Economic and social rights adjudication: what is it good for?
Reasonableness, restraint and participation in the South African model

Workshop on specifying and securing a social minimum, International Institute for the Sociology of Law, 29-30 June 2017

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1. Introduction

Over the last two decades, enormous strides have been made in international human rights law and in domestic constitutional systems in breaking down traditional barriers to the legal protection of rights to housing, health care, water, food, social security, etc. Economic and social rights (ESR) are included in a number of national constitutions. ¹ Their content has been given clearer definition at an international level and the UN Committee on Economic, Social and Cultural Rights (CESCR) now has the mandate to hear individual communications, emanating from states that have ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), with respect to violations of that treaty. Underlying these developments is a commitment to the idea that poverty is a human rights issue – the recognition that, when approximately half of the world’s wealth lies in the hands of 1% of its population, poverty is an affront to human dignity and constitutes a violation of human rights.²

Despite this widespread agreement about the importance of ESR and a great deal of concern about the number of people who continue to live in poverty, the relationship between law and poverty alleviation remains contentious. With an avowedly transformative vision of constitutionalism and a Constitution containing several directly justiciable ESR, South Africa has been at the forefront of the debate since the mid-1990s. The South African experience highlights the fact that, even in the context of a Constitution that expressly gives courts the power to give effect to ESR, there are no easy answers to the question of how courts may best contribute to securing these rights. Many scholars and activists, having fought hard for ESR to be recognised as rights at all, are resistant to adjudicative methods that appear to retreat to a version of human rights in which ESR are again the ‘poor cousin’ or Cinderella subjects to civil and political rights (CPR). The consideration of how ESR are best protected in South Africa occurs against the background of a deeply unequal society,

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high levels of unemployment and poverty, and a slowing down of progress with respect to poverty alleviation.³

This paper has three principal aims: first, to describe and to try to account for the approach of the South African Constitutional Court (SACC) to ESR; second, to consider the usefulness of the current model (particularly the recent development of the idea of meaningful engagement); and third, to suggest ways in which this model may be usefully developed in implementing ESR. It should be noted at the outset that the ESR provisions in the South African Constitution are not explicitly directed at achieving a social minimum – the rights are more broadly phrased. However, a key question which this paper will address is whether the South African experience suggests that the role of courts ought to be circumscribed in this way. Are courts are better placed to contribute to the securing of a social minimum, rather than to play a more expansive role in identifying and implementing rights to the ‘highest attainable standard of physical and mental health’⁴ or ‘the continuous improvement of living conditions’, for example?⁵

2. Reasonableness: the early cases

It was in the seminal Grootboom case⁶ that the SACC first began to develop its reasonableness-based approach to ESR adjudication. The judges chose to build their approach on the section 26(2) requirement of ‘reasonable legislative and other measures’:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.⁷

Following this decision, Cass Sunstein described the Court’s approach to ESR as an ‘administrative law model’ that placed a burden of explanation on government agencies. He noted that, using this model, courts attempt to curb arbitrary administrative action whilst preserving the democratic integrity of government bodies.⁸ In the judicial review of administrative action, courts would be cognisant of the limited resources of governmental agencies and ‘any reasonable priority-setting will be valid and perhaps even free from

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⁴ ICESCR, Art. 12(1).
⁵ ICESCR, Art. 11(1).
⁶ Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC). The applicants, a group of about 900 adults and children, decided to leave the deplorable conditions of their informal housing but the land they moved on to was private land earmarked for low-cost housing. The court had to decide whether their eviction infringed the right to adequate housing in section 26 of the Constitution – see pars. 4, 7-8 of the judgment.
⁷ Grootboom above, par. 41. The relatively cautious approach was prefigured by the Court’s earlier decisions - see Certification of the Constitution of the Republic of South Africa (First Certification case) 1996 (10) BCLR 1253 (CC) at par. 78 and Soobramoney v Minister of Health (KwaZulu-Natal) at par. 29. See also C Scott and P Alston ‘Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney’s legacy and Grootboom’s promise’ (2000) 16 South African Journal on Human Rights 206.
judicial review’. For scholars and activists in favour of strong ESR, this level of judicial minimalism was a hard pill to swallow. The inviduous, racist system of Apartheid was premised not just on the removal of CPR but also on socio-economic deprivation. An emphasis on socio-economic justice alongside political freedom had been a hallmark of the National Liberation Movement’s political manifesto. Furthermore, when the Constitutional Assembly tasked with drafting the 1996 Constitution co-ordinated a public participation programme in which South Africans had the opportunity to write in, expressing their views about the content of a new Constitution, requests for rights to jobs, houses and education loomed large in the responses received.

It was against this background, with salient reasons both for and against robust judicial intervention, that the SACC had to develop its approach to ESR. Despite attempts by litigators to get the court to delineate the minimum content of ESR rights in the early cases, the court exhibited an unwavering preference for a reasonableness-based approach to the rights. As an inherently flexible device, reasonableness has sometimes been interpreted by the Court in the cases following Grootboom to place relatively onerous demands on government in ESR cases. For instance, in the celebrated Treatment Action Campaign decision, the court ordered government to widen access to the anti-retroviral drug nevirapine used to prevent mother-to-child transmission of HIV. And in the Khosa case, Justice Mokgoro, writing for the majority, rejected the argument that providing social security benefits to permanent residents (rather than citizens alone) would stretch governmental resources too far.

Despite some praise for the manner in which the SACC negotiated the various interests at play in ESR cases, these early cases were heavily critiqued by South African scholars. They objected to the court’s failure to give normative content to the rights, its preoccupation with the process by which governmental decisions impacting on ESR were taken, and a reluctance to use strong remedies such as supervisory jurisdiction. Perhaps most significantly, the impact of the ESR jurisprudence was questioned. As pointed out by Brian Ray, ‘Mr. Soobramoney died, literally on camera, in a media interview about his

9 Sunstein above, 121.
10 The 1955 Freedom Charter, which was drafted on the basis on ‘freedom demands’ collected from people across the country by 50 000 ANC volunteers and considered to be the statement of core principles of the ANC and its allies, included a demand that ‘There Shall Be Houses, Security and Comfort!’ – see http://www.sahistory.org.za/article/congress-people-and-freedom-charter.
12 Grootboom above, pars 17-18; Minister of Health and Others v Treatment Action Campaign and Others (No. 2) 2002 (10) BCLR 1033 (CC).
13 Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and Others 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).
14 She stated that, on government’s own higher estimate, the extension would entail a less than two percent increase on the existing cost of social grants Khosa above, pars. 60-62.
reaction to the decision’. Furthermore, even in those cases where ESR litigation led to a successful outcome, implementation of judicial decisions was rife with problems. Thus, the fact that Mrs Grootboom was homeless when she died has been highlighted in the commentary. And the relative success of the Treatment Action Campaign case has been linked to the strong civil society campaign supporting the case and pushing for implementation of court orders, a feature not always present in the South African context.

The early cases gave rise to a number of tangible principles— for instance, that a policy will be found to be unreasonable if it did not cater for those in desperate need; that governmental action which unreasonably excludes a particular segment of the population is unconstitutional; and that a policy had to be reasonable in both design and implementation. But, on the whole, the approach was marked by restraint and was, as a result, a source of disappointment for many working in the field.

3. Restraint reaffirmed

After two decades, many critics of the SACC’s model of ESR adjudication still object to the use of reasonableness as a standard of review in itself. They argue that reasonableness is by definition a weak form of scrutiny that focuses on procedure at the expense of substance. However, there are those who argue that the problem lies not with the standard of reasonableness itself but with the fact that the court has applied it in a manner that does not make sufficient and consistent use of all the elements of a proportionality analysis. Quinot and Liebenberg, for instance, note that a two-stage proportionality analysis requires an initial ‘principled examination of what the scope of the right is’, an examination routinely missing from the SACC’s analysis in ESR cases.

This approach to the rights was reaffirmed in the 2009 case of Mazibuko v City of Johannesburg. The Mazibuko case arose from a decision by the City of Johannesburg to transform Johannesburg’s poorly functioning system of water provision, beginning with Phiri Township in Soweto. The Phiri applicants argued that the amount of free water provided to individuals under the plan was insufficient and that the decision not to make a

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17 See, for example, https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless; M Langford ‘Housing Rights Litigation: Grootboom and Beyond’ in M Langford, J Dugard and B Cousins and T Madlingozi Socio-Economic Rights in South Africa: Symbols or Substance (CUP, 2014) at 188.
20 Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening) 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).
21 Mazibuko above, par. 13.
credit system available to them was unconstitutional. For the residents of Phiri, the new plan meant that once they had used up their free water allocation of 20 litres per person, per day their supply would be cut off until they could pay for more water.  

Clarifying its model of ESR adjudication in this case, the court, per Justice O’Regan, set out what appeared to be a consciously very minimalist interpretation of the reasonableness standard. Rejecting the argument that the court should find that ‘sufficient water’ amounted to 50, rather than 25, litres per person, per day, Justice O’Regan J held:

The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness [emphasis added].

Justice O’Regan set out several, non-exhaustive, elements to the reasonableness enquiry in ESR cases. Courts would require government to ‘at least’:

(a) take steps to realise positive obligations in respect of the ESR in the Constitution where no steps were being taken;
(b) review unreasonable measures to ensure that they met the standard of reasonableness;
(c) regularly reassess policies to check that those policies were capable of progressively realising the rights;
(d) make provision for those in desperate need; and
(e) remove any unreasonable limitations or exclusions from its ESR policies.

Justice O’Regan was critical of the fact that the High Court and Supreme Court of Appeal ‘without first considering the content of the obligation imposed upon the state by section 27(1)(b) and 27(2), found it appropriate to quantify the content of the right’, confirming that the content of the right is determined by the extent of the obligation.

Lest one be tempted to assume that Mazibuko heralded a new and highly deferential approach to ESR adjudication, it should be noted that the court has taken a more interventionist stance in subsequent cases. In the later Blue Moonlight decision, the court held that the state had a legal duty to budget for, ad provide, emergency accommodation where the emergency was foreseeable. Furthermore, the evidence provided by the City to support its claim of a budget deficit was inadequate as it related to its housing budget, rather than its overall financial position. After years of reluctance to exercise supervisory jurisdiction based on the need to show some deference to government officials, the court

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22 Credit meters were provided outside Soweto, in areas largely inhabited by white residents. Although there were disadvantages to a credit system – higher charges, for instance – notice had to be given to these residents before their supply could be cut off. See Mazibuko above, par. 148.
23 Mazibuko above, pars. 78-81. Those who could not afford to pay could apply to be placed on an indigent persons register and get an extra 4 kilolitres per month per household (at pars. 92-3). But applicants argued that the fact that only a fifth of eligible people in Phiri were on the register was an indication that it was not an effective means for indigent persons to secure access to more water (at par. 98).
24 Mazibuko above, par. 66.
25 Mazibuko above, par. 67.
26 Mazibuko above, par. 68.
27 Mazibuko above, pars. 72 and 74.
28 Mazibuko above, par. 74.
has also now ordered supervision of its remedies in a few cases. But, what was striking about Mazibuko was the court’s emphatic reiteration of its fundamentally unchanged approach: ESR rights were to be interpreted in light of the obligations set out in the internal limitations clauses and the more onerous elements of the reasonableness standard would not necessarily be employed in interrogating governmental decision-making.

4. Evictions and engagement: a new direction?

The court’s use of a ‘meaningful engagement’ remedy in the 2008 Olivia Road case has generated a great deal of commentary on a possible and promising new direction in the SACC’s approach. The case concerned a decision by the City of Johannesburg to eject approximately 400 occupiers from buildings considered to be unsafe and unhygienic in inner city Johannesburg. Two days after hearing the occupiers’ application for leave to appeal, the SACC handed down an interim order designed to ensure that the parties ‘engaged with each other meaningfully on certain issues’. In explaining the rationale for the meaningful engagement order, Yacoob J noted that people in need of housing should not be seen as a ‘disempowered mass’ but as active participants in the process of finding housing solutions. The consequent engagement process resulted in agreement between the parties on many of the issues in the case.

The question of whether government officials had consulted with those who would be affected by their decisions had arisen in earlier cases. But, meaningful engagement as applied in Olivia Road had its roots in the 2005 decision in Port Elizabeth Municipality v Various Occupiers, Sachs J held that the Prevention of Illegal Eviction from and Unlawful Occupation of Land (PIE) Act, taken together with the Constitution, required courts to engage in ‘active judicial management’. By this, he meant that equitable treatment, broad considerations of fairness and other constitutional values had to be taken into account alongside the question of whether the potential evictees were in lawful occupation. He

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29 See Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) at par. 50; and Schubart Park Residents Association and others v City of Tshwane and others [2012] ZACC 26 at par.51 and 53. The court’s jurisprudence on the obligations of private parties is also informative – see, for instance, Blue Moonlight above, Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others [2011] ZACC 13; 2011 (8) BCLR 761 (CC) and, most recently, Daniels v Sribante and Another 2017 ZACC 13, in which a majority of the judges left open the possibility that private parties could incur positive obligations in terms of the ESR provisions.

30 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others 2008 (3) SA 208 (CC).


32 Olivia Road above, pars. 1-2.
33 Olivia Road above, par. 5.
34 Olivia Road above, par. 20.
35 See Groothoom above, par. 87; and President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd 2005(5) SA 3 (CC) at para. 31.
36 2000 (2) SA 1074 (SECLD).
went on to state:

[O]ne potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions.  

Recognising the limitations of courts in correcting systemic unfairness, Sachs J noted that a managerial approach required judges to be innovative and 'do as well as they can with the evidential and procedural resources at their disposal'.

Meaningful engagement, as subsequently applied in *Olivia Road*, generated a high level of interest and enthusiasm because people could see the potential of courts acting as facilitators of participation, a key democratic value, in ESR cases. The outcome of the case was that the occupants did not have to leave the buildings and conditions were improved whilst temporary accommodation was identified. So, whilst the judgment focused on a procedural aspect of the governmental action, for the residents of the buildings, the effect was substantive. The fact that the engagement process worked so well in *Olivia Road* may be attributed to a number of factors – good faith on the part of the people involved; the fact that the residents were a relatively small number of people; and the fact that the court had effectively made the evictions contingent on meaningful engagement.

But what were the implications of this case for the SACC’s overall approach to ESR adjudication? Whilst drawing on the idea of active judicial management from *Port Elizabeth Municipality*, Yacoob J also located the duty to engage in section 26(2)'s requirement of reasonable state action: where the state sought an ejectment or eviction order which could render people homeless, a court had to take into account the question of whether the authorities had engaged with those people in deciding whether the state had satisfied its section 26 (2) obligations. Furthermore, the SACC’s finding that any assessment of the City’s plan for permanent housing solutions vis-à-vis the litigants and others in their situation would be premature chimed with its general reluctance to set hard and fast standards regarding the content of the rights.

The implications of meaningful engagement must also be read in light of the 2009 *Joe Slovo* decision. Here, the Court ordered eviction in the context of a clearly inadequate governmental approach to engagement with the affected community. The case involved a pilot project to upgrade an informal housing settlement in Cape Town, part of a national

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37 *Port Elizabeth Municipality* above, par. 36.
38 *Port Elizabeth Municipality* above, par. 39.
39 *Port Elizabeth Municipality* above, par. 38.
40 Supporting Sachs J’s point that, under a managerial approach, it would not always be possible to draw a clear distinction between ‘procedural and substantive aspects of justice and equity’ - *Port Elizabeth Municipality* above, par. 39.
42 *Olivia Road* above, pars. 17-18.
43 *Olivia Road* above, par. 34.
44 Residents of Joe Slovo Community, *Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).
project ultimately aimed at eradicating informal housing and providing low-cost housing to accommodate those in need. Government argued that they needed to evict the residents of the Joe Slovo settlement to carry out the rebuilding project. The residents wanted to stay on-site, arguing that a move would take them away from transport routes to their places of work and expose them to high levels of crime. In their analysis of government’s approach to engagement, all the judges noted how flawed the process had been. But, for the judges, the problems with engagement were to be taken into account in determining whether the implementation of the plan was reasonable. They were not a reason to halt the proposed eviction.

5. Making sense of the model

5.1. Distancing strategies

In his discussion of the complexities surrounding human rights adjudication McCrudden refers to ‘distancing strategies’ used by judges in order to bolster their decisions against criticisms related to judicial competence and legitimacy. The SACC has resisted a ‘straightforwardly normative approach’ to ESR adjudication. Such an approach would have left the court open to criticisms stemming from separation of powers and legitimacy concerns. Even those most critical of the court’s ESR model recognise the importance of courts delineating a ‘democratically defensible’ role for themselves in dealing with the rights. But the SACC’s model of ESR adjudication breaches what many commentators hold to be a fundamental aspect of rights-adjudication that is, the two-stage approach in terms of which a court first decides whether the action interferes with the right and then determines whether the interference is justifiable.

There are two points to be made here. First, this approach does not necessarily return ESR to Cinderella status. It is increasingly evident that courts tend to balance the issues of justiciability, substantive content of rights and potential remedies, rather than treat these as entirely separate stages in the judicial process. Recently, Kai Möller has argued that the first stage of a rights-analysis has become less important ‘largely as a consequence of rights inflation, i.e. the phenomenon that more and more interests are protected as rights’. What Poole refers to as ‘second-order’ concerns that is, ‘issues

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45 On-site upgrading was emphasised in government’s national housing plan and was also international best practice – see Moseneke DCJ, par. 174; Ngcobo J, pars. 201 and 205 and Sachs J, pars. 364 and 367 in Joe Slovo, above.
47 See Sachs J, par. 380 in Joe Slovo, above.
49 To use Sandra Fredman’s term in Human Rights Transformed: Positive Rights and Positive Duties (OUP, 2008), 103.
51 ‘Constructing the Proportionality Test’ in Lazarus et al, above, 32. See also T Poole ‘Legitimacy, Rights and Judicial Review’ (2005) 25(4) Oxford Journal of Legal Studies 697 at 720. Compare P Babie and J
relating to constitutional structure and administrative decency rather than basic or primary issues of justice and morality" may be more pronounced in ESR cases but it is useful to note that courts dealing with CPR also adopt a less than categorical approach to defining the rights. The second point, however, is that, even accepting this approach to the internal limitations clauses as part of an attempt to respect democratic principles, the court has not made sufficient use of alternatives to pure normative reasoning that would allow it to distance itself from critiques about capacity and legitimacy.

One such alternative, referred to by McCrudden, involves developing the institutional capacity of courts. An oft-cited reason for failing to delineate the minimum – or other – content of ESR by the SACC is a lack of information. It is striking that the relative success of the Treatment Action Campaign litigation may be attributed, at least in part, to the availability of empirical evidence on HIV and anti-retroviral drugs provided by TAC activists. But in Mazibuko, the court failed to adequately engage with specific international evidence of the quantity of water required for various household uses.

The use of a proportionality test also allows courts to distance themselves from the accusation that they are merely engaging in a political judgment when balancing rights as it provides structure and content to the balancing exercise. The SACC has not applied a structured proportionality test, such as that contained in the general limitation clause of the Constitution, in its reasonableness-based model of ESR adjudication. Moreover, whilst the court has sometimes adopted elements of a proportionality analysis to interrogate the substance of governmental decisions impacting on ESR and the impact of governmental action on individuals and groups has loomed large in its decision-making, when faced with large-scale projects with creditable objectives, the court has been much more circumspect. For instance, in Mazibuko, the water supply of the Phiri residents would be cut off for weeks at at time, irrespective of how extreme the need for water was. Yet the Court did not


Poole above, 697.

See Grootboom above, par. 33; and Treatment Action Campaign above, pars. 34, 37 and 38.

On this point, see the documentary ‘Law and Freedom’, available at https://www.youtube.com/watch?v=7erB1wHHrxI from 1:10 min. See also McCrudden above, 24-25 on adapting the institutional capacity of courts by facilitating information-provision, another means of addressing concerns about their competence and legitimacy.


See, for example, the court’s treatment of government’s argument that extending the provision of the anti-retroviral drug nevirapine would result in people developing a resistance to it – Treatment Action Campaign above, par. 59; see also Khosa above, pars. 60-62; 74 and 76 (although it should be noted that that the fact that this case was decided, in part, on the basis of the right to equality complicates the analysis).
engage seriously with the question of whether better attempts to recover debt would be more cost-effective than installing pre-paid meters.59

5.2. Securing a social minimum incrementally

In the context of ESR adjudication, the idea of a social minimum is attractive because it takes account of the limitations of courts: courts are unsuited to making determinations involving distributive justice generally but they can ensure that basic needs related to ‘a decent life’ are protected.60 South African scholars and activists would strongly resist the notion that the objective of the ESR provisions is to secure a social minimum (rather than a more expansive version of ESR). The general tenor of the scholarship has been against a routinely minimalist approach to either the content of the rights or the remedies.61 Thus, the minimum core argument made by the amici curiae in the Treatment Action Campaign case was essentially that sections 26(1) and 27(1) created an immediately enforceable obligation on the state to fulfil the minimum core content of right to housing and health care but sections 26(2) and 27(2) referred to the progressive realisation of the full content of these rights.62 In Mazibuko, the applicants argued that the 25 litres per person, per day set out in the relevant Regulation amounted to a minimum standard and that the court was entitled to determine that a greater amount of water formed the (broader) content of the right in section 27(1)(b).63 In contrast to this generous view of the rights, however, the SACC’s ESR jurisprudence has, in fact, tended to focus on minimum entitlements. In a recent article Sandra Liebenberg summarises the factors the SACC has identified as being indicative of unreasonable governmental action or inaction thus:

- Failure by government to take steps to realise the rights; a lack of provision within a government programme for those most desperately in need; a lack of flexibility and responsiveness to relevant scientific and social impact evidence; the absence of meaningful engagement with the beneficiaries of the rights; or the adoption of a policy with unreasonable limitations or exclusions.64

In his book Judging Social Rights,65 Jeff King builds on the idea of a social minimum66

59 Mazibuko above, par. 99. The argument that a universalist approach to providing the extra 4 kilolitres a month was more cost-effective than keeping an indigent persons register was also neglected in the judgment, despite the fact that the City’s representative had indicated before the court that a universalist system would be cheaper to administer. Similarly, despite clear evidence of deeply flawed implementation of the N2 Housing Project in Joe Slovo, the court allowed the overall worthiness of the project to outweigh concerns about its impact on the residents.


61 Sandra Liebenberg (South African Law Journal, above, 426) also points out that Rawls’ broader theory of justice, from which the idea of a social minimum emanates, does not conform easily to the spirit of the South African Constitution – in particular as regards the lexical priority accorded to civil and political liberties.


63 Mazibuko above, pars. 44, 56 and 72.

64 South African Law Journal above, 413-14.

65 (CUP, 2012).

66 According to King, the social minimum should satisfy three thresholds (deriving from minimal respect for the values of autonomy, well-being and social participation): a healthy subsistence threshold, a social participation threshold and an agency threshold (above, 29-30).
to put forward an ‘incrementalist’ approach to ESR adjudication. The reason that this approach is interesting, from a South African perspective, is that it strongly reflects the methods adopted by the SACC.\textsuperscript{67} King argues for a conceptual framework for judicial restraint in the adjudication of social rights cases.\textsuperscript{68} In his view, there are at least four general principles of restraint applicable in this context: democratic legitimacy, polycentricity, expertise and the need for flexibility. Where more than one principle applies in a particular case, judicial decision-making should be incremental. The techniques of incrementalism include reasoning by analogy, following precedent and deciding on narrow grounds. They are employed in order to preserve space for future adaptation.\textsuperscript{69}

In discussing how weight should be attributed to the four principles he identifies, King also examines the situations in which these principles will not be especially important or weighty. For example, in determining the weight that should be attributed to the democratic legitimacy of legislation, judges need not show strong restraint when the disadvantage experienced by the claimant is linked to her membership of a marginalised group.\textsuperscript{70} King does not advocate a universally applicable incrementalist approach. He notes that where certain background political conditions\textsuperscript{71} do not apply, a different approach may be advisable. So, where there has been a breakdown of collaboration between governmental institutions or when non-judicial avenues for social welfare disputes are missing, for instance, a more active judicial role would be appropriate.

As noted by Wesson, the fact that King’s approach is based on securing ‘a bundle of resources that would secure a “minimally decent life”’ rather than anything more ambitious ‘may not endear him to many other commentators in this field’.\textsuperscript{72} However, the appeal of King’s approach is that it acknowledges that, far from being a matter secondary to rights implementation, the extent to which it is appropriate for courts to intervene in a matter is at the heart of our understanding of the key democratic values.\textsuperscript{73} And, for those interested in how ESR adjudication may be used most effectively, this is something that should not be ignored.

5.3. Legitimacy and participation

How then does the SACC’s meaningful engagement jurisprudence fit within an incrementalist account of ESR adjudication? Although it is fair to say that an order for meaningful engagement is still primarily an order that a particular procedure be adopted, the focus on participation suggests that affected parties may more readily influence the outcome of the process. Part of the attraction of a ‘thick’ procedural\textsuperscript{74} remedy like

\begin{itemize}
\item \textsuperscript{67} King above, 315.
\item \textsuperscript{68} King above, chapter 5.
\item \textsuperscript{69} King above, chapter 10.
\item \textsuperscript{70} King above, 176-77.
\item \textsuperscript{71} King above, 10-13.
\item \textsuperscript{72} M Wesson ‘Enforcing Human Rights Incrementally: Review of Jeff King, Judging Social Rights (Cambridge University Press, 2012)’ 130.
\item \textsuperscript{73} Fredman above, 103.
\item \textsuperscript{74} The term ‘thick proceduralism’ comes from a 2006 article by Keith Syrett in which he noted a trend towards seeing a deliberative or ‘thicker proceduralist’ mode of regulation as a useful way of dealing
\end{itemize}
meaningful engagement in the context of ESR adjudication is that, at its best, the remedy allows courts to facilitate participation and encourage stake-holders to frame solutions together, thus avoiding challenges that courts are acting undemocratically.

Given the fact that meaningful engagement orders by their nature already entail courts taking a step back and creating a space for dialogue amongst government officials, civil society organisations and affected individuals, their use should be less controversial and more robust. In other words, there is less of a need for an incremental approach. However, the SACC’s jurisprudence demonstrates that the fact that meaningful engagement orders are aimed at furthering democratic participation has not insulated them from judicial caution when the case concerns a major government project with worthy objectives (such as Joe Slovo).

There is, as yet, insufficient clarity on what the SACC’s conception of participation entails.75 In trying to flesh out and understand the SACC’s conception of the kind of participation that amounts to meaningful engagement, Muller76 usefully draws upon Shelley Arnstein’s influential 1969 article in which she developed a typology of eight levels of participation arranged as rungs on a ladder. She defined participation as the means by which citizens ‘can induce significant social reform which enables them to share in the benefits of the affluent society’. Her levels of participation ranged from manipulation and therapy (non-participation) to informing, consultation and placation (tokenism) to partnership, delegated power, and citizen control (real citizen power).77 Arnstein saw partnership as involving the redistribution of power through ‘negotiation between citizens and powerholders’. Partnership is marked by ‘genuine bargaining influence’ over outcomes. Muller suggests that the court’s conception of meaningful engagement mostly closely resembles a partnership. But in the housing cases mentioned above, engagement has entailed anything from manipulation to consultation to informing to placation to partnership.78

An alternative way of thinking about the meaningful engagement jurisprudence is not to focus on the judgements but to take a broader view of the impact of the remedies. In Joe Slovo, where the SACC weakened the coercive effect of the meaningful engagement remedy by allowing the eviction to go ahead, the judges also ordered government to continue to engage with the affected individuals and to provide temporary accommodation of a certain standard.79 In the ensuing engagement process, driven by civil society

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76 G Muller ‘Conceptualising “meaningful engagement” as a deliberative partnership’ (2011) 22 Stellenbosch Law Review 742, 754-5.
77 S Arnstein ‘A Ladder of Citizen Participation’, (1969) 35 Journal of the American Institute of Planners 216. Arnstein acknowledges certain limitations of the typology, for instance that it does not examine the most important obstacles to reaching ‘genuine levels of participation’.
78 Muller above, 754-5. See the discussion of Joe Slovo above. See also the Abahlali case, in which applicants noted that interaction with public bodies was characterised by attempts to persuade the local community of the acceptability of existing governmental plans, sometimes through threats of violence and actual violence, and announcements of decisions affecting the community that had already been made (Abahlali above, pars. 1,2 and 5), discussed in Muller above, 752.
79 Joe Slovo above, par. 7
organisations, it became clear that on-site upgrading, which was what the applicants wanted, was actually the best approach mainly because the government did not have enough temporary accommodation of the requisite standard to move all the residents off the land.\textsuperscript{80}

In Mazibuko, the court suggested that the City’s ‘comprehensive and persistent engagement’ with research and information could have been a result of the litigation.\textsuperscript{81} The government ultimately capitulated with respect to the free basic water allocation that was the subject of the litigation in the Mazibuko case, agreeing to raise the amount to 50 litres per person per day for the poorest households in the City of Johannesburg.\textsuperscript{82} The litigation arguably contributed to this but only as part of a wider mobilisation process involving ‘meetings, marches, media exposure and bypass, a form of civil disobedience that entails removing the offending technology … and connecting to the main water supply, thereby restoring the unlimited water supply’.\textsuperscript{83} In both of these cases, the ultimate success of engagement depended on the presence of civil society organisations and their capacity to drive the engagement process.

6. Tentative conclusions

The South African ESR experience has divided commentators. Many South African scholars have pressed for the SACC to develop a stronger version of its ESR model – one that pays greater attention to the normative content of the rights and employs proportionality as part of a two-stage approach to rights adjudication. For others, the SACC has done a good job of negotiating what is a very tricky terrain: giving effect to ESR whilst respecting the democratic mandate and institutional expertise of the other branches of government and protecting its own institutional security.\textsuperscript{84} This paper takes the view that the SACC’s approach may accurately be described, following King, as incremental and that there are sound reasons, related to the limitations of judicial decision-making, for this caution.

However, there are three further points to be made here. Each relates, in some way, to the notion of variability. Commentators, whether advocating a minimum core approach to the rights, arguing for the employment of a proportionality test or making the case for incrementalism, all embrace the notion of variability in some way. They accept the need for circumstances to determine exactly how far a court should go in interpreting and implementing the rights. For King, key background political conditions have to be in place for the incrementalist approach to be argument to be applicable: thus, there should, for instance, be a ‘reasonably independent, professional, well-functioning, mostly non-corrupt


\textsuperscript{81} \textit{Mazibuko} above, pars. 95-96.

\textsuperscript{82} J Dugard ‘Urban Basic Services: Rights, Reality and Resistance’, in M Langford, B Cousins, J Dugard and T Madlingozi (eds.) above, 31

\textsuperscript{83} Ibid, 28.

\textsuperscript{84} The need for the court to strike a balance between principle and pragmatism, given the political constraints within which it has operated, is not an issue I cover in this paper due to limitations of space. See, however, the discussions of three social rights cases (Soobramoney, Grootboom and Treatment Action Campaign) in T Roux \textit{The Politics of Principle: the First South African Constitutional Court, 1995-2005} (CUP, 2013), chapter 7.
civil service and other executive agency staff’ and there must be a ‘good-faith political commitment to protecting social rights’. There is also an argument to be made that, when the institutional capacity of courts is bolstered by the availability of empirical information, they need not exercise the level of restraint otherwise necessary. Whilst the reasons for caution are very clearly outlined in the SACC’s approach, there is a lack of clarity about what would persuade the court to take a more interventionist approach.

The second point concerns the meaningful engagement jurisprudence. Here, the concerns about legitimacy and institutional capacity do not apply as strongly. Yet the court has failed to develop a strong narrative about what meaningful engagement entails (beyond an administrative law right to be heard). Even if we accept that governmental action will not necessarily be made conditional on meaningful engagement, a clear articulation of what engagement requires, rooted in participatory democracy, has value. Without this, it is much too easy for government officials to treat meaningful engagement cynically, ticking it off a list when there has been little more than information provision. Also, even when the court is reluctant to halt government action to allow for meaningful engagement to shape the next steps taken, combining the remedy with a supervision order would bolster its effectiveness.

A final point concerns the need to preserve space for a more content-based approach to the rights and perhaps even one that goes beyond a social minimum. A principled rejection of the idea that the SACC could give definition to the minimum or other content of particular ESR is inconsistent with the idea of variability, which accepts that circumstances may allow for greater judicial activism. This more content-based approach may not be immediately feasible but to close off this possibility completely is at odds with the ethos of the ESR provisions in the Constitution. At the moment, there is a great deal of criticism of government’s failures with respect to the implementation of ESR. Whilst the high quality of judicial decision-making has been a mainstay of South African government, there are increasing threats to the independence of the judiciary. Furthermore, until very recently, the African National Congress did not face any real opposition, the executive wields a huge amount of power, evidence of corruption under the Zuma-government is growing and redressing socio-economic inequality cannot be said to be a high priority of

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85 King above, 11.
86 As noted earlier, the court has sometime adopted this approach but, thus far, it is not clear when it will do so.
the current administration. In this climate, the capacity of courts to act as strong accountability mechanisms continues to be highly relevant.