more detailed and comprehensive than those of the other two countries. In addition to the obvious difference to the German constitution, it is easy to recognise that the South African constitution, which was adopted just a few years after the Hungarian constitution, is much more detailed on social rights. The specificity of the provisions therefore, in principle, could have left less room for doctrinal maneuvers when interpreting SER claims. In *Soobramoney* as a first significant decision of the constitutional court in SER cases, beyond paraphrasing the relevant provisions in the constitution, the court did not invoke dignity either as a right or as a principle of interpretation. In *Grootboom*, however, the court gives human dignity a more important role as in *Soobramoney*. The court used human dignity as a value of evaluation on reasonableness when saying '(i)t 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.'[85] But in the *TAC case* a few years later, which, like in *Soobramoney*, was also about access to medical services, the court again did not rely on human dignity when interpreting the three aspects of the right to health.[86] In *Khosa* the court used dignity in a balancing with the financial burden of the state budget and it found that '(...) providing access to social assistance (...) and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.'[87]

[85] Grootbroom para 83

[86] Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

[87] Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) para 82

Although dignity is invoked to some extent in all decisions as a fundamental value, a right or a principle of interpretation, its doctrinal use is less coherent than in German or Hungarian cases.

As we will see in detail later at reasonableness review, the German constitutional court has made the most crystallized outcome from the least comprehensive textual basis to protect social rights in the context of human dignity. However, it must be noted that this had started long before the 1990s. In contrast, the Hungarian body has clearly extracted a few rights from a much larger number of textual bases. Another important feature of the Hungarian SER adjudication is that the case law did not go beyond theoretical-doctrinal considerations and the court has not provided practical guidance for those seeking recourse to their SER claims. Finally, the South African examples show that dignity does not play as prominent or as a pivotal role in the court's reasoning as it does in European courts.' This is, however, more due to the fact that the South African court (ZACC) has more leeway in the textual bases of fundamental rights and also could define its own role as more activist due to the transformative nature of the constitution.

Chapter 4: Interpretation of SER cases under civil and political rights

Liebenberg, when making an overview on the context outside South Africa, sheds light on the fact that apex courts strive to protect social rights as far as they are able to do. She emphasizes that the limited wording of constitutions could drive courts to rely more on civil and political rights as the only given means of protection of SER.[88] She distinguishes two ways of protection. The first way is when courts interpret civil and political rights broad enough to include social rights too. This interpretation is also facilitated by the fact that social rights are often formulated as state objectives.[89] As to the second way of protection, Liebenberg argues the applicability of equality rights or administrative rights. In this chapter, I would like to demonstrate how the Hungarian and German constitutional courts rely on civil and political rights in SER. Since South Africa's Bill of Rights is rich in social rights, civil and political rights might play a less important role in their case.

4. 1. Right to life

Although the right to life plays a relatively marginal role in SER adjudication, there are still a few cases where arguments based on the right to life can be identified. While I couldn't find a substantive right to life reference in the FCC's rulings under my research,[90] it has occurred in the practice of the other two courts.

When striking down elements of the austerity program in 1995, the HCC turned to the right to life argument regarding the allowances transferred to the mother of a newborn. The court has not chosen the right to life as the main path of its reasoning but the legal certainty. However, it is still

[88] FN 13 p. 121
[89] Ibid
[90] In the Hartz IV Sanctions case, the right to life was invoked by one of the referring social courts. See para 79.

significant that the HCC also annulled the enacting provision of the law that withdrew maternity benefits with the effect of two weeks, on the grounds that the state had a duty to protect life. In essence, the HCC found that the social transfer targeting especially mothers had been terminated by the legislature with immediate effect in a period of pregnancy when an abortion could no longer legally take place. This, it was argued, upset the balance between the state's duty to protect life and the recognition of the mother's right to self-determination.[91]

It has already been shown in HCC's case law that the court has linked the constitutionality of the social system not only to human dignity but also to the right to life in its 2000 decision on housing. Despite the fact that bodies of the Hungarian state specialised on fundamental rights have approached the HCC with their concerns, the court in its judgement refrained 'from recognising certain specific rights as fundamental constitutional rights, beyond acknowledging the general obligation to provide for the safeguarding of life and dignity and pursuant to the capacities of national economy (...).'[92] In a recent decision, the HCC found it constitutional to punish homeless people for not voluntarily entering shelters, invoking precisely the state's duty to protect life.[93]

The ZACC faced a right to life argument in *Soobramoney*, as the applicant's claim for life saving medical treatment had been rejected, first by the state-owned hospital based on a medical policy, and second, by the ordinary court. The applicant promoted that the right to health should be interpreted together with the right to life. To support his argumentation his counsel invoked the case law of the Indian Constitutional Court. The Court rejected this approach developed by the Indian Constitutional Court as the Indian Constitution's structure and the referred case have been

[91] HCC No. 43/1995. (VI. 30.) (maternity allowances I - legal security)
[92] HCC 42/2000. (XI. 8.) (housing)
[93] HCC 19/2019. (III. 22.) (criminalisation of homelessness) para 108

found to be different.[94] The court also made a distinction between right to health and right to life therefore the claim for medical assistance remained only in the context of social rights. According to the court, the applicant's situation falls under the scope of the general provision regarding access to health. However, compared to the right to life and emergency care, the general provisions on health have an important limitation: the resources available for the state. If the court were to grant the applicant's claim, the priorities of care established by the hospitals and the funding state would be upset, ultimately leading to the public health system becoming less fundable. In the light of these considerations, the court dismissed the appeal. The deferential attitude of the court will be discussed later. Later, in the *Occupiers* and *Khosa* cases, the right to life reappears in the context of social rights, but only in a close connection with dignity and equality.[95]

4. 2. Equal protection

The requirements of equal treatment and non-discrimination play a supporting role in the cases under my examination. The German and Hungarian courts examined equality mainly in the context of contribution paid to the state, the South African court in the context of exclusion from certain services provided by the state.

The German court found tax laws to be incompatible with the Basic Law because they did not take into account properly the different tax paying capacities of families. These decisions were all taken to ensure the very basic subsistence of family members.[96] In *Risikostrukturausgleich*, however, the court used the general principle of equality to uphold the risk structure compensation as a tool for social equalisation in the statutory health insurance, and it found that the inclusion of East Germans

[94] Soobramoney paras 14-19
[95] Occupiers of 51 Olivia Road para 16 and Khosa paras 44 and 82
[96] BVerfGE 82, 60 (Steuerfreies Existenzminimum) para 81 and BVerfGE 99, 246 (Kinderexistenzminimum I)

in the all-German solidarity association of statutory health insurance also serves to realise the social equalisation characteristic of health insurance.[97]

The Hungarian court annulled certain elements of the 1995 austerity package on the grounds of non-discrimination. In one of its first decisions, it principally acknowledged that the state has a wide margin of appreciation to make changes in social benefits depending on economic conditions. However, it added that the constitutionality of these cuts depends on whether they conflict with other constitutional principles and rights, such as the prohibition of discrimination.[98] Having established this in principle, it annulled the reform of the social system in its later decisions on the grounds of non-discrimination. On the one hand, the package provided for the same level of financial contribution in exchange for different nature of social services and, on the other hand, it provided for the same liability for workers and entrepreneurs in different situations without reasonable justification.[99] Also on the grounds of non-discrimination, the court annulled the rule on eligibility criteria for benefits dependent not only on need but also on the number of children in the family.[100]

Since the South African Constitution contains detailed rules on social rights, equality and non-discrimination play less of a role. Only two of the social rights cases examined specifically addressed violations of equality. The applicants of the *Mazibuko* case submitted that the water pre-paid meters introduced in their place, but not into white suburbs, discriminates unfairly between poor black and wealthy white people. The court upheld the rule precisely on the grounds that

[97] BVerfGE 113, 167 (Risikostrukturausgleich)
[98] HCC No. 43/1995. (VI. 30) (maternity allowances I - legal security)
[99] HCC No. 45/1995. (VI. 30.) (financial contributions of artists) and 54/1995. (IX. 15.) (financial contributions of self-employed persons)
[100] HCC No. 60/1995. (X. 6.) (family allowances II)

different treatment must sometimes be applied in order to end apartheid and achieve equality.[101] In *Khosa* the court confronted the exclusion of permanent residents of South Africa from some welfare benefits just because they are not citizens of the country. The court distinguished the issue from all previous cases and found the distinction based on citizenship is run against the reasonable realisation of the right to social security and is explicitly in contradiction with right to equality.[102]

4. 3. Right to property

The arguments of the three constitutional courts shed light on the particular interpretation of the HCC. While examining the 1995 austerity package, the HCC essentially divided social services into two parts. One part was considered as a matter of social rights and in the context of the state's social responsibility, while the other was separated from it and given a higher degree of protection as property. According to the court, services that might be based on an insurance element have been understood by the court under the protection of the right to property. The HCC found principally that where an insurance element is involved, the constitutionality of reducing or withdrawing services must be reviewed on the criteria of property protection.[103] While the court struck down some elements of the package by invoking right to property, for example the reform of statutory sick pay system,[104] it found that the withdrawal of dental care without any compensation, as well as the mandatory reimbursement for ambulances cannot be considered impermissible restriction of property.[105] Sajó, criticizing the court for being too active, described

[101] Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) para 156
[102] Khosa paras 44 and 53
[103] HCC No. 43/1995. (VI. 30) (maternity allowances I - legal security)
[104] HCC Nos. 45/1995. (VI. 30.) (financial contributions of artists) and 56/1995. (IX. 15.) (sick leave II)
[105] Reasoning of the majority, Decision of HCC No. 56/1995. (IX. 15.)

this doctrinal solution as follows: '(t)he benefit and the advantage acquired based on this new 'property' is in fact a social right with its specific constitutional protection.'[106]

4. 4. Protection of family

All three constitutions contain provisions on the protection of children, and the Hungarian and German constitutions have separate provisions on the protection of the family and marriage.[107] However, these provisions are invoked to a different extent by the constitutional courts in cases where they have to adjudicate on a claim relating to the welfare of the family.

Some of the FCC's decisions that are connected to family's welfare concern the taxation of family members. The issue in these cases is whether the state is allowed to deprive a family of income in a way that might in fact force family members to receive social subsidies from the state. In these cases, the FCC not only invoked the state's obligations to maintain existential minimum and the human dignity read in conjugation with the social state principle by following the *Waisenrente* judgement from 1975 but the provision on protection of marriage and the family.[108]

In contrast, in the Hungarian cases where the HCC examined rules on subsidies for family welfare, despite the applications invoking them, the court refused to apply the provisions of the Constitution on the protection of families or children on the merits. Instead, when striking down some elements of the austerity package, it invoked either concepts outside the text of the Constitution such as legal certainty and acquired rights or the prohibition of discrimination.[109]

[106] Sajó, András (1996) A materiális természetjog árvái, avagy hogyan védi Alkotmánybíróságunk az elesetteket. A szociális jogok és a gazdasági megszorítások. Magyar Jog, no. 4, p 213

[107] Article 6 of Basic Law, Articles 15, 66 and 67 of Hungarian constitution of 1989, Section 28 of South African constitution

[108] BVerfGE 82, 60 (Steuerfreies Existenzminimum), BVerfGE 87, 153 (Grundfreibetrag), BVerfGE 99, 246 (Kinderexistenzminimum), BVerfGE 99, 216 (Familienlastenausgleich II)

[109] Decisions of the HCC Nos. 43/1995. (VI. 30.), 52/1995. (IX. 15.), 60/1995. (IX. 15.)

In South African cases where the applicants were minors or children were involved, the court also did not primarily apply the child protection provisions.[110] Unlike the lower court, in *Grootboom* the court found that neither right to housing nor children's right to shelter gave the right to claim shelter immediately for families with children. So although the court examined the eviction under the provision on the rights of children, it applied only the general reasonableness requirement, which obliges public bodies to implement housing programmes. Similarly in the *TAC* case, where access to medication for a mother and her newborn baby was at issue, the court relied only on the right to health care and not particularly on children's rights. Two years later, in the *Khosa* case, the court examined child protection arguments on the merits and found a violation of the constitution in relation to children's rights as they were refused to grant benefits based on their parents' citizenship.

Chapter 5: Review on procedures

From the arguments discussed already, it is necessary to distinguish those cases in which the court did not or not exclusively focus on the protection of the material right but on how the process was carried out by the law- or decision-makers. As I presented its critics in the theoretical part, the advantage of procedural understanding of a case is that it might create a dynamic relationship between applicants and decision-makers, which is adaptable for the changing economic conditions. The disadvantage of it, however, is that this type of adjudication is not able to provide a solid normative basis for SER claims. In this chapter I show different types of procedural considerations invoked by the courts that are able to demonstrate the court's understanding of their own role while adjudicating SER cases.

[110] Grootbroom, Port Elizabeth, TAC and Khosa

5. 1. Lack of competence

The most formal version of the procedural type of review is when the court examines whether it was even possible to provide for social rights in that form, i.e. whether the decision-maker had the power to make the decision. In this way, the court can avoid having to examine the substance of the fundamental rights problem on the merits, and it can only review the authorisation of the law or decision-making.

As part of the 1995 austerity package, the Hungarian government decided to cut not only social services and benefits but to manage a layoff in the public sector. The measures concerning the employees of the Hungarian public broadcasters and higher education were also reviewed by the HCC. The HCC did not examine the general cutback on the basis of workers' rights or their social security, but on the basis of the government's decision-making powers. It simply found that the government did not have the power to issue a decree over bodies that it did not directly manage, therefore, the government had violated rules on legislation.[111]

In *Berliner Mietendeckel* the FCC had to decide whether the rent cap adopted by the Land Berlin in response to the housing crisis was a matter of public or private law. The court took a formal approach and found that the regulation of tenancy was clearly private law matter and Berlin had unconstitutionally divested the federal state of its legislative powers as the tenancy law passed by the Land contradicts the Civil Code adopted by the federal state.[112]

[111] Decisions of the HCC Nos. 31/1995. (V. 25.) (MTV layoff) and 40/1995. (VI. 15.) (higher education I - layoff)
[112] Decision of March 25, 2021 2 BvF 1/20 (Berliner Mietendeckel)

5. 2. Proper time for preparation

In the context of the 1995 austerity package, the Hungarian court relied on legal certainty when striking down many elements of the law. Even though legal certainty is not included in the constitution, the HCC derived it from the rule of law enshrined explicitly in the constitution. This concept gained importance when the court first examined the austerity measures which came into force almost immediately. Therefore, the HCC made a review not substantively, but merely from the perspective of rule of law. The court principally stressed that the welfare system might be freely reformed by the government but that it should not forget that stability and predictability are the most important elements of a social system under the rule of law.[113] The HCC did not review elements of the package, such as rules on maternity allowances and sick leave, on the basis of social rights, but purely on the basis of the rule of law. Few months later, it examined the substance of the rules. The results of the review are discussed in the section on deferentialism.

5. 3. Proper justification

While the Basic Law does not include any social rights at all, Hungarian constitutions do but without any meaningful provision on how to achieve them. In contrast, the detailed catalogue of rights in the South African document not only provides for social rights, but also includes many transformative elements that makes the interpretation of SERs much more dynamic. The South African constitution provides in several areas, in particular housing and health, that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

[113] Decisions of the HCC Nos. 43/1995. (VI. 30.) (maternity allowances I - legal certainty) and 44/1995. (VI. 30.) (sick pay I - legal certainty)

Despite the fact that the FCC has almost no textual basis, it managed to develop a detailed constitutional review in SER cases. Already in earlier decisions such as *Steuerfreies Existenzminimum*, the FCC has been seen to be examining the merits of the arguments made by the legislature and what empirical evidence they provide for justification. The court principally framed the leeway of the constitutional scrutiny as follows: '(...) whether the child benefit reduced (...) meets these minimum constitutional requirements with regard to its tax relief function, the Federal Constitutional Court must limit itself to an examination of evidence.[114] By doing so the FCC assessed statistical data in order to check whether the law leaves the subsistence minimum tax-free.[115] This type of constitutional review focusing on empirical justification can also be seen in other rulings of the FCC where there were doubts as to whether the state not endangers the minimum subsistence level.[116] The evidence-based review is most clearly reflected in the *Hartz IV* decision, in which the FCC clearly defined what the legislature's role is when governing unemployment benefits. The legislature '(...) must initially assess the types of need, as well as the costs to be expended for them, and on this basis must determine the amount of the overall need. The Basic Law does not prescribe to it a specific method for doing so (..); it may, rather, itself select the method within the bounds of aptitude and expedience. Deviations from the selected method however require a factual justification.'[117] The FCC also emphasized the need for keeping the assessment updated, the legislature must react promptly to changing economic conditions.[118] The FCC not only stressed that the legislature's decision should be based on calculations, but went further: '(i)n order to ensure the traceability of the extent of the statutory assistance as

[114] BVerfGE 82, 60, 85. (Steuerfreies Existenzminimum) para 124
[115] Ibid para 131
[116] BVerfGE 87, 153, 169. (Grundfreibetrag) para 74-93 and BVerfGE 99, 246 (Kinderexistenzminimum) paras 73-74, BVerfGE 137, 34 para 141 (Existenzsichernder Regelbedarf) para 141
[117] BVerfGE 125, 175 - 260 (Hartz IV) para 139
[118] Ibid para 140

commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.'*[119]* The FCC is not reluctant to assess the methods used for calculation by the legislature.[120] The ruling was praised for 'an example of diplomacy and the wisdom of a strategic actor,'[121]since the FCC has not taken away the powers of the legislature but sent a strong message to the legislature on how to comply with fundamental rights. Others point out that the court took a 'hybrid' approach as it examined both the constitutionality of the lawmaking process and its outcome.[122] These considerations are reflected in subsequent FCC decisions such as decisions on benefits for refugees and the Hartz sanctions case.[123]

From a much larger constitutional textual basis, the ZACC demonstrates a similarly active role when reviewing the legislature's performance under criteria of reasonableness set by the Constitution. After its initial restraint in *Soobramoney*, the court in *Grootboom* started to clarify the constitutional obligations in SER cases. It found that the state must devise a 'comprehensive and workable plan' for the realisation of housing rights.[124] The court stressed that mere legislation is not enough for a program to be considered reasonable. It must be much more than that: it must be reasonable both conceptually and in its implementation.[125] In addition, the state needs to

[119] Ibid para 142
[120] Ibid paras 167, 193 -194
[121] Messerschmidt, Klaus (2012): The good shepherd of Karlsruhe. The "Hartz IV" decision: a good example of regulatory review by the German federal constitutional court? In Popelier, Patricia - Mazmanyan, Armen - Vandenbruwaene,Werner (eds.): The role of constitutional courts in multilevel governance Responsibility, Cambridge, p. 246
[122] FN 4 p. 34
[123] BVerfGE 132, 134 (Asylbewerberleistungsgesetz) para 91 and BVerfGE 152, 68 (Hartz IV Sanctions) paras 134 and 193
[124] Grootboom para 36
[125] Grootboom para 42

allocate resources to the objectives and to cooperate with other bodies of the government.[126] Like the FCC, the ZACC spoke out for programs that require continuous review.[127] It also points out that even if the reasonableness of a program appears to be statistically justifiable, this is not enough for passing the constitutional review: it must be demonstrable at the level of the individual.[128] The court also recognizes the financial burdens of government programs. Reflecting on this, it notes that among others this fact is also relevant to the reasonableness test.[129] In *TAC*, the court took the same approach, finding that the government's implementation of the drug program was too slow and did not meet constitutional requirements.[130] In *Khosa*, the court contrasted the reasonableness test with the rationality test. While it acknowledged that there is a rationally justifiable connection between the exclusion of non-citizens from welfare benefits as providing them with benefits would increase the state's financial burdens, the Constitution requires a higher scrutiny: the reasonableness test.[131] Rejecting the rationality test promoted by the government, the court found that there was no reasonable justification for excluding residents from social benefits just because they are not citizens of the country. The court in the *Mazibuko* case narrowed the reasonableness test and only emphasized that the government must explain its decisions in order to remain accountable.[132] The decision was criticized for showing a high degree of flexibility in the interpretation of reasonableness that normatively hollows the content of social rights.[133] In another eviction case, in *Occupiers of 51 Olivia Road*, the court overruled the ejectment order of the Supreme Court and introduced a new interpretation of reasonableness, which mirrors a

[126] Grootboom para 40
[127] Grootboom para 43
[128] Grootboom para 44, see the same arguments in Occupiers of 51 Olivia Road para 15
[129] Grootboom para 46
[130] TAC para 92
[131] Khosa para 67
[132] Mazibuko para 71
[133] FN 13 pp. 270, 280 and 469

participatory, deliberative nature of adjudication. The court obliged the municipality to engage meaningfully with those who it plans to evict in order to comply with the Constitution and said:[134] '(...) It must make reasonable efforts to engage, and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement.' The ZACC emphasises the purpose of its order regarding reasonable steps: '(i)t is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.'[135]

The Hungarian court has examined the legislature's arguments on welfare spending much more modestly than the other courts above. On the one hand, it is hard to find a reference in the reasoning of the court that contains non-legal references or empirical data that could either justify or refute the challenged regulation. On the other hand, where the court's need for empirical justification was identifiable, at the end of the case there was no convincing argument based on empirical findings either. In the 1995 austerity package, the sick leave calculations, on which the court ultimately based its decision,[136] were criticised as flawed.[137] In a later case concerning the minimum subsistence level necessary for human dignity, the HCC suspended a case in 1998 and asked the government to justify its law. Nine years later the HCC discontinued the case as moot in a brief order since the competent Ministry had never replied to the court and the respective law changed in the meantime.[138] The HCC refused to rely on empirical data even when the referring ordinary

[134] Occupiers of 51 Olivia Road para 18
[135] Occupiers of 51 Olivia Road para 15
[136] Decision of the HCC No. 56/1995. (IX. 15.) (sick leave II)
[137] Sajó, András (1996) A materiális természetjog árvái, avagy hogyan védi Alkotmánybíróságunk az elesetteket. A szociális jogok és a gazdasági megszorítások. Magyar Jog, no. 4 p. 211
[138] Order of the HCC No. 28/2007. (V. 17.)

courts challenging the criminalisation of homelessness complained that homeless people were unable to comply with the law because there were not enough places in state-run shelters.[139]

5. 4. Proportionality

The proportionality requirement is of relatively less importance in SER cases, as these cases are more about the positive obligations of the state, rather than how and to what extent the state-imposed restrictions on the rights of its citizens.[140] Among the judgments examined, the issue of proportionality arose in the area of benefit reductions and sanctions.

Due to the rich doctrinal toolkit provided by the Constitution, the ZACC might not be characterised by active use of proportionality test, although in the *Khosa* case the court ultimately reached its decision on a balancing.[141] In the 1995 austerity package, the HCC referred to violations of proportionality in several decisions,[142] but these can be seen as unelaborated conclusions rather than a step-by-step, deep analysis. It is particularly interesting, however, to contrast the Hartz Sanctions decision with the HCC decision on the criminalisation of homelessness, which was handed down by the two courts in the same year. Beyond the time of delivering the decisions, what the two judgments have in common is that both pieces of legislation under review deal with breaches of the individual's duty of cooperation with the state in the field of social assistance. Although at that time the Hungarian Fundamental Law already explicitly included the proportionality requirement in the case of a fundamental right restriction, the HCC only vaguely

[139] Decision of the HCC No. 19/2019. (VI. 18.) (criminalisation of homelessness)
[140] Contiades, Xenophon - Fotiadou, Alkmene (2012). Social rights in the age of proportionality: Global economic crisis and constitutional litigation. International Journal of Constitutional Law, 10(3), pp. 660-686
[141] Khosa para 82
[142] Decisions of the HCC Nos. 45/1995. (VI. 30.) (financial contributions of artists), 56/1995. (IX. 15.) (sick pay II), 79/1995. (XII. 21.) (higher education II - tuition fee)

referred to the proportionality requirement when it upheld the need to punish homeless people if they do not voluntarily enter a shelter.[143] In contrast, the FCC concluded, under a strict proportionality test, that a large extent or complete withdrawal of unemployment benefits is disproportionate as a sanction for non-cooperation with state agencies.[144]

[143] Decision of the HCC No. 19/2019. (VI. 18.) (criminalisation of homelessness) para 101
[144] BVerfGE 152, 68 (Hartz IV Sanctions) para 116

Chapter 6: The Relationship with the different Branches of Government

How the constitutional courts interpret the problem of separation of powers in SER cases is best shown by the expressions they themselves make to the legislature or the executive. In order to identify the judicial attitudes, I have developed two indicators against which I examine the arguments. In this chapter, I will therefore show the extent to which the courts limit their own leeway ('deferentialism') and the extent to which they step up actively ('instructions').

6. 1. Deferentialism

In general, courts in SER cases are keen to emphasise that the legislature or the executive has wide powers in shaping the field of social policy, and they do not wish to interfere with the decisions of legislation or government. This kind of reasoning can be found in virtually all judgments right in the introductory part of the reasonings. This is even true for cases of the FCC where the court fiercely confronted the legislature, such as in the decisions on the existence minimum, more recently in the Hartz IV case.[145]

In the case of the ZACC, deferentialism can be observed only in a limited number of judgments. One of the court's earliest decisions is an illustrative example for that. In *Soobramoney* the court rejected the arguments of the individual seeking lifesaving medical treatment. In essence, the court based its decision on the fact that funding of treatment is expensive and decisions about scarce resources must be made at the political level. If it can be seen that the medical authorities have made their decisions in good faith, there is nothing for the court to overrule.[146] The court even noted that if all poor people received the life-saving treatment in question, the budget would go

[145] BVerfGE 82, 60, 85. para 88 (Steuerfreies Existenzminimum I) or BVerfGE 125, 175 - 260 para 138 (Hartz IV)
[146] Soobramoney para 29

into debt.[147] As we have already seen in the cases presented above, later the ZACC has taken a very activist approach to SER claims and has examined the cases with varying degrees of intensity. Although in virtually all cases it had to decide on the scarcity of financial resources, only in one case, in *TAC,* did the government explicitly invoke the separation of powers. In response to the government's arguments for deferential approach,[148] the court outlined in detail the role of the courts in SER cases. Although the court acknowledged that it is not best equipped to make large-scale economic decisions that require a broad assessment of the facts,[149]it pointed out that the reasonableness test will always have budgetary implications.[150] Consequently, the fact that a court's decision has an impact on policy or the budget of the state does not violate the principle of separation of powers and does not prevent the government from making legitimate choices of policy. Faced with a militant approach in the *TAC,* in the *Mazibuko* case the court accepted the democratic arguments and stressed that the court cannot take the role of the government, and its own role in SER cases is limited to promoting participatory democracy when holding the government responsive and accountable.[151]

The HCC, in contrast, hardly has experimented in SER cases with the interpretation of its own role. In its very first year of operation, when the legislature wanted to increase interest rates on long-term housing loans, which had been under state control during socialism, the HCC warned the legislature that the court should not enter into unnecessary dialogue with it on the constitutionality of a particular draft law.[152] In the same decision, the president of the court who

[147] Soobramoney para 28
[148] TAC para 96
[149] TAC para 36
[150] TAC para 38
[151] Mazibuko para 161
[152] Decision of the HCC No. 31/1990. (XII. 18.) (interest rates on housing loans)

had been chairing the body for almost a decade, in a concurring opinion, noted that it is not for the HCC but for the legislature to define the content of social rights. Later, the court said regarding the 1995 austerity package that the legislature was free to reshape the welfare system, making universal benefits means-tested, provided it did not completely hollow social rights.[153] The court imposed only two constraints: on the one hand, for those benefits where an insurance element could be identified, the rules of property protection applied, and on the other hand, the pace of changes must allow people sufficient time to prepare themself on the new conditions. The position stating that the legislature has wide margins has been upheld by the court to this day, with the later ruling that the benefit cuts must not endanger human dignity by not providing a subsistence minimum.[154] Apart from this doctrinal reasoning, the court has never ventured into a more detailed review of a SER law.

6. 2. Instructions from the Court

During the research, I examined whether the operative part of the decisions contains any instruction to the legislator or the government. In the cases examined, there are a good number of decisions in which the courts have gone beyond declaring a violation of the constitution by following a binary logic and have issued instruction to the legislature or the executive. It must be noted that the instructions might have different nature. Some of the identified instructions aim to help with the general interpretation of constitutional rights, while others are much more specific with a high degree of specificity.

[153] Decisions of the HCC Nos. 43/1995. (VI. 30.) (maternity allowances I - legal certainty), 79/1995. (XII. 21.) (higher education II - tuition fee) and later 77/1995. (XII. 21.) (financing of health services at municipality level)
[154] Decisions of the HCC Nos. 32/1998. (VI. 25.) (unemployment benefit) and 42/2000. (XI. 8.) (housing)

In the seventeen Hungarian decisions, eleven of which are about the austerity package of 1995, the HCC has made some kind of order in six of the decisions. It must be noted that before 2012 there was no legal basis for so-called 'constitutional requirements' instructions, which were autonomously developed by the court during the 90s. This of course shows the activism of the court. Two of the constitutional requirements instructed by the court relate to the speed with which austerity measures were introduced and derive concepts that are not found in the wording of the constitution from rule of law.[155] In two further decisions, it went beyond the text of the constitution in terms of social rights, but in doing so, it practically minimised the state's duties under a welfare system.[156] In two decisions, however, the HCC did not develop concepts but supplemented the statutory law with further provisions.[157] With these two exceptions, the court made rather doctrinal interpretations in its instructions.

In Germany, the FCC has given instructions in four out of eleven decisions. All of them concerned human dignity and the welfare state, more precisely: the legislature had to maintain the *Existenzminimum* until it made no law compliant to the Basic Law.[158] In one case it made quasi law when the FCC ordered that until the legislator has fulfilled its obligation to introduce new law, the Hartz IV law should be applied in case of asylum seekers.[159] In the *Hartz Sanctions* case it found that a maximum of two months' cutback might be permissible before the Bundestag enacts

[155] Operative part, Decisions HCC Nos. 43/1995. (VI. 30.) (maternity allowances I) and 44/1995. (VI. 30.) (sick pay I)

[156] Operative part, Decisions of the HCC Nos. 32/1998. (VI. 25.) (unemployment benefit) and 42/2000. (XI. 8.) (housing)

[157] Operative part, Decisions of the HCC Nos. 52/1995. (IX. 15.) (family allowances I) and 19/2019. (VI. 18.) (criminalisation of homelessness)
As Halmai also remarks, in the former case the HCC was so activist that it is questionable whether the HCC was creating only constitutional requirements or in fact making law instead of the legislature. Halmai, Gábor (1999): Az aktivizmus vége. A Sólyom bíróság kilenc éve. Fundamentum 1999/2. p. 17

[158] BVerfGE 87, 153 (Grundfreibetrag) and BVerfGE 125, 175 (Hartz IV)

[159] BVerfGE 132, 134 (Asylbewerberleistungsgesetz)

a new law.[160] It must be noted that the FCC's reasonings usually include many requirements that the lawmaker must meet.[161]

Compared to the German and Hungarian courts, the ZACC's instructions, three out of seven cases, are much more varied. In *Grootboom*, the court, by giving an example, issued an order on how to implement a reasonable housing program.[162] And in another housing case, the court issued an interim order obliging the municipality to engage in a meaningful dialogue with those facing eviction.[163] The court in the *TAC* case created a health policy and set out detailed orders accordingly.[164]

[160] BVerfGE 152, 68 (Hartz IV Sanctions)
[161] BVerfGE 125, 175 - 260 (Hartz IV) paras 144 and 214
[162] Grootbroom para 99
[163] Occupiers of 51 Olivia Road para 5
[164] TAC paras 114 and 135

Conclusions

(1) What arguments, not specifically social rights focused, are used by the courts in SER cases?

The comparison showed that the courts use different arguments that are not particularly social rights focused. The ZACC almost always refers to the historical and social context of the case. However, the analysis of context is not a mere formality, and the court has in some cases specified the consideration of these factors as part of its legal doctrinal analysis. In contrast, such references are less frequent in German and Hungarian decisions. In the FCC's practice, when it does occur, it is limited to describing the legislative history. In HCC's practice, if the context comes into play, the nature of the transition to capitalism is emphasised, especially in the early period of the court. As to the moral arguments, references to social justice are strongly interconnected with the situation of the transition. More specifically, courts refer to the role that the state should play in a political transition - and in the case of Hungary, in a political and economic transition in the early 1990s. While the South African references to justice are based on the need for the state to be active and intervene with the conditions of society, the Hungarian point is based on the need for the state to be self-reflective and to remain less active. Moral references are rarely made in FCC decisions. The concept of human dignity is enshrined in all three constitutions, but their nature and importance are different. While the German SER jurisprudence is fundamentally based on an active interpretation of human dignity, in the HCC's case law is only one element among several other concepts. The South African case law has not developed a consistent dignity doctrine. Furthermore, the decisions examined show that all three courts have relied on civil and political rights when deciding SER cases. The Hungarian court has relied on the right to life and property actively, the German court did not have a substantive argument on this, and the ZACC rejected the right to life invocations. Equality rights are used by all three courts, but only the German case law

seems to be more consistent. While the FCC frequently invoked family protection in tax cases, the ZACC invoked child protection only a few times compared to the large extent of minor's affiliation in the cases, the HCC has not developed a substantive argument for either family or children's rights.

(2) To what extent do the courts focus on the procedure of the decision-maker?

The three courts rely to different extents on procedural considerations when deciding SER. While the ZACC did not, the FCC and HCC turned to a finding of lack of competence in invalidating rules affecting SER. In both countries, the court did not carry out a substantive review beyond finding the formal check on law. The requirement of ensuring proper time for preparation before the law comes in force, compared to a finding of lack of competence, is clearly an extratextual invention of the HCC, which was not relied upon by the other two courts. The most important difference in the practice of the three courts is the extent to which they hold the legislature or the government to account, and the extent to which they require justification for decisions under review. The FCC tends to use a strong evidence-based review, which has no textual basis in the Basic Law. Meanwhile, the ZACC is still actively seeking to fill the reasonableness requirement of the Constitution with varying content in an experimental manner. With two exceptions, the HCC has not held the legislature to account for its decisions with a justification. The concept of proportionality has been raised in all three jurisdictions, but only the FCC has applied it as a test, the other two courts have invoked it only sporadically.

(3) To what extent can courts be considered deferential while adjudicating SER cases?

Looking at the courts' expressions of deferentialism and the frequency of instructions, the broad margins of the legislature in SER cases emphasized by the FCC can be seen rather as mere lip

service. The German court is not reluctant to use extratextual concepts in its decisions' operative part or to impose clear transitional rules. The ZACC is not reluctant to issue instructions either but the nature of these varies widely: some are substantive, while others are procedural. However, these procedural orders are not always procedural obligations in the classical sense, but are of deliberative, participatory nature. It must be noted that the ZACC was the only court that explicitly addressed in its judgement the different understandings of judicial role models and the theories of the separation of powers in SER cases. By contrast, in its instructions the HCC mainly limited itself to doctrinal considerations and theoretical findings that could serve as interpretation of the constitution. With an exemption of few cases, it refrained from orders and insisted on a classic binary assessment of the legislation under review.

To sum up my main findings, the German court has a limited reflection on the broader context of a case, but it developed an activist role when relying on *Existenzminimum* stemming from a very little textual basis (human dignity and social state) combined with an even stronger evidence-based review. The Hungarian court had initially shown activism by developing concepts that met the philosophy of market capitalism and rule of law (legal certainty, right to life, right to property). However, later it turned to be deferential without looking at the reality behind the doctrinal considerations. The South African court embeds strong moral references while continuously tries to give meaningful interpretation to the transformative elements of the constitution such as the reasonableness review, even combined with deliberative elements.

Suggestions for a Future Research

During the research I had to realise the methodological limitations of my comparative study, i.e. the complexity of the research stemming from different types of cases within SER cases. In a future study, it would be worthwhile to select only one type of case from SER adjudication and examine a larger number of decisions from the selected case type.

Another exciting line of research could be the sociological analysis of judicial strategies identified in my thesis, i. e. the reasons and circumstances in which courts choose one argument or another. According to Georg Vanberg, constitutional courts make their decisions strategically, in which factors like transparency of the political environment, public support of the court, legislative-judicial relations and political importance of the case may play a decisive role.[165] The changing social context places a special burden on constitutional courts as well. As András Sajó points out, looking back to the early years of the HCC, the protection of the constitution or the failure to enforce it might have led to the loss of the credibility and political legitimacy of the constitution.[166] Peter Grimm also argues this may have been the reason why the German Basic Law had deliberately not incorporated the social rights contained by the Weimar Constitution.[167] These are all considerations that would be exciting to test empirically in the light of case law from three decades after the transitions.

[165] Vanberg, Georg (2001) Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review, American Journal of Political Science 45(2) pp. 346-361
[166] FN 10 p. 88
[167] Grimm, Dieter (2015) The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany, International Journal of Constitutional Law, vol. 13, no 1, p. 13

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Abbreviations

FCC - Federal Constitutional Court of Germany
HCC - Constitutional Court of Hungary
SER – Social and economic rights
ZACC - Constitutional Court of South Africa

Laws

Act XX of 1949 on the Constitution of the Republic of Hungary
Basic Law for the Federal Republic of Germany, adopted in 1949
Constitution of the Republic of South Africa, adopted in 1996
Fundamental Law of Hungary, adopted in 2011

Referred cases

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BVerfGE 12, 354 (Volkswagenprivatisierung)
BVerfGE 40, 121, 133 (Waisenrente II)

Selected cases

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BVerfGE 82, 60 (Steuerfreies Existenzminimum)
BVerfGE 87, 153, 169 (Grundfreibetrag)
BVerfGE 99, 216 (Familienlastenausgleich II)

BVerfGE 99, 246 (Kinderexistenzminimum I)
BVerfGE 103, 197 (Pflegeversicherung I)
BVerfGE 113, 167 (Risikostrukturausgleich)
BVerfGE 125, 175 (Hartz IV)
BVerfGE 132, 134 (Asylbewerberleistungsgesetz)
BVerfGE 137, 34 (Existenzsichernder Regelbedarf)
BVerfGE 152, 68-151 (Hartz IV Sanctions)
Decision of March 25, 2021 2 BvF 1/20 (Berliner Mietendeckel)

Constitutional Court of Hungary

8/1990. (IV. 23.) (representation of employees)
31/1990. (XII. 18.) (an increase by law in the interest rates on long-term housing loans I.)
32/1991. (VI. 6.) (an increase by law in the interest rates on long-term housing loans II.)
Austerity package of 1995
- 31/1995. (V. 25.) (MTV layoff)
- 40/1995. (VI. 15.) (higher education I - layoff)
- 43/1995. (VI. 30.) (maternity allowances I - legal certainty)
- 44/1995. (VI. 30.) (sick pay I - legal certainty)
- 45/1995. (VI. 30.) (financial contributions of artists)
- 52/1995. (IX. 15.) (family allowances I)
- 54/1995. (IX. 15.) (financial contributions of self-employed persons)
- 56/1995. (IX. 15.) (sick pay II)
- 60/1995. (X. 6.) (family allowances II)
- 77/1995. (XII. 21.) (financing of health services at municipality level)
- 79/1995. (XII. 21.) (higher education II - tuition fee)

32/1998. (VI. 25.) (unemployment benefit)
42/2000. (XI. 8.) (housing)
28/2007. (V. 17.) (follow up order - 32/1998. (VI. 25.)
19/2019. (III. 22.) (criminalisation of homelessness)

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Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) (access to drugs)

Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) (housing)

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