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by

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in respect of the following topics in

ADVANCED CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW

to wit

"The 'contextual approach' as an essential method of constitutional interpretation"

"The justifiability of suspending fundamental rights under the Constitution 1996"

"A brief overview of arguments raised against the inclusion of socio-economic rights and how such arguments were addressed by the Constitutional Court in *Certification of the Constitution of the Republic of South Africa 1996* (10) BCLR 1253"

"The principle of "reasonableness", and what it entails. In your discussion, indicate how this principle has been applied by the South African Constitutional Court in its case law to date and its strengths and weaknesses, if any."

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ADVANCED CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW - TOPIC 1

"The 'contextual approach' as an essential method of constitutional interpretation"

The essentiality of the contextual method of constitutional interpretation should be appraised cognizant of the dictum raised by *Kentridge AJ* in *S v Zuma* - citing Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), 328-9 wherein Lord Wilberforce, inter alia called for interpretation "...[s]uitable to give to individuals the full measure of the fundamental rights and freedoms referred to".¹ Significantly *Kentridge AJ*'s position echoed that of *Sachs J* in *S v Makwanyane* - wherein the learned judge postulated that the interpretation of the Constitution should be construed so as to afford "[i]ndividuals the full measure of its protection",² aimed at entrenching common values, and avoiding repetition of injustices of the past.³

Considering the constitutionality of the death penalty in *Makwanyane* the learned judge referred to fundamental rights entrenched in Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as the *Interim Constitution*) i.e. equality before the law (section 8(1)); the right to life (section 9); the right to human dignity (section 10) and the right to freedom and security of the person which includes the right not to be subjected to torture of any kind, whether physical, mental or emotional - or - subjection to cruel, inhuman or degrading treatment or punishment (section 11(1) and (2)) as prescribing separate and independent standards with which all due process and sanction must comply.⁴

This having been said, the contextual interpretation of the provisions of the Constitution requires that these provisions should not be read in isolation, but in context so as to ascertain their purpose, including the history and background of the adoption of the Constitution.⁵ *Botha* - arguing for a value based approach - concedes that constitutional history and the nature of a legal system, would necessarily determine the eventual interpretation and application of the constitution within the legal order.⁶

Significantly *Sachs J* in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* warned against a formal academic analysis or ad hoc technicism in interpreting provisions of the Constitution, but encouraged pursuit of finding a synergetic relation between the values that found fundamental rights and the state-of-affairs relevant to a particular matter at hand.⁶

1. 1995 2 SA 642 (CC) [14].
3. 1995 3 SA 391 (CC) [323].
5. 1995 3 SA 391 (CC) [10].
7. 1995 4 SA 631 (CC) [46].

2. 1995 3 SA 391 (CC) [10].
4. 1995 3 SA 391 (CC) [10].
6. *Botha Grondwetuitleg* 41.

Mangu however qualifies that constitutional provisions "[s]hould be understood with reference to its context" and that such interpretation should take place mindful of concurrent and complimentary provisions of the Constitution as well as modalities within its social and political environment.⁸

In *Ferreira v Levi*, Ackerman J inter alia considered the rights of an accused to be subjected to fair and equitable due process in terms of section 25 of the Interim Constitution, with specific reference to action taken against the applicant of terms of section 417(2)(b) of the Companies Act 71 of 2008, which the applicant contested in respect of the constitutionality of the said provision. Ackermann J firstly considered the applicant's contention that his right to freedom and security of person (section 11(1) and (2)) were infringed. The learned judge pointed out that, it was a requirement to determine the meaning, nature and extent of the right and the inconsistency of the aggrieved section 417(2)(b), as mentioned above, with the determinations of the Interim Constitution,⁹ whilst accentuating that the court should follow a 'generous' and 'purposive' interpretative approach which gives expression to the underlying values of the Constitution.¹⁰ The majority decision in the matter favoured the appellant.¹¹

In the 2006 and 2007 *Matatiele Municipality v President of the Republic of South Africa & Others* judgements, on the demarcation of municipal boundaries, Ngcobo J - in the 2006 judgement - re-affirmed that constitutional provisions should be construed purposively in a process of contextual interpretation - as informed by the founding values of the Constitution.¹² In his 2007 judgement Ngcobo J emphasized that a mere textual interpretation was insufficient and required a structural or contextual approach consistent with the design of the Constitution - and - cognizant of the historical paradigm and constitutional context in which it occurs.¹³ Within this context Mangu accentuated that: "Systematic, contextual or purposive interpretation goes far beyond the ordinary or textual meaning of the phrases. It must also be a holistic reading."¹⁴

On the flipside, in a virtually textual viewpoint, Froneman J in *Qozoleni v Minister of Law and Order* stated that labels proclaiming the proper approach to constitutional interpretation as liberal, generous, purposive carried the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself, whilst extracting principles of values from the Constitution as the supreme law itself, served far greater purpose.¹⁵

8. Mangu *Advanced Constitutional Law* 84.

10. 1996 (1) SA 984 (CC) [46] - [48].

12. 2006 (5) BCLR 622 (CC) [98] Also see Mangu *idem* 84.

14. Mangu *Advanced Constitutional Law* 84.

9. 1996 (1) SA 984 (CC) [45]

11. 1996 (1) SA 984 (CC)[156]

13. 2007 (1) BCLR47(CC) [37]

15. 1994 (3) SA 625 (E) 633 G

ADVANCED CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW - TOPIC 2

"The justifiability of suspending fundamental rights under the Constitution 1996"

Temporary suspension: Whilst the Constitution of the Republic of South Africa 1996 provides for a limitation of fundamental rights under section 36, the enjoyment of these rights may only temporarily be suspended in terms of section 37(4) of the Constitution, and only if a state of emergency has been declared by the President by proclamation in the Government Gazette.¹⁶ Section 37 of the Constitution provides for the declaration of a state of emergency only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration of a state of emergency is required to restore peace and order.¹⁷

Timeframe: *Mangu* accentuates that a state of emergency may only persist for a limited timeframe, unless the National Assembly directs otherwise. Any concurrent suspension of fundamental rights may only persist for the timeframe of such state of emergency, which is limited to 21 days from the date of declaration, unless extended as indicated above.¹⁸ *Mangu* further points out that when the President declares a state of emergency, the enjoyment of fundamental rights are automatically suspended.¹⁹

Non-derogable rights: However, section 37(5) provides for "non-derogable rights" that cannot be suspended by such proclamation including: the right to life (s11) and the right to dignity (s10). The section further provides that certain fundamental rights may only be partly suspended. These include: the right to equality (s9); freedom and security of the person (s12); the right not to be subjected to slavery, servitude and forced labour (s13); children's rights (s28), and the rights of arrested, detained and accused persons (s35).²⁰

Checks-and-balances: This does not boil down to a dictatorial derogation of rights. Section 37(4) provides checks-and-balances for such action, including that such derogation may only apply to the extent that it is strictly required by the emergency; that the applicable legislation is consistent with the country's obligations under international law as applicable to states-of-emergency; conforms to determinations of section 37(5) in respect of non-, or partially derogable rights, as alluded to above; - and - has been published in the national Government Gazette, as envisaged in section 37.²¹ *Currie and de Waal* make it clear that neither the state nor any person, shall be indemnified in respect of unlawful acts; that all requirements are justiciable and that the courts cannot be deposed in a state of emergency.²²

16. s37(4) of the Constitution 1996 read with s1 of the State of Emergency Act 64 of 1997.

17. s37(1) of the Constitution 1996 read with the preamble of Act 64 of 1997.

18. *Mangu Advanced Constitutional Law* 109 read with s37(2)(b) of the Constitution 1996.

19. *Mangu Advanced Constitutional Law* 109

20. s37(5) of the Constitution 1996

21. s37(4) of the Constitution 1996

22. *Currie and de Waal Bill of Rights Handbook* - 804; 805.

ADVANCED CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW - TOPIC 3

The arguments opposing the inclusion of socio-economic rights in the Constitution 1996 were finally adjudicated by the Constitutional Court in the 1996 *Certification of the Constitution of the Republic of South Africa* judgement.²³ (hereinafter referred to as the *Certification* case). These arguments included that: socio-economic rights are not universally accepted as fundamental rights²⁴; the rights are inconsistent with the separation of powers, as required by Constitutional principle vi²⁵, claiming that the enforcement of these rights would compel the judiciary to encroach upon the terrain of the legislature and executive²⁶ - and finally - that, contrary to principle ii, these rights are not justiciable as they are not universally accepted fundamental rights and therefore not capable of protection by "entrenched and justiciable provisions in the Constitution".²⁷

As early as 1992, the honourable High Court Judge and Professor at Law *D M Davis* explored the case against the inclusion of socio-economic rights in a then envisaged Bill of Rights. Davis hypothesized that the historical primacy of first-generation fundamental rights, created the ground rules for democratic government and included rights of "...[e]quality before the law, freedom of expression, movement, association, rights of life, liberty and property" thus creating "...[a] space for uncoerced political activity".²⁸ Quoting *Sachs A, Davis* pointed out that arguments for constitutionalising so called second- and third-generation - social-, economic- and environmental rights in the Bill of Rights, accentuated that exclusion of those rights would perpetuate false libertarianism and reduce such document to instrument of human abandonment.²⁹

Highlighting the controversy of the proposals, Davis identified three prominent arguments that were raised against the inclusion of second- and third-generation rights into a constitution or bill of rights, at the time. These included: the absolute nature of these rights; the implicit imposition of negative duties upon the government to channel resources to those, inter alia, deprived of rights such as the right to housing, medical care, education, employment, and nutrition - and - the impracticability and unenforceability of these rights.³⁰

Chaskalson P et al responded to the objections in the *Certification* case as follows:

Universal acceptability: I.r.o an objection that these rights were not universally accepted, the court held that principle ii permitted supplementation of universal fundamental rights with other rights that are not universally accepted, or more generously formulated rights.³¹

23. 1996 (10) BCLR 1253 (CC)
 25. Schedule 4 - Interim Constitution 1993
 27. 1996 (10) BCLR 1253 (CC) [78]
 29. Davis *SAJHR* 476 - 477
 31. 1996 (10) BCLR 1253 (CC) [76] & [52]

24. 1996 (10) BCLR 1253 (CC) [76]
 26. 1996 (10) BCLR 1253 (CC) [77]
 28. Davis *SAJHR* 475
 30. Davis *SAJHR* 477 - 479

Encroachment of the jurisdiction of the legislature and the court: The objection raised that the inclusion of these rights would be contrary to Constitutional principle vi and therefore inconsistent with the separation of powers - and - warning of encroachment of the judiciary on the jurisdiction of the legislature and executive, was rejected by the court stating that the responsibilities conferred upon the court in respect of the inclusion of socio-economic rights in a bill of rights, were consistent with first generation rights ordinarily conferred upon the courts and would therefore not result in a breach of the doctrine of the separation of powers.³² The court held that no universal model of the separation of powers existed - and - whilst recognising functional independence of the branches of government, the court held that the system of checks-and-balances facilitated only partial separation. The court further accentuated that the Constitutional principles did not call for technical rigidity in interpretation and did not impose a doctrine of the strict separation of powers.³³

Justiciability of socio-economic rights: The court rejected the objection that socio-economic rights were not justiciable, holding that those fundamental rights entrenched in 26 to 29 of the new text were not universally accepted rights and that their justiciability was not required by principle ii. The court further held that these rights would neither cause budgetary encroachment in excess of what can be anticipated from civil and political rights, nor would these considerations compromise their justiciability or enforceability.³⁴

Davis in his 1992 exposition commented that: "In a society like South Africa, the simultaneous provision of civil liberties and the disregard of social and economic equality would render the democratic enterprise extremely problematic, if not nugatory".³⁵ The objections recorded by *Davis* at the time broadly concurred with those raised in the *Certification* case therein that the absolute nature of these rights inform upon the lack of their international inclusion; the imposition of negative duties inform upon their potential encroachment within the realm of the separation of powers and budgetary constraints and finally their impracticality and unenforceability relate to the alleged lack of justiciability of socio-economic rights. Accordingly these early objections would also not have withstood scrutiny of the *Certification* judgement.³⁶

Pieterse aptly asserted that the Certification judgement not only sanctioned, but also constitutionally obliged our courts to pronounce on the validity of socio-economic legislation and policy and to remedy the states' non-compliance to its concurrent obligations.³⁷

32. 1996 (10) BCLR 1253 (CC) [77].

34. 1996 (10) BCLR 1253 (CC) [78]

35. *Davis SAJHR* 488.

37. *Pieterse SAJHR* 404 and 405.

33. 1996 (10) BCLR 1253 (CC) [108] - [113]

also see *Christiansen UCLA JILFA* 377.

36. *Davis SAJHR* 478; 479; 482-487.

Socio-economic rights and the Constitution 1996: Pursuant of the determinations of the *Certification* judgement, socio-economic rights were expressly included in the Constitution of the Republic of South Africa 1996, such as: access to adequate housing, healthcare, food, water, social security, and education, as entrenched in the Bill of Rights³⁸ - and - informed by the right to equality, human dignity, freedom and security of person.⁴⁰ Importantly, Chapter 9 regulatory institutions can be utilised by the courts, not only to ensure the enforcement of human rights but to oversee "their actual and substantive translation into reality".⁴¹

Justiciability and enforcement - the judicial test: Scrutiny by the Constitutional Court duly followed, amid concerns that "*ideologically loaded entitlements*" of socio-economic rights would detract from the - "*objectivity' and 'neutrality' of the judicial function.*"⁴²

The first challenge to socio-economic rights served before the Constitutional Court in ***Soobramoney v Minister of Health, KwaZulu Natal.***⁴³ The court had to decide on the legality of a "resource-rationing policy of a state hospital by a patient who was excluded by the policy from receiving life-sustaining dialysis treatment at state expense",⁴⁴ being an infringement of the applicant's right to life⁴⁵ and his right to be afforded emergency healthcare services⁴⁶ by an organ of state. Pieterse and Kende commenting on the decision to uphold the minister's good faith prioritization policy, highlighted the reluctance of the court to infringe the separation of powers and attempting to confirm enforceability of socio economic rights.⁴⁷

In ***Government of RSA and Others v Grootboom and Others*** Jacob J *et al* - whilst explicitly reaffirming the justiciability of socio-economic rights, held that a provincial housing plan failed to ameliorate poverty and infringed the right to adequate housing and the rights of children (s 26 and s28 of the Constitution). The government was ordered to give equitable effect to these rights, applying available resources in appropriate circumstances, and ordering the Human Rights Commission to monitor and report on compliance.⁴⁸

The ***Minister of Health v Treatment Action Campaign*** judgement upheld the justiciability and enforceability of a second generation right to equitable health care, critical of the state's policy on the prevention of mother-to-child transmission of HIV, in restricting the availability of the anti-retroviral drug Nevirapine, to expectant mothers. The court duly ordered the government to find and channel resources to honour their constitutional responsibility.⁴⁹

39. Christiansen *UCLA JILFA* 382.

41. Mangu *Advanced Constitutional Law* 102

43. 1998 (1) SA 765 (CC)

45. Section 11 - The Constitution 1996

47. Pieterse *SAJHR* 401 & Kende *CLR* 145-147.

49. 2002 (10) BCLR 1033 (CC) [135]

40. Mangu *Advanced Constitutional Law* 100

42. Pieterse *SAJHR* 395 and 396.

44. Pieterse *SAJHR* 401.

46. Section 27 - The Constitution 1996

48. 2000(11)BCLR1169(CC) [5]-[13];[97]-[99]

ADVANCED CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW - TOPIC 4

The Constitution 1996 and the reasonableness debate.

The essence of the debate:

Any debate regarding the counterpoised jurisprudential modalities of reasonableness in juxtaposition to unreasonableness- would lie fallow without contemplation of the dictum of local and international jurists and academic minds, on these issues. This analysis will consider reasonableness and its counterpart, within the South African constitutional paradigm, with specific reference to the adjudication of socio-economic rights that are entrenched in the South African Bill of Rights.

Reasonableness - an exacting standard:

The words of *Judge Robert Jackson* (prosecutor and associate justice of the United States Supreme Court), clearly emphasize the exacting responsibility resting on the shoulders of our judges dealing with the adjudication- and justiciability of socio-economic rights, when he accentuated the origins and essence of due process within this context - to wit:

"Civil liberties had their origin and must find their ultimate guarantee in the faith of the people"⁵⁰ and "procedural fairness and regularity are of the indispensable essence of liberty... not for the sole benefit of an accused... [but being]... the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice".⁵¹[my emphasis]

Dr Christopher Mbazira (lecturer in public law at the Makerere University and alumnus of the Universities of the Western Cape and Pretoria) aptly distils the issue at hand, stating:

"Rights operate in the realm of abstraction; remedies in the world of practical reality"⁵² and further "a remedy that is impossible to implement, however beautifully crafted, does not answer the needs of an 'appropriate, just and equitable' remedy".⁵³

Whilst *Prof Christof Heyns* (Professor of Human Rights Law at the University of Pretoria) accentuates the dilemma of our courts adjudicating matters of unlawfulness in criminal law, his remarks exact contemplation within the context of the reasonableness debate apropos the adjudication of constitutionally entrenched fundamental civil and socio-economic rights.

Heyns highlights the fact that access to "*Absolute, Objective Truth*" is an evasive privilege which not even our courts can access. He further argues that the pursuit and determination of what is reasonable lie beyond the realms of empirical science, thus excluding absolute objectivity from the judicial debate.⁵⁴ The challenge is clear...

50. *Douglas v Jeannette* 319 U.S. 157, 181 (1943) [46]

51. *Shauhnessy v Mezei* 345 U.S. 206, 224 (1953) page 345 U. S. 224, 225.

52. *Mbazira Litigating Rights* 123

53. *Mbazira Litigating Rights* 128

54. Heyns SALJ 301

Reasonableness - a precept of the Constitutions' transformative agenda:

Breaking the shackles of an oppressive and failed socio-political experiment in the guise of "apartheid", the Constitution and Bill of Rights set the scene for a socio-political departure of the country from a culture of authoritarianism. This heralded the establishment and preservation of a new culture of justification - which - in accordance with the precepts of the Bill of Rights, enshrined fundamental human rights giving substance to those values based on human dignity, equality and freedom that are reasonable and justifiable in an open and democratic society.⁵⁵

Accordingly - *Murray Wesson* (lecturer at the School of Law, University of Leeds) - maintains that the concept of "reasonableness" within the Bill of Rights context, established the bulwark within which socio-economic rights constitutes the basis of the Constitution's "*transformative agenda*" which imposes redistributive obligations on the state. This, he argues, secures the provision of fundamental socio-economic strategies geared towards the upliftment of society, equality before the law and accountability, responsiveness and openness of the state.⁵⁶

The constitutional precept of "reasonableness" features prominently in the Bill of Rights. This relates to second- and third- generation socio-economic and environmental rights. In each instance an obligation is placed upon the state to take reasonable legislative and other measures, cognizant of available resources, aimed at the progressive realisation of each of these rights.⁵⁷ This includes the right to just administrative action that is required to be lawful, reasonable and procedurally fair⁵⁸ - and that any limitation of a fundamental right shall be in terms of a law of general application, within the confines of what is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁵⁹

Etienne Mureinik (former dean of the faculty of law at the University of the Witwatersrand), described the Constitution as a "*bridge away from a culture of authority*" and postulating that:

"[e]very exercise of power by the state requires justification, wherein the leadership afforded by the state rests on the efficacy of the case in defence of its decisions - and - not the fear inspired by the force at its command".⁶⁰

This statement distills a constitutional imperative which calls the state to task to ensure equity and accountability - accordingly testing the intersection of socio-economic and civil and political rights, balanced- and informed by the precept of "reasonableness".⁶¹

55. Mureinik *SAJHR* 32 read with the preamble and section 7 of the Constitution 1996.

56. Wesson *HRLR* 391 *Idem* 55.

57. Sections 24 - 35 of the Constitution 1996.

58. *Ibid* Section 33.

59. *Ibid* Section 36.

60. Mureinik *SAJHR* 32.

61. Mangu *Advanced Constitutional Law* 100, 103.

Reasonableness - a quintessential condition for distributive justice:

The inclination of our courts, and more particularly our Constitutional Court, towards adherence to- and application of- distributive justice is demonstrated by our judiciary's steadfast consideration of - the effect of their arguments and decisions on the doctrine of the separation of powers; and of - internal and external concerns raised in respect of the institutional competence of the courts to adjudicate matters of social- and socio-economic justice. This includes adjudicating matters of resource allocation by the state, influenced by either a form of corrective or distributive justice. In this respect the Constitutional Court has favoured enforcement of collective- rather than individual socio-economic rights.⁶²

Heyns argues that the courts find themselves in a choice between opposing values, albeit between pragmatic rationality versus an ethos of morality.⁶³ He further asserts that the pursuit and achievement of measures of objectivity, culminates in the adjudication of often opposing values by our courts. This determines the perception of the degree of legitimacy of a legal system. This perception must ultimately... "*depend on the degree to which its [decisions] rules and enactments are considered by those subjected to it, as reasonable or just*".⁶⁴ [my emphasis]

Considering legal and philosophical arguments enables one to postulate that within the genesis of diverse value systems, constantly evolving socio-economic-, legal- and political- frameworks are established within society. Dichotomies of wealth and disadvantage arise in opposition and fundamentally affect the continued stability of society and quality of individual lives. A (re)distribution of wealth is required to facilitate equilibrium, or a return to an original state, as argued in *John Rawls's* "Theory of social justice". Accordingly - the judiciary and the state strive towards a morally justifiable equilibrium aimed at facilitating reasonable and equitable (re)distribution of wealth - essential to the concept of distributive justice.⁶⁵

The vast imbalances between societies in a post-apartheid South Africa kindled and encouraged a political and judicial debate which finally culminated in the certification and promulgation of the Constitution, legislating peremptory "reasonableness" in all matters of just administrative action, the entrenchment of socio-economic and environmental rights. Thus affording protection of these rights, enforced through reasonable judicial scrutiny and due process.⁶⁶ Opponents to the inclusion of socio-economic rights - claiming non-justiciability of these rights, lay waiting with baited breath for failure, of the new culture of "reasonableness" as constitutional precept. The Constitutional Court rose to the challenge...

62. Mbazira *Litigating Rights* 103
 64. Heyns *SALJ* 279 - 280
 66. Mbazira *Litigating Rights* 122 - 130

63. Heyns *SALJ* 288
 65. Heyns *SALJ* 290-6; Lamont and Favor *SEP* 1

Reasonableness - vindicated as constitutional precept:

The **Certification judgement** established a competent framework for the intersection of socio-economic-, civil and political fundamental rights. Concurrently the judgement persuasively rejected arguments opposing the inclusion of socio-economic and environmental rights into the final Constitution.⁶⁷ However, the defining test to determine the justiciability and expediency of these rights, lay in abeyance.

Two years later in 1998 **Thiagraj Soobramoney brought the first constitutional challenge against the then Minister of health** for the selective allocation of life sustaining dialysis treatment which infringed his right to adequate health care as envisaged in section 27 of the Constitution.⁶⁸

Whilst the decision did not afford specific relief to the applicant, the court found that a clear-and-present affirmative obligation rested upon the state, thus inducing judicially enforceable socio-economic rights.⁶⁹ Concurrently, the unreasonableness of an action by an organ of state was argued. Refuting this argument the court held that legitimate medial guidelines were in place, justifying deference in respect of the allocation of resources.⁷⁰ The court held that raising reasonable resource limitations on behalf of the state required prima facie proof. In this context the court made it clear that the rationing of access to life-prolonging resources was in fact integral to the human rights paradigm.⁷¹ In so deciding, the dictum of the court ensured an equitable and "reasonable" allocation of the resources of the state to those most in need within the context of a carefully tailored health care programme,⁷² raising the justifiability of the limitation of the right due to limited resources.⁷³

The acid test for the lawful, reasonable and procedurally fair action by an organ of state came before the Constitutional Court less than a year later in **Government of Republic of South Africa v Grootboom**.⁷⁴ This matter, yet again, raised issue with the prevalent, but no less disturbing common failure of the state's compliance with section 26 of the Constitution in respect of the provision of adequate housing and basic care and shelter for children in terms of section 28 of the Constitution.⁷⁵

The court accentuated the state's "negative obligation" to "desist from impairing access to adequate housing" and emphasized it's "positive obligation" to "devise a comprehensive and workable plan" pointing out that this obligation was not absolute,⁷⁶

67. Mangu *Advanced Constitutional Law* 103.

69. 1998 (1) SA 765 (CC) [1],[15],[18],[19] and [36] read with Christiansen *CHRLR* 361

70. 1998 (1) SA 765 (CC) [25],[49].

72. Christiansen *CHRLR* 362.

74. 2001 (1) SA 46 (CC)

68. 1998 (1) SA 765 (CC) [1]

71. 1998 (1) SA 765 (CC) [52]

73. Christiansen *CHRLR* 363.

76. Christiansen *CHRLR* 364.

Grootboom - a guideline for reasonable socio-economic rights adjudication:

This having been stated does not detract from the pivotal role the *Grootboom* decision has fulfilled in the formulation of a comprehensive dictum of compliance for the achievement of reasonable government action.⁷⁷

The separation of powers and delegation of authority: On the issue of "reasonable" legislative measures that severally and collectively bind the different spheres of government, the court accentuated the obligation of the state to co-operate within all spheres of government, directed at ensuring the sustainable provision of services within a framework of clearly allocated responsibilities - and - ensuring the availability and appropriate distribution of financial and human resources.⁷⁸

Devolution of authority within a reasonable framework: The court further insisted on the devolution of authority within a reasonable legislated framework, with duly assigned policies, programmes and strategies, wherein the national government accepts responsibility for the implementation, devolved to the provinces on an equitable basis with an according impetus that imposed executive obligations are met.⁷⁹

The reasonable realisation of a right: The court further held that the programme must be capable of the facilitating the realisation of a right, within a framework of reasonable measures, justiciable in their own right,⁸⁰ and in both their conception and implementation, failing which the state will fail in the fulfilment of- and compliance to- its constitutional obligations.⁸¹

A test for reasonableness: The court further formulated a clear dictum in respect of whether a set of measures are in fact reasonable. This included inclusion of all segments of society; consideration of problems in their social, economic and historical context; consideration of the capacity of institutions responsible for implementing the programme; the incorporation of short, medium and long term strategies to address concurrent needs, set within a framework of continuous review.⁸²

The Bill of Rights "reasonableness" imperative in Grootboom: The court held that the precept of reasonableness required that the basic necessities of life are provided to all pursuant of the creation of a society based on human dignity, freedom and equality.⁸³ Any denial of a right requires consideration of the degree and the extent of its effect.⁸⁴

77. 2001 (1) SA 46 (CC) [39] - [46] and [83],[90],[92].

79. 2001 (1) SA 46 (CC) [40].

81. 2001 (1) SA 46 (CC) [42].

83. 2001 (1) SA 46 (CC) [44].

78. 2001 (1) SA 46 (CC) [39].

80. 2001 (1) SA 46 (CC) [41].

82. 2001 (1) SA 46 (CC) [43].

84. 2001 (1) SA 46 (CC) [44].

Provision for the most in need and reasonable allocation of resources: The court further accentuated an entitlement of all those in need, provided that those in most dire circumstance are afforded prevalence. That everyone is treated with care and concern and that mere statistical presentation of capacity does not translate to substantive proof of actual operational compliance or success.⁸⁵ The aim should be - the court held - “the progressive realisation of this right” efficiently, within the context of reasonably allocated and availability of resources.⁸⁶ In closing *Yacoob J* emphasised that human beings are required to be treated as human beings and that reasonableness should be determined on the facts of each case.⁸⁷

The *Jacoob J et al* decision set the scene for the reasonable adjudication of second and third generation fundamental rights and the established dictum in *Grootboom* affords our courts clear guidance in respect of adjudication of any of these rights - and - regarding what the requirements for efficient delivery are - and - respect for human dignity entails.

Grootboom applied: In the *Minister of Health v Treatment Action Campaign* case Chaskalson CJ applied the reasonableness test in *Grootboom* when the advocacy group challenged the government's policies in respect of the selective provision of the ante-retroviral drug Nevirapine to expectant mothers to prevent mother-to-child transmission of HIV, which excluded up to 90% of mothers and children for whom the treatment was functionally prohibited. The court ruled for the respondent critical of: “the program’s inflexibility and its failure to account for the needs of a particularly vulnerable group made it unreasonable” and a breach of the state's constitutional obligations inherent in section 26 of the Constitution.⁸⁸

In both *Khosa and Others v Minister of Social Development* and *Jaftha v Schoeman and Others* the court reviewing the internal limitation clauses relevant to the infringed rights, ruled that: whilst the government should take reasonable and other legislative measures to afford the realization of a right,⁸⁹ such limitation must be consistent with the precepts of the Bill of Rights in conjunction with the rights to equality, life, and dignity for everyone.⁹⁰

In conclusion - The adjudication of inept actions by spheres of government and functionaries require the scrutiny by our courts as a given constitutional instruct. Whilst *Grootboom* distilled the guidelines for reasonable execution of duty by the state such measure of reasonable execution and adjudication will in future find exponential reliance on the critically essential and encompassing axiom for legal and political jurisprudence in governance of the state - and - of mankind - the principle of respect for human dignity.⁹¹

85. 2001 (1) SA 46 (CC) [44]

87. 2001 (1) SA 46 (CC) [83],[90],[92]
Christiansen *CHRLR* 368 - 369.

90. 2004 (6) SA 505 (CC) [44]

86. 2001 (1) SA 46 (CC) [45]

88. 2002 (5) SA 721 (CC) [80] and

89. 2005 (2) SA 140 (CC) [31] [33]

91. Louw *UNISA FUR* 2601 1 & 4

BIBLIOGRAPHY:**Legislation:**

Constitution of the Republic of South Africa Act 200 of 1993
 Constitution of the Republic of South Africa 1996
 State of Emergency Act 64 of 1997

Case Law:

Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC)
Coetzee v Government of the RSA; Matiso v Commanding Officer, Port Elizabeth Prison 1995 4 SA 631 (CC)
Douglas v Jeannette 319 U.S. 157, 181 (1943)
Ferreira v Levin NO 1996 (1) SA 984 (CC)
Government of RSA and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)
Jaftha v Schoeman and Others 2005 (2) SA 140 (CC)
Khosa and Others v Minister of Social Development 2004 (6) SA 505 (CC)
Matatiele Municipality v President of the Republic of South Africa & Others 2006 (5) BCLR 622 (CC)
Matatiele Municipality v President of the RSA & Others 2007 (1) BCLR 47 (CC)
Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1033 (CC)
Qozoleni v Minister of Law and Order 1994 (3) SA 625 (E)
S v Makwanyane 1995 3 SA 391 (CC)
S v Zuma 1995 2 SA 642 (CC)
Shauhnessy v Mezei 345 U.S. 206, 224 (1953)
Soobramoney v Minister of Health, KwaZulu Natal 1998 (1) SA 765 (CC)

Articles & Research Reports:

Christiansen *CHRLR* 361
 Christiansen EC "Adjudicating Non-Justiciable Rights: Socio-economic Rights and the South African Constitutional Court" 2007 (38) *CHRLR* 321 - 386
 Columbia Human Rights Law Review
 Christiansen *UCLA JILFA* 475
 Christiansen EC "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa" 2008 (13) (3) *UCLA JILFA* 369-406
 UCLA Journal of International Law and Foreign Affairs
 Davis *SAJHR* 377
 Davis DM "The case against the Inclusion of socio-economic demands in a Bill of Rights except, as directive principles" 1992 (8) (4) *SAJHR* 475-490
 Heyns *SALJ*
 Heyns C "Reasonableness in a Divided Society" 1990 (107) (2) *SALJ* 279 - 303
 Kende *CLR* 145 - 147
 Kende MS "The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective". 2003 *CLR* 137-160
 Lamont and Favor *SEP*
 Lamont J, Favor C "Distributive Justice" June Edition 2014 *SEP: The Stanford Encyclopaedia of Philosophy*.
 Louw *UNISA FUR* 2601
 Louw PJ "Human Dignity : The critically essential, universal and encompassing axiom for legal and political jurisprudence in governance of the state - and - of mankind". 2013 *UNISA FUR* 2601 1 - 6 (LLB research assignment)
 Mureinik *SAJHR*
 Mureinik E "A bridge to where? -- introducing the interim Bill of Rights". 1994 (10) *SAJHR* 31 - 48
 Pieterse *SAJHR* 404 and 405.
 Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" 2004 (20)(3) *SAJHR* 383 - 417

Wesson *HRLR*

Wesson M "Reasonableness in Retreat - The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*". 2011 (11) *HRLR* 390 - 406

Books, theses & dissertations

Botha *Grondwetuitleg*

Botha *Waarde-aktiverende grondwetuitleg : vergestaltung van die materiele regstaat.* (LLD thesis University of South Africa 1996)

Currie and de Waal *Bill of Rights Handbook*

Currie I and de Waal J *Bill of Rights Handbook* 5th Ed (Juta Cape Town 2011)

Mbazira *Litigating Rights*

Mbazira C *Litigating Economic and Social rights in South Africa: A Choice between Corrective and Distributed Justice* (Pretoria University Law Press 2009)

Mangu *Advanced Constitutional Law*

Mangu AMB *et al Advanced constitutional law and fundamental Rights Study Guide for LCP4806* (University of South Africa, Pretoria 2011)

Internet resources:

Cases:

1996 (10) BCLR 1253 (CC)

Certification of the Constitution of the RSA 1996 (10) BCLR 1253 (CC)

<http://www.saflii.org/za/cases/ZACC/1996/26.pdf>

(Date accessed - August 23rd 2015)

1995 4 SA 631 (CC)

Coetsee v Government of the RSA; Matiso v Commanding Officer, Port Elizabeth Prison 1995 4 SA 631 (CC)

<http://www.saflii.org/za/cases/ZACC/1995/7.pdf>

(Date accessed - August 27th 2015)

319 U.S. 157, 181 (1943)

Douglas v Jeannette 319 U.S. 157, 181 (1943)

<http://caselaw.findlaw.com/us-supreme-court/319/157.html>

(Date accessed - September 2nd 2015)

1996 (1) SA 984 (CC)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

<http://www.saflii.org/za/cases/ZACC/1995/13.pdf>

(Date accessed - August 25th 2015)

2000 (11) BCLR 1169

Government of RSA and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)

<http://www.saflii.org/za/cases/ZACC/2000/19.pdf>

(Date accessed - September 3rd 2015)

2005 (2) SA 140 (CC)

Jaftha v Schoeman and Others 2005 (2) SA 140 (CC)

<http://www.saflii.org/za/cases/ZACC/2004/25.rtf>

(Date accessed - September 10th 2015)

2004 (6) SA 505 (CC)

Khosa and Others v Minister of Social Development 2004 (6) SA 505 (CC)

<http://www.saflii.org/za/cases/ZACC/2004/11.pdf>

(Date accessed - September 10th 2015)

2006 (5) BCLR) 622 (CC)

Matatiele Municipality v President of the Republic of South Africa & Others 2006 (5) BCLR) 622 (CC)

<http://www.saflii.org/za/cases/ZACC/2006/2.pdf>

(Date accessed - August 26th 2015)

- 2007 (1) BCLR 47 (CC)
Matatiele Municipality v President of the Republic of South Africa & Others 2007 (1) BCLR 47 (CC)
<http://www.saflii.org/za/cases/ZACC/2006/12.pdf>
 (Date accessed - August 26th 2015)
- 2002 (10) BCLR 1033 (CC)
Minister of Health v Treatment Action Campaign 2002 (10) BCLR 1033 (CC)
<http://www.saflii.org/za/cases/ZACC/2002/15.pdf>
 (Date accessed - September 3rd 2015)
- 1994 (3) SA 625 (E)
Qozoleni v Minister of Law and Order 1994 (3) SA 625 (E)
[jutalaw.co.za.oasis.unisa.ac.za](http://www.jutalaw.co.za/oasis.unisa.ac.za)
 (Date accessed - August 28th 2015)
- 1995 3 SA 391 (CC)
S v Makwanyane 1995 3 SA 391 (CC)
<http://www.saflii.org/za/cases/ZACC/1995/3.pdf>
 (Date accessed - August 24th 2015)
- 1995 2 SA 642 (CC)
S v Zuma 1995 2 SA 642 (CC)
<http://www.saflii.org/za/cases/ZACC/1995/1.pdf>
 (Date accessed - August 24th 2015)
- 345 U.S. 206, 224 (1953)
Shauhnessy v Mezei 345 U.S. 206, 224 (1953)
<https://supreme.justia.com/cases/federal/us/345/206/case.html>
 (Date accessed - September 2nd 2015)
- 1998 (1) SA 765 (CC)
Soobramoney v Minister of Health, KwaZulu Natal 1998 (1) SA 765 (CC)
<http://www.saflii.org/za/cases/ZACC/1997/17.pdf>
 (Date accessed - September 3rd 2015)
- Articles and research reports:
- Christiansen *CHRLR* 361
 Christiansen EC " Adjudicating Non-Justiciable Rights: Socio-economic Rights and the South African Constitutional Court " 2007 (38) *CHRLR* 321 - 386
 Columbia Human Rights Law Review
<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1141&context=pubs>
 (Date accessed - September 3rd 2015)
- Christiansen *UCLA JILFA* 475
 Christiansen EC "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa" 2008 (13) (3) *UCLA JILFA* 369-406
[www.heinonline.org.oasis.unisa.ac.za](http://www.heinonline.org/oasis.unisa.ac.za)
 (Date accessed - September 1st 2015)
- Davis *SAJHR* 377
 Davis DM "The case against the Inclusion of socio-economic demands in a Bill of Rights except, as directive principles" 1992 (8) (4) *SAJHR* 475-490
[www.heinonline.org.oasis.unisa.ac.za](http://www.heinonline.org/oasis.unisa.ac.za)
 (Date accessed - August 29th 2015)
- Heyns *SALJ*
 Heyns C "Reasonableness in a Divided Society" 1990 (107) (2) *SALJ* 279 - 303
[www.heinonline.org.oasis.unisa.ac.za](http://www.heinonline.org/oasis.unisa.ac.za)
 (Date accessed - September 1st 2015)
- Kende *CLR* 145 - 147
 Kende MS "The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective". 2003 *CLR* 137-160
[www.heinonline.org.oasis.unisa.ac.za](http://www.heinonline.org/oasis.unisa.ac.za)
 (Date accessed - September 1st 2015)

Lamont and Favor *SEP*

Lamont J, Favor C "Distributive Justice" June Edition 2014 *SEP*: The Stanford Encyclopaedia of Philosophy.

<http://plato.stanford.edu/archives/fall2014/entries/justice-distributive/>

(Date accessed - September 2nd 2015)

Mureinik *SAJHR*

Mureinik E "A bridge to where? - introducing the interim Bill of Rights".

1994 (10) *SAJHR* 31 - 48

www.heinonline.org.oasis.unisa.ac.za

(Date accessed - September 10th 2015)

Pieterse *SAJHR* 404 and 405.

Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" 2004 (20)(3) *SAJHR* 383 - 417

www.heinonline.org.oasis.unisa.ac.za

(Date accessed - August 23rd 2015)

Wesson *HRLR*

Wesson M "Reasonableness in Retreat - The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*". 2011 (11) *HRLR* 390 - 406

www.heinonline.org.oasis.unisa.ac.za

(Date accessed - September 10th 2015)

Books, theses & dissertations:

Botha *Grondwetuitleg*

Botha *Waarde-aktiverende grondwetuitleg: vergestaltung van die materiële regstaat*. (LLD thesis University of South Africa 1996)

<http://hdl.handle.net/10500/15624>

(Date accessed - August 27th 2015)

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