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THE ROLE OF COURTS IN THE QUANTITATIVE-IMPLEMENTATION OF SOCIAL AND ECONOMIC RIGHTS: A COMPARATIVE STUDY

*Lucy A Williams**

1 Introduction

A growing number of democratic constitutions combine three components: they entrench social and economic rights, impose affirmative obligations on government to promote and fulfil such rights, and render social and economic rights judicially enforceable at least in some degree. This combination brings forward new and challenging questions regarding separation of powers and the relative institutional competence of legislatures and courts. If constitutional social and economic rights are to be more than mere statements of aspiration, courts must have some powers to give them content and enforce them. Yet the supremacy of the representative branches of government and their institutional superiority with respect to matters of social and economic policy are articles of faith in modern, democratic legal thought.[1] The common wisdom is that courts must

* Many people over the years have contributed to my understanding of South African law. I am particularly grateful to Sandra Liebenberg, Danie Brand, and Dennis Davis, and more recently Jackie Dugard. Colm O'Cinneade has been invaluable in discussing the *Hartz IV* decision. I also especially thank my colleague Karl Klare who read multiple drafts of this article and provided me with insightful criticism.

1 It is increasingly recognised that traditional approaches to separation of powers and institutional competence are simplistic and outdated. For one thing, the trite assumption that the political branches reflect the will of the people is anachronistic. Political branches are often 'captured' or stymied by powerful, self-serving interests. On occasion, courts are capable of opening clogged political processes so as to enhance their democratic effectiveness and representativeness. Moreover, traditional separation of powers thinking is based on a certain conception of democracy focusing primarily on institutional arrangements and processes designed to guarantee representative voting and determination of public policy by majority rule. Contemporary thinking understands these institutional considerations as only an aspect, albeit fundamental, of the values and practices that constitute democracy. A deeper or 'thicker' conception of democracy includes, at a minimum, the aspiration that society will make available to all members of the community the basic

not substitute their own judgment on issues of social and economic policy for that of the other governmental branches. At most, courts may ask the representative branches to justify the choices they have put in place, usually under some formulation of a 'reasonableness' test. Judicial scrutiny may be somewhat stricter when fundamental rights or suspect classifications are at issue, but in most cases the question is not whether the legislature has chosen the ideal method or program to give effect to the constitutional right, but whether it has selected a defensible or reasonable approach to the problem, given existing resource constraints.

Scholars have spent hundreds of hours debating the pros and cons of various standards of review, but most of the general formulations — 'reasonableness,' 'rationality,' 'least restrictive means,' 'proportionality,' 'strict scrutiny' — are too vague and indeterminate to predictably constrain judicial decision making. One judge's 'strict scrutiny' is another's 'reasonableness review.' The general theme of this article is that separation of powers doctrine as we know it operates at too high a plane of abstraction to provide much guidance to or restraint upon decision making in social and economic rights cases.[2] As comparative inquiry shows, separation of powers doctrine certainly does not and, as presently formulated, cannot explain what actually happens in adjudication. What courts actually do depends on the values, assumptions, and sensitivities they bring to the exercise of decision making, whether consciously or not. Inevitably, extra-doctrinal considerations play a role.

This article explores these themes in the context of cases in which a litigant asks a reviewing court to test the constitutional validity of a legislative or executive program to give effect to a social or economic right, and the key issue is whether the government's program provides the target population or eligible claimants with the constitutionally guaranteed social good in a sufficient amount

social and economic resources they need to participate meaningfully in political and social decision making. From this vantage, judicial enforcement of social and economic rights is not automatically anti-democratic and may on balance in a particular case enhance democracy. As Theunis Roux and others have argued, the South African Constitution embraces as a fundamental principle the duty of government to promote and fulfil democracy in some version of a 'thick' conception. For an overview, see T Roux 'Democracy' in S Woolman et al (eds) *Constitutional law in South Africa* (2008) 10-66. For further elaboration of the 'thick' conception of democracy embraced by the South African Constitution, see D Brand 'Writing the law democratically: A reply to Theunis Roux' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 997-112. Twenty-first century constitutionalism requires critical engagement with and new approaches to separation of powers and institutional competence theory.

2 See the important work of M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 and D Brand 'Courts, socio-economic rights and transformative politics' unpublished doctoral thesis, Stellenbosch University, 2009 120-133, 217-218, 235-237.

measured in quantitative terms. I call these 'quantitative implementation' cases. They are likely to arise with ever greater frequency as the 21st century progresses. The precise question on which I focus is how a reviewing court should engage with evidence that is quantitative in nature. The government may have calculated that a certain sum of money constitutes an adequate income for basic subsistence. If the government has made no reasonable effort to estimate subsistence income, if it comes to court with no data at all, a reviewing court might well ask the government to come back with a better explanation of its program, and the court could do this without stepping outside the boundaries of judicial deference. But suppose the government has made reasonable or even elaborate efforts to estimate basic subsistence income, but the litigants challenge the reliability and coherence of the government's calculations, as well as challenging the bottom line amount at which the government arrived? Within the framework of judicial deference, what is it proper for a reviewing court to do in such a case? May it second-guess the government's calculations? Suppose a litigant offers to prove that the government's statistical methods were irrational? May the reviewing court weigh the evidence on that point? May it require the government to justify its calculations and estimates? May it consider the numerical and computational aspects of the case at all? Or is the duty of a reviewing court simply to assure itself, or perhaps, to presume that the government employed reasonable assumptions and methods, in which case the government's program is constitutional? I will argue that, once generalities and platitudes are dispensed with, separation of powers doctrine has very little to say in answer to this question. New lines of inquiry and a new conceptual vocabulary are needed to begin grappling with it.

Two recent landmark constitutional court decisions that reflect and examine these concerns — the judgment of the German Federal Constitutional Court (FCC) in *Hartz IV*[3] and that of the South African Constitutional Court (SACC) in *Mazibuko & Others v City of Johannesburg & Others* (*Mazibuko*)[4] provide an exceptional opportunity to address these questions. I explore what each decision teaches about the role of the judiciary and judicial oversight

3 The official volume that would contain the *Hartz IV* judgment has not been published as of the date of this writing. The unofficial citation is BVerfGE, judgment of 9 February 2009, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09. I cite to paragraphs of the judgment as received online.

4 2009 ZACC 28; 2010 3 BCLR 239 (CC) (*Mazibuko* CC). Lower court decisions are cited as *Mazibuko v City of Johannesburg & Others* 2008 4 All SA 471(W) (*Mazibuko* HC) and *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA); 2009 8 BCLR 791 (SCA) (*Mazibuko* SCA).

regarding actions of elected and executive branches when giving effect to social and economic rights.[5]

A second concern of the article lies in the shadow of the first. That is the question, what is the role and potential of litigation to enforce social and economic rights, if any, not only in the delivery of social goods to people, but also in democratising society. The democratic concern of traditional separation of powers doctrine is to ensure the effectiveness of elected representatives in carrying out the will of the people. But separation of powers issues raise an entirely distinct democratic concern — namely, the degree to which civil society may influence social policy and hold government accountable through social and economic rights litigation. Determination of the proper standards of judicial review in advanced constitutional regimes is not an abstract, academic debate. It directly affects the degree to which the legal process can be a forum for community engagement. This connection is drawn explicitly in these stirring words of O'Regan J in *Mazibuko:*

> The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.
>
> When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open. (citation omitted)[6]

5 In this article, I do not provide an extended description of German and South African constitutional jurisprudence regarding social and economic rights, although I incorporate some important aspects of that jurisprudence into my discussion of the cases. I also do not attempt to provide an analysis of German and South African dignity jurisprudence, except in broad terms as it relates to the cases being discussed. For the reader who wishes a more in-depth understanding of German or South African constitutional jurisprudence and a nuanced analysis of dignity in German and South African jurisprudence, see DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1997); H Botha 'Human dignity in comparative perspective' (2009) 20 *Stellenbosch Law Review* 2; S Liebenberg *Socio-economic rights—adjudication under a transformative constitution* (2010).

6 n 4 above, paras 160-61.

Whether the SACC judgment in *Mazibuko* lives up to this vision of the potential and importance of social and economic rights litigation in the context of transformative constitutionalism[7] is a question addressed below.

In *Hartz IV*, unemployed individuals and their dependents challenged the constitutionality of certain recently enacted legislation that reduced the level of basic subsistence grants. A central claim was that, because the benefit amounts determined by Parliament did not provide a subsistence minimum of income, they were in derogation of the dignity clause of the German Basic Law — Article 1. The FCC concluded that, in accord with separation of powers principles, courts should not establish the level of subsistence benefits in specific quantitative terms. At the same time, the FCC engaged in a searching examination of the method of calculation used by the legislature to set these amounts. The FCC held that the legislature's justification for determining benefit amounts must be based on a sound empirical basis and coherent methods rather than random estimates. As Parliament's calculations did not meet this standard, the FCC sent the matter back to the legislature for re-calibration of the benefits using a constitutionally adequate procedure.

In *Mazibuko*, residents of the Phiri neighbourhood in Soweto challenged, as violating the constitutional guarantee of access to water — section 27 — the amount of water that they were provided under the City of Johannesburg's program of free basic water supply given to all residents. In different degrees, the High Court of Johannesburg (High Court) and the Supreme Court of Appeals (SCA) agreed with the applicants, and ordered the city to provide free water in a quantitatively specific amount — although the two courts disagreed on the precise amount. On appeal, the SACC found the city's scheme constitutionally adequate and therefore dismissed the

7 The German Basic Law and the 1996 South African Constitution are understood in their respective legal contexts to be documents aimed at transforming society. 'German decisions ... "can only be fully understood if one bears in mind the utter contempt shown towards human dignity by the Nazi regime."' Kommers (n 5 above) 419 (quoting BS Markesinis *A Comparative introduction to the German law of torts* (1994) 410.) 'Postwar German leaders believed that the traditional parliamentary and judicial institutions that had failed to protect the Weimar Constitution were insufficient to safeguard the new liberal democratic order. They created a national constitutional tribunal to serve as a guardian of political democracy ... and to protect the basic liberties of German citizens ... In some areas of constitutional adjudication, [the Constitutional Court's] role has been no less than transformative.' Kommers (n 5 above) 1–2. For South Africa, see, eg, *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 1 SA 530 (CC); 2005 2 BCLR 150 (CC) para 81 (O'Regan J) (footnote and citations omitted) — '[a]s this Court has emphasised on many occasions, our Constitution is a document committed to social transformation'. See generally K Klare, 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

residents' case. On the question of basic water supply, the SACC was very circumspect in its engagement with the evidence, to the point that one might say that the Court took a 'hands off' attitude.

This article compares the quite different approaches to judicial review exhibited by the FCC and the SACC in these two cases, comparing the two courts' respective analyses and the relief they chose to grant. To avoid misunderstanding, I should be clear about the scope and limitations of this endeavour. I am not evaluating the quality of the evidence presented in either case, nor am I drawing conclusions as to whether the courts properly evaluated the evidence before them. My focus is on the respective methodologies the courts used in evaluating the evidence. I am looking at what each court tells us about the proper role of a reviewing court when presented with quantitative evidence in cases involving social and economic rights.

On their face, the two cases are similar in broad outline. Both legal regimes are committed to the notion that social policy matters are ordinarily — at least initially — for the elected and representative branches of government, and that courts are obliged to respect and pay deference to legislative judgment in such matters. Both the *Hartz IV* and *Mazibuko* Courts operated within a jurisprudential framework of deference to the elected branches. Both Courts affirmed that their respective constitutions do not empower them to set any quantitatively specific amount for constitutionally guaranteed social goods such as basic income or free basic water supply. The FCC and the SACC agreed that, pursuant to basic principles of separation of powers, it is the prerogative of the representative branches to assign quantitatively specific values to social and economic rights.

As will be seen, however, *Hartz IV* and *Mazibuko* were governed by different doctrinal frameworks with respect to the standards constraining courts when reviewing legislation aimed to give effect to the social and economic rights in question. The German Constitution incorporates an inviolable right to human dignity. This is an absolute or fundamental right that may not be constitutionally amended. If the state action in question violates the right to dignity, the state cannot plead that the interference was proportionate or reasonable in light of legitimate public interests. At least on paper, the legal test applied by the FCC in dignity cases is not a reasonableness test. If the state's action or inaction impinges at all on the right to dignity, it is unconstitutional. The constitutional jurisprudence of South Africa does not recognise absolute rights. The SACC in *Mazibuko* understood itself to be bound by a reasonableness standard of review, obliging it to give substantial weight to the City's judgment and constraining it from inquiring too closely into the City's assumptions and methodology.

As important as these doctrinal differences are, they do not fully explain the differences in approach of the two courts. The line between the German and South African conceptions of judicial deference is not as bright as might appear at first glance. Considerations of reasonableness and/or proportionality infuse judicial review in Germany even when 'absolute' entitlements are at issue. The *Hartz IV* Court regularly applies terms such as 'justifiable' or 'reasonable' in its judgment. At the same time, the concept of reasonableness employed by the SACC is so malleable and indeterminate that the SACC easily could have adopted the FCC's more demanding approach to quantitative determinations, while remaining faithful to South Africa's developing jurisprudence of social and economic rights. Doctrine alone does not explain the difference between *Hartz IV* and *Mazibuko*. Each court could have reached the opposite result while still remaining comfortably within the boundaries of applicable doctrine.

My argument requires a close engagement with the details of the two cases. In Section 2, concerning *Hartz IV*, I set out the relevant provisions of the Basic Law and describe the legislation that was the subject of review and the FCC judgment. In Section 3, I describe *Mazibuko*, providing the factual context of the law suit and discussions of the judgments of the High Court, the SCA, and the SACC. Much of the account will be familiar to South African readers. I beg their indulgence while I review rudimentary details of *Mazibuko* which are not well-known outside of South Africa. In Section 4, I compare and reflect on the cases in light of the concerns discussed in this introduction. I conclude that, with respect to considerations of separation of powers and institutional competence, the SACC's approach in *Mazibuko* took an unnecessarily narrow and restricted view of a reviewing court's role and responsibilities, diminished the social right in question, and was inconsistent with the project of transformative constitutionalism.

2 The Federal Constitutional Court's judgment in *Hartz IV*[8]

In this section I first describe the background of the *Hartz IV* judgment. I set out the two articles of the German Basic Law providing the basis for the aspects of the judgment on which I focus, namely Article 1 establishing human dignity as a fundamental right and the principle of the welfare state contained in article 20, with a brief sketching of the doctrinal context in which these provisions must be interpreted. I then discuss the so-called 'Hartz IV legislation' challenged in the litigation. The core of the Court's judgment addressed the method by which the legislature determined the amount of benefits under the welfare program ('standard benefit amounts'), so this must be described in some detail. I then describe the judgment itself, discussing the analysis underlying the Court's ruling striking down the Hartz IV legislation and the remedy that the Court imposed.

2.1 The *Hartz IV* judgment and the Basic Law[9]

The *Hartz IV* judgment rests on the fundamental right to human dignity set forth in Article 1 of the Basic Law and the principle of the social welfare state set forth in Article 20 of the Basic Law.

Article 1 of the Basic Law provides:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

8 As yet, there is no official English language translation of the *Hartz IV* approved by the FCC. In writing this article, I relied on a commissioned translation performed by Ms Katharina Kuhn, LLM Candidate, University of Bremen. I express extreme gratitude to her both for her expert translation and for her ongoing assistance that she generously provided. As the research progressed, I obtained access to a second translation that was sent from Ms Hedwig Weiland, Translator/ Protocol of the FCC to Ms Wendy Zeldin, Library of Congress. This version has not yet appeared on the FCC web site and remains unofficial at the time of writing. I wish to thank Ms Wendy Zeldin, and Ms Susan Zago of Northeastern University School of Law, who kindly assisted me in obtaining this document. I am solely responsible for all quotations from the German herein, which reflect my reading of both translations. Both translations are on file with the author.

9 The Basic Law (*Grundgesetz)* of Germany, drafted in 1949, was not called a constitution (*Verfassung)* because those drafting it within the western part of Germany did not believe that they should draft a constitution for the divided Germany, and that the reunited Germany would re-craft a true constitution. When reunification ultimately occurred in 1990, the Basic Law had become so respected that it was accepted, with some amendments, as the constitution of the reunited Germany, but was still called the Basic Law.

> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world.
>
> (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law.[10]

Article 1 is frequently read with Article 2 which sets forth the right to the free development of one's personality. Although the *Hartz IV* judgment does not specifically refer to Article 2, the understandings derived from it are imbedded in the *Hartz IV* judgment.

Article 20 provides:

> (1) The Federal Republic of Germany is a democratic and social federal state.
>
> (2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.
>
> (3) Legislation shall be subject to the constitutional order; the executive and judiciary shall be bound by law and justice.
>
> (4) All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible.[11]

Articles 2 through to 19 articulate an extensive bill of rights. Legislation challenged as infringing one of these rights is subject to proportionality review.[12] However, human dignity holds first place among the Basic Law's values.[13] It is the dignity of the individual, not the state that is deemed to be absolute and inviolable by legislative action. The right to dignity is not subject to review under the principle of proportionality.[14] The central place of human dignity as an individual right in the Basic Law was a response to the horrors of the Third Reich.[15]

In addition, Article 1 and Article 20 are unique in the Basic Law in that they may not be constitutionally amended. Article 79(3), known as the 'eternity clause,' provides:

> Amendments to this Basic Law affecting the division of the Federation into *Länder* [regional territories or states], their participation in the

10 Translation from Kommers (n 5 above) 507.
11 Translation from Kommers (n 5 above) 510-511.
12 See discussion of proportionality, a major constitutional principle which the FCC has stated is required by the rule of law set forth in Article 1(3) and 20(3) in DP Kommers 'Germany: balancing rights and duties' in J Goldsworthy (ed) *Interpreting constitutions* (2006) 161, 201-202.
13 Kommers in Goldsworthy (ed) (n 12 above) 169.
14 Botha (n 5 above) 178, 194-196. Note critique below.
15 Kommers in Goldsworthy (ed) (n 12 above) 180-181; Botha (n 5 above) 178.

> legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.[16]

This clause is deemed to freeze the principles reflected in Articles 1 and 20 in perpetuity.[17]

The FCC has given meaning to the right to human dignity in numerous cases, many of which are cited in the *Hartz IV* judgment. For example, in the *Life Imprisonment Case,* the FCC considered whether it would be a violation of Article 1(1) to deprive a person of his or her freedom without at least providing that individual with the possibility to someday regain freedom. In finding such a violation, the Court stated:

> The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order ... Thus Article 1(1) considered in tandem with the principle of the state based on social justice requires the state to guarantee that minimal existence ... necessary for a life worthy of a human being.[18]

Thus the FCC has a key role in protecting rights and human dignity as part of the German separation of powers/constitutional order.

From a German viewpoint, a novelty of *Hartz IV* is that the FCC invoked the Article 1 absolute value of human dignity in a case regarding the administration of a social welfare program. This is a seminal development in German jurisprudence. For comparative purposes, however, this article looks at *Hartz IV* from a different standpoint. In doctrinal terms, treating dignity as an 'absolute right' means that, once a court detects an infringement of dignity, the case is over. The legislature is not supposed to have an opportunity to justify the infringement.[19] However, in its actual analysis in *Hartz IV*, the FCC fell back on intellectual habits drawn from the more traditional discourse, inquiring whether the steps the legislature had taken in its calculations were reasonable or justified.

16 Translation from Kommers (n 5 above) 520-521.

17 *See Article 10 Case*, 30 BVerfGE 1, 24-26, in which the Federal Constitutional Court interpreted this section as affirming the Court's power to declare unconstitutional any amendment contrary to the principles in Articles 1 and 20.

18 45 BVerfGE 187, translated in Kommers (n 5 above) 307-308.

19 Compare to *R (on the application of Limbuela) v Secretary of State for the Home Department, R (on the application of Tesema) v Secretary of State for the Home Department, R (on the application of Adam) v Secretary of State for the Home Department*, [2005] UKHL 66, [2006] 1 AC (HL) 396 (appeal taken from Eng) (finding that because a failure to provide welfare support for late-applying asylum seekers was a violation of Article 3 of the European Convention of Human Rights that prohibits inhuman and degrading treatment in terms that are absolute, the UK government was not allowed to plead that its measures were proportionate or reasonable).

2.2 Hartz IV legislation

The legislation known as 'Hartz IV' sets the level of basic grants for unemployed individuals and their dependents. I discuss the legislation as it was understood and described in the FCC judgment and the elaborate evidence that the government presented to justify the enactment. The *Mazibuko* case discussed later also involved very complicated evidentiary material. My descriptions of the welfare program in *Hartz IV* and the water-delivery program in *Mazibuko* no doubt gloss over details that would be flagged and debated by experts in the respective legal regimes. Nevertheless, the main point I wish to focus on here is the striking difference between the two courts with respect to their respective engagement with and analysis of the evidence and program-details.

The Hartz IV legislation of 2003 was a central plank of then Chancellor Gerhard Schroeder's (Social Democratic Party) Agenda 2010, which called for sweeping social reforms including changes in education, health insurance, pensions and the labour market institutions designed to reduce the costs of the German social welfare system.[20]

Prior to January 1, 2005, the cash assistance component of the German social welfare system for the unemployed and their dependents was composed of several programs that provided benefits, known as 'basic grants,' that beneficiaries accessed successively: (1) a time-limited unemployment insurance based on one's prior earnings, (2) tax-financed, means-tested unemployment assistance based on income level for an unlimited period of time, and (3) means-tested social assistance benefits under the Federal Social Assistance Act (BSHG)[21] when no other welfare benefits were available.[22] There were numerous special needs that could be covered outside of the basic grant when a recipient documented a specific non-recurring need. For example, non-recurrent assistance was available to repair clothing and shoes, to purchase fuel for stand-alone heaters, to purchase specific learning materials for students, to repair household items, to make home repairs, and to purchase durable household goods, among other enumerated needs.[23]

Pursuant to the Fourth Act for Modern Services on the Labour Market[24] of 24 December 2003 (known as the 'Hartz IV legislation'),

20 The Hartz 'reforms' were implemented through four laws, staggered between January 2003 and January 2005.
21 *Bundessozialhilfegesetz*.
22 People unable to work also could receive social assistance benefits.
23 *Hartz IV* (n 3 above) para 41.
24 *Viertes Gesetz für modern Dienstleistungen am Arbeitsmarkt*.

the two means-tested programs were merged into a single means-tested program for employable adults and dependents living with them in the newly created Second Book of the Code of Social Law (SGB II).[25] The benefits provided include a standard benefit to secure one's livelihood and an amount for shelter and heating. The Social Democratic-Green Party coalition government headed by Schroeder lobbied for the reform on the basis that it reduced benefits to the unemployed, thereby supposedly heightening the incentive to seek work.[26]

The SGB II changes resulted in a significant reduction in the amount of benefits available to the unemployed and their dependents. Unlike the benefits paid under the prior BSHG which had flexibility within a range of programs and special needs grants, the 'standard benefit to secure one's livelihood' under the SGB II is largely paid as a single lump sum that is intended to cover food, clothing, personal hygiene, household goods, participation in cultural life and other everyday needs.[27] Very few additional increases are allowed for non-recurring or irregularly occurring special needs. Non-recurrent assistance is now provided only in exceptional cases for items such as initial home-equipment purchases in the home, including household appliances, the initial purchase of clothing, specifically in the case of pregnancy and birth, and for class trips lasting several days.[28]

SGB II section 23(1) allows the Employment Agency to provide, upon documentation by the recipient, for additional needs that are meant to be covered by the standard benefit but which in fact cannot be met through that lump sum amount. However, these additional payments may not be provided as a grant but only in the form of a loan that the recipient must repay by a monthly offset of up to ten per cent of the standard benefit.

Single employable individuals living in the old West German states — including East Berlin — receive €345 as the standard benefit, with other members of the joint household receiving a percentage of this amount. Spouses, civil partners and live-in partners receive 90 per

25 *Sozialgesetzbuch Zweites Buch*.

26 Dialog International 'Peter Hartz and Hartz IV' 26 November 2004 http://www.dialoginternational.com/dialog_international/2004/11/peter_hartz_and.html (accessed 23 January 2011); Deutsche Welle 'The much-hated Hartz IV' 2 September 2010 http://www.dw-world.de/dw/article/0,,5221558,00.html (accessed 23 January 2011).

27 SGBII, sec 20(1), quoted in *Hartz IV* (n 3 above) para 8. At the same time that Hartz IV was enacted, the social assistance law was reformed in the Twelfth Book of the Code of Social Law to provide for means-tested social assistance for those persons who were not eligible for benefits under SGB II, that is, those who are not considered employable.

28 *Hartz IV* (n 3 above) para 6.

cent or €311, children up to age 14 receive 60 percent (€207) and children 14 to 18 years of age receive 80 per cent (€276). The FCC quotes the legislature's reasoning for the children's percentages as follows:[29]

> Subsection 2 simplifies the standard rate structure for household members ... by reducing the previous four age groups to two. The two age classes that were selected, namely 'up to 14 years' and 'over 14 years', are in accordance with internationally recognised scientific procedures, such as the modified OECD scale. They also correspond to the statutory determination for social benefits contained in § 28 of the Second Book of the Code of Social Law. The new percentages of 60 per cent and 80 per cent of the basic standard rate, respectively, are based on a scientific study carried out by the Federal Statistical Office (*Ausgaben für Kinder in Deutschland - Berechnungen auf der Grundlage der Einkommens — und Verbrauchsstichprobe 1998*, Statistisches Bundesamt, Wirtschaft und Statistik, 12/2002, pp 1080 *et seq*), according to which children aged 14 and older have roughly one-third higher costs than younger children. The new provisions also eliminate the excessive difference under the previous standard rate system in the benefits for younger and older children, as well as the incomprehensible reduction in the benefits when reaching the age of consent (18). How different ages and situations, such as gender, influence individual needs cannot be displayed with the necessary reliability in general regulations. Since the statistical overview did not show any significant differentiations beyond the divisions made, one may assume that as a rule different needs [based on age, gender, etc] largely cancel one another out in this respect.

In determining the level of benefit for the single employable adult, the legislature began with the 1998 standard rates issued under the former BSHG as a statistical model. These rates were based on a sample survey of income and expenditure, performed every five years by the Federal Statistical Office, of the lowest 20 per cent of single-person households 'stratified according to their net income — lowest quintile — after leaving out the recipients of social assistance.'[30] However, as discussed below, not all expenditures in the standard rates under the BSHG were fully taken into account in determining the benefit level under the SGB II.

In addition, unlike the scheme under the BSHG, the legislative model used only two age groups for children and did not account for the expenditure behaviour of married couples with one child. Finally, under Hartz IV, cost of living adjustments for the period between 1998 and 2005 are based on annual changes in the current value of the public or statutory pension insurance scheme, as determined under a

29 *Bundesrat* printed paper 206/04 10-11, quoted in *Hartz IV* (n 4 above) para 62.
30 *Hartz IV* (n 3 above) para 57.

complicated formula indexing changes to movements in gross national wages with certain adjustments.[31]

The FCC discussed the process by which calculations of standard payments were developed.[32] Staff members of the Ministry for Health and Social Assistance and the Ministry for Commerce/Economics and Labour, along with representatives of the leading government parties, participated in drafting and debating various versions of the legislation, prior to submission and passage by the legislature. The Court notes that one of the bills submitted to the legislature explained that the standard rates were determined by using fixed percentages of the individual items from the sample survey on income and expenditure.[33] Elsewhere the Court states that

> [a] Draft of the Standard Rate Ordinance with detailed reasoning from the Federal Ministry of Health and Social Security was forwarded to the associations involved[34] by letter of 23 January 2004 and transmitted to the *Bundesrat* for approval ...[35]

The government made several program changes after the original implementation of the Hartz IV legislation in 2005 relevant to the discussion of *Mazibuko*. First, a revision was made to the SGB II calculation based on the sample survey from 2003. However, this change did not result in an increase of the standard benefit of €345.[36]

Second, a new evaluation of the 2003 sample survey on income and expenditure regarding the consumption behaviour of married couples with one child in the lowest quintile prompted the legislature to create a third children's category — age 7 through to 14 — that would receive 70 per cent of the standard rate for the single employable adult effective 1 July 2009.[37] The Federal Government recounted this special evaluation in some detail in its written statement to the Court and also at the oral hearing. The Government asserted that the evaluation confirmed the adequacy of the standard benefit rates for the lower and upper age groups under the new system — respectively, age 0 to age 7 and age 14 to age 17 — but indicated that children from ages 7 to 14 had higher expenses than those reflected in the standard benefit amount, likely as a result of school attendance.[38]

31 *Hartz IV* (n 3 above) para 25.
32 *Hartz IV* (n 3 above) paras 52-56.
33 *Hartz IV* (n 3 above) para 55.
34 A number of these associations filed written comments with the FCC and participated in the oral hearing. *Hartz IV* (n 3 above) paras 107-118.
35 *Hartz IV* (n 3 above) para 56.
36 *Hartz IV* (n 3 above) para 63.
37 Sec 74 SGB II.
38 *Hartz IV* (n 3 above) para 74.

Third, all pupils in general or vocational school below the age of 25 began receiving an additional €100 per year as school benefits effective 1 August 2009.[39] The Court noted that the government advanced the following reasoning in proposing this amendment in SGB II section 24a:[40]

> By granting an annual non-recurrent benefit of €100, the Federal Government complies with its concern to promote the schooling of children and juveniles from families who cannot, or cannot completely, provide for their livelihood themselves. The decisive date for the entitlement is the yearly start of the school year ... This benefit should serve particularly for the purchase of personal equipment needed for school (eg school bag, school rucksack, gym kit, gym bag, recorder) and for writing, arithmetic and drawing material (eg fountain pen including ink cartridges, ball-point pen, pencils, crayons, paint box, exercise books, writing pads, paper, rulers, book covers, compasses, calculator, geometry set square).

The Court found, however, that the Government's statements did not disclose the method used for calculating the €100 amount. The FCC noted that the reasoning in the equivalent school benefit provision of the Twelfth Book of the Code of Social Law (SGB XII) which provides benefits for the non-employable[41] is similarly sparse, stating that 'this amount is suitable in social policy terms in view of the Federal Government's education policy goal.'[42]

Fourth, the standard benefit was increased three times between January 2005 and the date of the judgment in February 2010 based on changes in the pension value: to €347 as of 1 July 2007, to €351 as of 1 July 2008 and to €359 as of 1 July 2009. No increases were made on 1 July 2005 or 1 July 2006 because the pension value remained the same.[43]

Under the German concept of concrete, or collateral, judicial review, lower courts must refer a case to the FCC without resolving the matter if the lower court is convinced that a federal or state law

39 Sec 24a SGB II.

40 *Bundestag* printed paper 16/10809 16 on Article 3 no 2, *Hartz IV* (n 3 above) para 80.

41 At the same time that Hartz IV was enacted, the social assistance law was reformed in the Twelfth Book of the Code of Social Law to provide for means-tested social assistance for those persons who were not eligible for benefits under SGB II, that is, those who are not considered employable.

42 *Bundestag* printed paper 16/10809 16 on Article 4 no 3, *Hartz IV* (n 3 above) para 81.

43 *Hartz IV* (n 3 above) para 26.

relevant to the case violates the Basic Law.[44] These submissions are based on the lower court's assessment of unconstitutionality, rather than a claim of unconstitutionality asserted by one of the parties. In *Hartz IV*, one case was submitted by the Higher Social Court of Hesse after the court had consulted expert reports on the question of the calculation, amount and means-tested nature of the standard benefit.[45] Two cases were submitted by the Federal Social Court. In all three cases, plaintiffs had sought to be granted a higher standard benefit.[46] Among other issues, the submissions from the lower courts raised the questions of whether the standard benefit amounts in SGB II met the necessary level of a subsistence minimum, whether the statutory provisions violated constitutional standards of systematic consistency and clarity, whether the legislature had provided an adequate explanation of why certain elements of the sample survey had been deemed relevant in establishing the standard benefit — thereby avoiding arbitrary action — and whether in calculating the amount of social benefits for children, the legislature must assess the needs of children rather than fixing the level simply as a percentage of benefits allocated to adults.

After an oral hearing,[47] the First Senate of the Federal Constitutional Court[48] on 9 February 2010 rendered its judgment that the provisions of the SGB II concerning the standard benefit amounts for adults and children were unconstitutional under two provisions of the Basic Law, Article 1(1) and Article 20(1).

44 DP Kommers & RA Miller, 'Das Bundesverfassungsgericht: Procedure, practice and policy of the German Federal Constitutional Court' in A Harding & P Leyland (eds) *Constitutional courts: A comparative study* (2009) 102, 112. Kommers and Miller note the small number of concrete review references and attribute the limited referrals to a strong tradition of legal positivism, in which lower court judges 'usually resolve doubts about the constitutional validity of laws at issue in pending cases by upholding them or interpreting them so as to avoid questions of constitutionality' (117).

45 n 3 above, paras 83, 94, 106.

46 The submission by the Higher Social Court of Hesse and one of the submissions by the Federal Social Court are abstracted in English on the website of the European Union Agency for Fundamental Rights as Inventory No Case 391 1 and 392 1, http://iinfoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=385 and 386 (accessed 23 January 2011).

47 Oral arguments are rarely allowed in the FCC other than on cases of abstract judicial review — those at the request of federal or state government or 1/3 of members of the *Bundestag* — where it is always permitted. Kommers and Millar (n 44 above) 114 note that oral arguments outside of abstract judicial review are limited to cases of major political importance. 'In 2006, the Court decided only six cases with the benefit of oral argument.'

48 The German Constitutional Court is divided into two Senates with separate jurisdictional spheres.

2.3 The *Hartz IV* decision

In *Hartz IV*,[49] the Court begins with the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity that emerges from Article 1(1) read in conjunction with the principle of the social welfare state of Article 20(1). This right is meant to guarantee both the physical well-being of the individual and the possibility of maintaining interpersonal relationships and minimum participation in social, cultural and political life.[50]

Because Article 1(1) declares human dignity inviolable and obliges the state to respect and protect it, the provision provides not only a defensive right against encroachment by the state, but requires the state to take positive action to protect human dignity.[51]

> Fundamentally, it, the right to a guarantee of a subsistence minimum in line with human dignity, is not subject to the legislature's discretion and must be honoured; it must, however be given concrete shape, and be regularly updated by the legislature, which has to calibrate the benefits to be paid in light of the stages of development of the community and existing life conditions. The legislature has latitude in bringing about this state of affairs.[52]
>
> …
>
> The benefit claim from Article 1(1) of the Basic Law is fundamentally provided by the constitution (citation omitted). However, the scope of this claim in terms of the types of needs and of the means necessary therefore cannot be directly derived from the constitution (citation omitted). It depends on society's views of what is necessary for an existence that is in line with human dignity, on the concrete living circumstances of the person in need of assistance, as well as on the respective economic circumstances and technical possibilities, and is thus to be determined by the legislature (citation omitted). The principle of the social welfare state contained in Article 20(1) of the Basic Law obliges the legislature to take account of social reality in a manner that is appropriate to the present day and realistic with regard to the guarantee of the subsistence minimum that is in line with human dignity, which for instance is different in a technological information society than was previously the case.[53]

To meet that obligation, the Court held that the legislature must realistically assess the needs for one's existence in a transparent and appropriate procedure, and must review and refine that assessment

49 n 3 above.
50 *Hartz IV* (n 3 above) paras 133, 135.
51 *Hartz IV* (n 3 above) para 134.
52 *Hartz IV* (n 3 above) para 133.
53 *Hartz IV* (n 3 above) para 138.

on a regular basis.[54] While the Court stated that Article 1(1) does not provide a basis for the FCC precisely to quantify the subsistence minimum consistent with human dignity for all citizens in Germany, and that the Basic Law itself does not prescribe a specific method for assessing need, the Court still has a central role in judicial oversight of the legislature's assessments of these matters.

The Court is responsible for

> a review of the basis and of the method of the assessment of benefits in terms of whether they do justice to the goal of the fundamental right ... In order to ensure that the benefits are commensurate with the importance of the fundamental right and can be subject to judicial review, the benefits must be calibrated on the basis and justifiable in terms of reliable numbers and coherent methods.[55]

Within the context, the FCC specifically examined:

> (1) whether the legislature has approached and described the goal of ensuring a minimum subsistence that corresponds to human dignity in a manner doing justice to Article 1(1) in conjunction with Article 20(1) of the Basic Law;
>
> (2) whether the legislature has, within the boundaries of its discretion, chosen a fundamentally suitable method of calculation for assessing the subsistence minimum;
>
> (3) whether the legislature has completely and correctly ascertained the necessary facts; and
>
> (4) whether the legislature has kept within justifiable boundaries in all stages of calculation, using plausible figures in light of the structural principles of the chosen methodology.[56]

In order for the FCC to answer these questions so as to insure that the legislature has fulfilled its constitutional obligations, the legislature must disclose the methods it employed to calculate the minimum subsistence specified level. The Court ruled that if the legislature does not do so adequately, the Court must find the subsistence minimum amounts in violation of Article 1(1) on that ground alone.[57]

A conspicuous feature of the FCC's analysis of the legislature's method of setting the basic amount is that, within a standard of absolute right, the court often applies an analysis of reasonableness and/or justifiability. This appears anomalous from a doctrinal standpoint. The doctrinal consequence of treating dignity as an absolute right is that no state action in derogation of the right is or

54 *Hartz IV* (n 3 above) paras 139-140.
55 *Hartz IV* (n 3 above) para 142.
56 *Hartz IV* (n 3 above) para 143.
57 *Hartz IV* (n 3 above) para 144.

may be justified. This is certainly the case when the issue is a direct, negative infringement of the right. It matters not how reasonable and justifiable the legislature's action is; state action intruding on dignity is unconstitutional. *Hartz IV* deals with a slightly different situation in which the question is what positive steps the state must take in order to fulfil and give content to the right. *Hartz IV* might mean that in 'affirmative steps' cases, a more forgiving standard of review applies (such as 'reasonableness and justifiability') than would be applicable in a direct, negative infringement case. Alternatively, the inviolability of dignity may apply with respect to both negative infringements and judicial review of positive steps taken by the legislature to fulfil the right. It is not immediately clear to this author precisely what the doctrinal position is after *Hartz IV*. However, I can say that, whatever the doctrinal rule may ultimately be, the actual, operative standard of review applied by the FCC in *Hartz IV* looks more like a familiar reasonableness and justifiability test than an absolute standard.

For example, (1) in the legislature's determination of the basic standard rate, the court used a reasonableness standard in assessing certain expenditures, including the amount for clothing and shoes and the amount for leisure, entertainment and culture;[58] (2) regarding the distinction between benefits for children whose parents are working and those whose parents are not, the court notes that there is no possible justification for this different treatment;[59] (3) regarding the assessment of the benefits necessary for human dignity, the court notes that the methods and deviations from them must be justifiable.[60] Statements of this kind are invoked a number of times in the *Hartz IV* judgment.[61]

Applying these criteria, the Court found that the legislature proceeded in a constitutionally inadequate manner in enacting the Hartz IV legislation. In so ruling, the Court specifically refrained from finding that the established standard benefit amounts are insufficient. Likewise, it found that the statistical model employed by the legislature — namely, a survey of income and expenditures of the lowest 20 percent of the single-person households after leaving out recipients of social assistance — was constitutionally unobjectionable. The legislature's protocol, which included only a portion of the expenditure on various categories of need revealed by the survey in

58 *Hartz IV* (n 3 above) para 59.
59 *Hartz IV* (n 3 above) para 102.
60 *Hartz IV* (n 3 above) paras 139, 142.
61 The standard of reasonableness or justification is invoked on 30 or more occasions in the judgment, although the English words may vary depending on the translation of the German text that one uses. See *Hartz IV* (n 3 above) paras 59, 65, 101, 102, 110, 111, 112, 125, 139, 142, 143, 148, 161, 162, 166, 169, 170, 171, 173, 176, 177, 179, 183, 185, 190, 195, 196, 205, 207, 217.

calculating the benefit amounts, also was found constitutionally unobjectionable.[62] However, the Court found several constitutional defects in the legislative action enacting Hartz IV.

First, while it is permissible in calculating the standard amount to consider only a portion of certain categories of expenditures in the sample survey on income and expenditures, the legislature must provide an empirical rationale for doing so; that is, parliament must show that the omitted amounts are covered elsewhere or are unnecessary to meet the subsistence minimum. The legislature may calibrate the amount of the reduction on the basis of estimates founded on a sound empirical basis. However, reliance on random estimates to calculate any components of the standard amount would violate Article 1(1). Moreover, so that a reviewing court can assess whether the legislature's methods comply with the requirements of Article 1(1), it must comprehensively explain the assumptions, methods, and estimates used in calculating the standard amount.[63]

The Court then itemised various categories or divisions of expenditure in which the legislature made adjustments — eliminations or percentage-reductions — with no or inadequate justification. Certain reductions were made for items such as furs, tailor-made clothes, sports boats, fax machines, even though there was no information that the reference group — lowest quintile — had incurred such expenditures at all. In fact, the federal government admitted at the oral hearing that it was impossible to determine whether these items should be deducted, because such items were not separately recorded in the survey.[64] With regard to other expenditure items, reductions were made that are justifiable in principle, but with respect to which the amounts of the reductions were not empirically substantiated — for example a 15 per cent reduction for the item 'Electricity' and an 80 per cent reduction for replacement parts for private vehicles.[65] The legislature completely omitted certain other expenditure items, for example division 10 — Education — and 'extracurricular classes in sports and artistic subjects' in division 09 — Leisure, entertainment and culture — from its calculations, without providing any rationale for doing so.[66]

Second, as noted, the projection of the change in the cost-of-living from the 1998 standard to the year 2005 when Hartz IV was implemented was based on the increase of the current pension value, rather than using direct indicators of rising cost of living. The Court

62 *Hartz IV* (n 3 above) paras 146-170.
63 *Hartz IV* (n 3 above) para 171.
64 *Hartz IV* (n 3 above) para 175.
65 *Hartz IV* (n 3 above) para 177.
66 *Hartz IV* (n 3 above) para 180.

found this unconstitutional in that changes in the current pension value are based on a complicated formula having no relationship to the subsistence minimum budget. The formula ties the pension value to the amount of gross wages, the contribution rate to the general pensions insurance fund, and a factor reflecting liquidity. The Court found that:

> The current pension value also does not serve to quantify the benefits necessary to ensure a subsistence minimum that is in line with human dignity and to extrapolate the change in the need annually. Rather, it is intended to steer and slow pension payments in accordance with general economic factors, maintaining the liquidity of the pensions insurance institutions, as well as considering the relationship of active employees to recipients of old-age pensions, and serving to guarantee equitable participation in a pay-as-you-go system.[67]
>
> …
>
> [A] projection using price developments of the expenditure items from which the consumption is composed that is relevant to standard benefits would be more in line with the statistical model.[68]

Third, because the method by which the benefit level for single unemployed individuals was calculated was constitutionally defective, so too were the amounts for partners and children, as these were calculated as percentages of the single-unemployed figure. The Court additionally noted the lack of any justification for determining the children's benefit level; the legislature's adoption of a simple percentage amount resulted in a failure to take into account the needs of children.[69]

> Children are not small adults. Their need which must be covered in order to ensure a subsistence minimum that is in line with human dignity must be based on child development phases and on what is needed for the development of a child's personality. The legislature has not carried out any investigation in this regard.

Because the legislature did not factor in the needs of children based on their stage of development, the Court found that 'children in need of assistance are under the threat of being excluded from chances in life.'[70] The Court made specific factual findings rejecting the federal government's reliance on the OECD scale in the explanation of the

67 *Hartz IV* (n 3 above) para 184.
68 *Hartz IV* (n 3 above) para 186.
69 *Hartz IV* (n 3 above) para 191.
70 *Hartz IV* (n 3 above) para 192.

Standard Rate Ordinance[71] and the survey of Münnich/Krebs[72] as justification for the children's benefit determination. In addition, the FCC found that it would have been quite possible for the legislature realistically to ascertain the subsistence needs of children when the SGB II was drafted. The Court found that, although the amendments subsequent to the 2005 Hartz IV legislation might have brought the standard benefit for children closer to their realistic subsistence needs, the legislative determination of children's benefits was still out of compliance with the requirement of the Basic Law because the provision of €100 was based on a 'free estimate,' not a methodologically sound assessment of need.[73]

Finally, the Court found that the rescission of any provision for recurring atypical special needs was inconsistent with Article 1(1) read in conjunction with Article 20(1). Even if properly determined, a lump sum standard benefit amount covers average needs in customary situations. For a program to fail to provide any process other than a loan for accessing special needs that are necessary to ensure a subsistence minimum, albeit only in rare cases, would be unconstitutional.[74]

By way of remedy, the Court ordered the legislature to implement a methodologically sound and constitutionally adequate procedure for determining realistic benefit amounts designed to ensure a subsistence minimum in line with human dignity and to reset the standard benefit by 31 December 2010. The FCC did not specify what that procedure should be, leaving it to the legislature to devise a new, but constitutionally adequate procedure. The provisions found unconstitutional were to remain in effect in the interim.[75] However, the Court ordered the federal government — *Bund* — as opposed to the single states, to cover the provision of special needs during the transition period.

71 '*Ausgaben für Kinder in Deutschland - Berechnungen auf der Grundlage der Einkommens-und Verbrauchsstichprobe 1998' Bundesrat* printed paper 206/0410-11, discussed in *Hartz IV* (n 3 above) para 193.

72 Discussed in *Hartz IV* (n 3 above) para 194.

73 *Hartz IV* (n 3 above) para 203; see text accompanying n 29 above.

74 *Hartz IV* (n 3 above) paras 204-207.

75 The FCC has utilised two methods of softening the political impact of its decisions regarding unconstitutionality. The strategy used in *Hartz IV* is that of declaring a statute unconstitutional but not void, while providing general guidelines and a time frame within which the legislature is required to act. A second method is to sustain the challenged statute, but indicate to the legislature that the court will invalidate it in the future if the legislature does not take corrective action. Kommers (n 5 above) 53.

3 The South African Constitutional Court's judgment in *Mazibuko*

Mazibuko[76] was the first case to reach the SACC respecting access to water as an affirmative right based in section 27 of the South African Constitution. Section 27 provides:

> (1) Everyone has the right to have access to:
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights ...

Residents of the Phiri neighbourhood in Soweto challenged the constitutional adequacy of the City of Johannesburg's water supply program, which is administered on behalf of the City by Johannesburg Water.[77] The Minister of Water Affairs and Forestry in the national government was also a respondent in the case, due to a challenge to a national regulation that will be discussed below. Among other things, Phiri residents challenged as constitutionally insufficient the amount of water that they were guaranteed under the City's free basic water supply program. In this section, I first describe the Phiri community and the changes made by the City in its water supply from the Johannesburg water system that formed the basis of the legal challenge in *Mazibuko*. Second, I summarise the judgments of the High Court and of the Supreme Court of Appeals. Unlike the case of *Hartz IV*, the *Mazibuko* case was fully aired in the lower courts prior to reaching the SACC. Finally, I discuss the judgment of the South African Constitutional Court setting aside the orders made by the Supreme Court of Appeals and the High Court.

76 n 4 above.

77 Johannesburg Water is a corporation wholly owned and controlled by the City, which is the sole shareholder. Johannesburg Water was treated as an 'organ of state' in terms of sec 239 of the Constitution for purposes of the litigation. *Mazibuko CC* (n 4 above) para 46. For purposes of this article, nothing turns on the distinction between the municipal government and the corporation, which are referred to here collectively as 'the City.'

3.1 The context of the *Mazibuko* Case: Access to water in Phiri

Phiri, which is located within the jurisdiction of the City of Johannesburg, is one of the poorest townships in the vast community known as Soweto. It is predominantly black, most of its residents are uneducated and unemployed, and the majority of them subsist primarily on government old age pensions or child grants. The community is ravaged by HIV and AIDS.

Prior to 2001, the residents of Phiri had access to an unlimited and unmetered supply of water for which they were charged a flat rate as if each account-holder consumed 20 kilolitres of water per month — 'deemed consumption'.[78] This system was a 'hangover from apartheid days when municipal officials were more concerned about political activism in Soweto than regulating water consumption.'[79]

In Phiri, as in many townships, most individuals holding a water account have more than one household unit residing on their property or 'stand'.[80] Multiple household units may live within the account-holder's premises, and many stand owners permit people to erect backyard shacks on their stands in return for modest rent. As a result, the number of households and the number of residents per stand often far exceeds the number of individuals in the account-holder's own household.[81]

The South African government sought to give effect to the right of access to water in the Water Services Act.[82] Section 9 thereof empowers the Minister of Water Affairs and Forestry to promulgate compulsory national standards for the provision of water services. In February 2001, the Minister announced that the government intended to ensure that all poor households nationwide would receive a 'free basic water supply' and that the Cabinet had approved a policy of

78 *Mazibuko CC* (n 4 above) para 11.
79 P Bond & J Dugard (2008) 'The case of Johannesburg water: What really happened at the pre-paid "Parish pump"?' (2008) 12 *Law, Democracy, and Development* 1 1-8.
80 A 'stand' is a piece of property that usually, but not always, has one water 'account-holder.'
81 *Mazibuko HC* (n 4 above) para 168.
82 Act 108 of 1997.

providing six kilolitres of safe water per household per month.[83] This was formalised in May 2001 when the Department of Water Affairs and Forestry (DWAF) issued Version 1 of its 'Free basic water implementation strategy document', which included the following statement:[84]

> [L]ocal authorities should still have some discretion over this amount. In some areas they may choose to provide a greater amount, while in other areas only a smaller amount may be possible. For example, in some remote areas with scattered settlements, high water costs and water stressed areas it is often not feasible to provide 6000 litres of water … In some areas where poor households have waterborne sanitation the total amount of water seen as a "basic supply" may need to be adjusted upwards (if financially feasible) to take into account water used for flushing.

In June 2001, the Minister promulgated National Water Standards Regulations. Regulation 3(b) thereof established compulsory national water standards. The regulation defines 'Basic Water Supply' as a minimum of 25 litres of water per person per day or six kilolitres of water per household per month as a basic lifeline to each household.[85] In an affidavit presented to the High Court in *Mazibuko*, Neil Macleod, head of Water and Sanitation of the eThekwini Municipality, described how the 1997 eThekwini's model of free water provision, based in part on administrative convenience,[86] provided the framework of the national policy and quantitative targets adopted by DWAF.

> The Durban Metropolitan Council, decided to undertake informal research in … "informal settlement" areas ... This research involved meeting with the members of the community — primarily the women who had the responsibility for finding and carrying water for the home — and trying to establish how much water they used per day. It was

83 The free basic water strategy was an African National Congress (ANC) election proposal that was formally translated into official government policy by the Department of Water Affairs and Forestry in May 2001. Affidavit of Anthony William Still, High Court, *Mazibuko v City of Johannesburg*, 12 January 2007,para 12.1 available at http://web.wits.ac.za/NR/rdonlyres/2DCB3071-83DF-494A-BDFF-AC7BF41E4370/0/Still5B1D.pdf (accessed 24 January 2011); DWAF, 'Free Basic Water Implementation Strategy' (August 2002) (FBW Implementation Strategy): http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf (accessed 23 January 2011).

84 *Mazibuko SCA* (n 4 above) para 31.

85 *Mazibuko CC* (n 4 above) para 23.

86 'During 1998, ... it became apparent that the amount of money that was collected by the Council for the water supply was in fact equivalent to or less than the costs of administering the collection of the amounts from the relevant communities ... The Council then agreed that 200 litres per month should be supplied free of charge.' Affidavit of Neil Alastair Macleod (Macleod Affidavit), High Court, *Mazibuko v City of Johannesburg*, 8 January 2007, para 12, available at http://web.wits.ac.za/NR/rdonlyres/167DDA6F-AC54-4611-9A70-EE901470291E/0/Macleod.pdf (accessed 24 January 2011).

> established that approximately 7 litres of water was used per person per day as this was generally the amount that an individual could physically carry and could afford.[87]
>
> ...
>
> [T]he experiences in eThekwini Municipality influenced government policy when it came in 2000 to determine the amount of free water that should be provided by all municipalities. I was involved in that decision and I personally engaged with Minister Ronnie Kastrils[sic], the then Minster[sic] of Water Affairs and Forestry, during this time ... [A]t that time, there was little other international research to guide us.[88]

In 2001, Johannesburg determined to provide every *account-holder* in the City with six kilolitres of free water per month,[89] or the equivalent of 25 litres of water per person per day *assuming* an average *household* of eight people.

Johannesburg Water chose the township of Phiri as the site for a Soweto pilot project known as Operation Gcin'amanzi — 'to save water'. Operation Gcin'amanzi's goals were to 'reduce unaccounted for water, to rehabilitate the water network, to reduce water demand and to improve the rate of payment.'[90] By the end of 2004, acting through this project, Johannesburg Water discontinued Phiri's unlimited water supply at a flat rate. The residents of Phiri would now receive their six kilolitres free water per month only from pipes controlled by pre-paid meters or from standpipes — outside yard taps. A third, but undesirable option was for residents to carry water from communal taps. Under the pre-paid meter system, after the stand consumed six free kilolitres within a month, its water supply was automatically cut off regardless of the number of residents actually living on the stand. The account-holder then had to purchase 'water credits,' that is, tags to activate the prepayment meter in order to obtain additional water until he or she became entitled to the next month's six kilolitres of free water. The City regulated water flow to the outside standpipes with an eye toward delivering no more than the six kilolitres per month.[91] As the Free Basic Water (FBW) supply was allocated only to property-owning account-holders, the six kilolitres had to be shared by all the people who lived on the property. Applicants in the case submitted that the FBW supply lasted between 12-20 days in a month, even in some cases when residents

87 Macleod Affidavit (note 86 above) para 9.
88 Macleod Affidavit (note 86 above) para 15.
89 *Mazibuko HC* (n 4 above) para 3.
90 *Mazibuko CC* (n 4 above) para 13.
91 *Mazibuko CC* (n 4 above) paras 78-79.

substantially reduced how often they flushed the toilet, cleaned the floor, bathed, or did laundry.[92]

As did the legislature in *Hartz IV,* the City altered its policy subsequent to original implementation. On 14 June 2002, the City introduced a 'Special Cases Policy' that allocated additional water to certain targeted groups — pensioners, disabled persons, unemployed persons, persons with full-time, temporary, casual, contract and seasonal employment with low income, and HIV or AIDS patients and/or their orphans.[93] However, these supplemental allocations were only triggered if the account-holder first registered as indigent and agreed to the installation of a pre-paid meter.[94] On 28 October 2004, the Special Cases Policy was amended to provide for a write-off of accrued arrearages as an incentive for indigents to register.[95] On 20 June 2005, the City amended the Policy to increase the income threshold for qualifying as indigent,[96] but at the same time strengthened the penalties for preventing installation of or tampering with a pre-paid meter — for example, an account-holder's arrears might be reinstated for such conduct.[97]

On 31 October 2005, the City changed the name of the Special Cases Policy to the Indigent Persons Policy, but retained all of its conditions on receiving supplemental water supply within the month.

92 Affidavit of Jennifer Makoatsane, High Court, *Mazibuko v City of Johannesburg*, date unknown, paras 7 10, available at http://web.wits.ac.za/NR/rdonlyres/3E694D18-A0DF-4B87-A905-F458AC7AF443/0/Makoatsane20affi.pdf (accessed 24 January 2011); Founding Affidavit of Lindiwe Mazibuko, High Court, *Mazibuko v City of Johannesburg*, date unknown, para 101, available at http://web.wits.ac.za/NR/rdonlyres/789545BC-025F-4046-8B82-69A63E7497D2/0/MAZIBUKO_Founding_affidavit_Final.pdf (accessed 24 January 2011).

93 *Mazibuko HC* (n 4 above) para 139.

94 '[Q]ualifying poor households were account holders with a monthly income of less that R 1 100, pensioners with a total income of less than 2 state pensions, breadwinners with full-blown AIDS and their direct orphans, as well as disabled persons receiving a state grant and having total monthly income of R 1 100 or less.' Supporting Affidavit of Rashid Ahamed Seedat for the First Respondent, High Court, *Mazibuko v City of Johannesburg*, 22 January 2007, para 28.5, available at http://web.wits.ac.za/NR/rdonlyres/E5B1F825-575A-440A-93DE-82AF3937E009/0/Seedat.pdf (accessed 24 January 2011).

95 Applicants' Heads of Argument (Applicants' Heads), High Court, *Mazibuko v City of Johannesburg*, 7 November 2007, para 108 available at http://web.wits.ac.za/NR/rdonlyres/6266A45E-2061-4232-9684-0CF14DA68F02/0/MazibukoApplicantsHeads.pdf (accessed 24 January 2011); *Mazibuko HC* (n 4 above) para 140.

96 'The people who qualify for the additional benefits by registration as indigents [under the program as of June 20, 2005, and still in effect] are, poor people whose combined household income does not exceed the value of two social grants paid by national government; pensioners and disabled people whose total household income does not exceed the value of two old age or disability pensions paid by national government, and accountholders who have *"full blown AIDS"* and AIDS orphans.' Founding Affidavit in the Constitutional Court of South Africa, Constitutional Court, *Mazibuko v City of Johannesburg*, date unknown, para 115, available at http://web.wits.ac.za/NR/rdonlyres/61317CD0-6821-4DC6-A1E6-7823D3140981/0/MazibukoApplicantsfinalwrittensubmission24July2009.pdf (accessed 24 January 2011).

97 *Mazibuko HC* (n 4 above) para 141.

The new policy retained the rule requiring the installation of pre-paid meters and continued the condition that only account-holders were eligible. No water rights were accorded to non-account holders.[98] As of 31 March 2006, only 118 000 indigent households were registered as such, out of an estimated 513 534 eligible poor households.[99] As of July 2007, registered indigent account-holders could receive four additional kilolitres per month (the equivalent of 25 litres per person per day for a household of 13 individuals), and, for emergencies, an additional 4 kilolitres per year.

Most residents of Johannesburg outside of Soweto were entitled to access an unlimited supply of water that was billed according to usage — not a flat-rate — monitored by an individually-metered credit system.[100] These communities, generally more affluent than Phiri, commonly draw large amounts of water to accommodate swimming pools, gardens and lawns. Since the City's FBW policy is universal, all account-holders, including wealthy families with a small number of household members, receive six kilolitres of free water and continue to receive water after using their free supply within the month; their supply is not automatically discontinued until they purchase water credit tags. Account-holders on the metered credit system receive monthly rebates for the free six kilolitres on their bills.

3.2 Launch of the litigation

Five Phiri residents (the applicants) sued the City and the Minister in the High Court. They raised numerous legal issues, but two constitutional claims were central to the case and the judgments of the courts. The applicants challenged two City policies: (1) the policy of supplying six – and only six – free kilolitres, and (2) the installation of pre-paid meters. As framed by the applicants, the two issues are integrally related because the pre-paid meters automatically discontinued water flow once a stand had consumed its FBW supply within a month. However, for purposes of comparison with the *Hartz* judgment concerning the amount of social benefits, this article focuses only on the question of the sufficiency of the FBW supply delivered by the City.[101]

The legal question posed in this aspect of the case is whether the provision of six kilolitres of free water satisfied the City's constitutional obligations as an organ of state under section 27(1)(b).

98 Applicants' Heads (n 95 above) para 125.
99 Applicants' Heads (n 95 above) paras 126-127.
100 *Mazibuko CC* (n 4 above) para 80.
101 I have discussed the pre-paid meter issue in some detail in L Williams 'The justiciability of water rights: *Mazibuko v City of Johannesburg*' (2009) *Forum for Development Studies* 5.

All courts hearing the case focused their attention on the constitutional adequacy of the City's six kilolitre policy in terms of section 27(1)(b) of the Constitution. As will be seen, the ultimate conclusion was that the City's policy did satisfy any obligation it had at the time of the litigation under the constitutional guarantee of access to sufficient water. Accordingly, in the remainder of this article I will discuss the case as simply and directly posing questions about what the Constitution requires. More specifically, I focus on how the courts understood the proper scope and purpose of judicial review in social and economic rights litigation when the constitutionality of the government's policy to give effect to a socio-economic right is challenged on the basis of some form of quantitative insufficiency.

The applicants first focused on Regulation 3(b) of the National Standard Regulations promulgated by DWAF which, as noted above, set the national basic water supply standard at 25 litres per person per day or six kilolitres per household per month. They argued that Regulation 3(b) was 'based on misconception; it falls short of providing *"sufficient water"* as provided for in section 27(1) of the Constitution; it was irrationally determined; it is irrationally related to the needs of the poorest people; it is arbitrary, inefficient and inequitable; it irrationally fails to distinguish between those with waterborne sanitation and those without; it is inflexible.'[102] For these reasons, they asked the court to declare Regulation 3(b) unconstitutional and invalid. Additionally, the applicants claimed that the provision of six kilolitres was too low to fulfil the City's obligation, as the relevant organ of state, to provide access to sufficient water as required by section 27(1)(b) of the Constitution.

The City defended on the grounds that the state is not constitutionally required to provide *any* free water, that Regulation 3(b) only obligates it to provide the defined basic water supply for a fee, and that, if it is obliged to provide FBW, that its policies, including the six kilolitre amount, are reasonable.

At least to an outsider's eye, there is some lack of clarity in the opinions of all courts hearing the case as to what, precisely, was the applicants' cause-of-action, that is, the legal ground upon which they brought the constitutional question before the courts. On one view of the record, the courts treated the applicants' suit as stating a free-standing claim on the Constitution itself — what in the United States (US) is called a 'constitutional tort' — implicitly assuming that a private litigant may bring a claim to compel the state to fulfil a

[102] *Mazibuko HC* (n 4 above) para 27.

constitutional right. In this view, the relief the applicants were seeking was to obtain more water.

Alternatively, the applicants might have been understood as challenging the constitutional adequacy of the Water Services Act and/or the Regulations promulgated pursuant thereto, asking by way of relief that the courts set these non-constitutional sources of law aside and order the City to come up with a better plan. The confusion was partly caused by the fact that originally the applicants in part challenged Regulation 3(b) as being unreasonable and therefore unconstitutional. Based on a concession by the Minister, the High Court concluded that Regulation 3(b) merely states a minimum standard for basic water supply, not a constitutional standard. Understandably, the applicants thereafter concentrated their fire on the substantive question of what the Constitution requires rather than persisting in challenging the Regulation as such. Belatedly the question arose whether the applicants might bring a constitutional claim having seemed to abandon the challenge to the Minister's regulations. As South African constitutional jurisprudence has evolved in recent years, this question implicates the principle of 'subsidiarity.' O'Regan J stated that the Constitutional 'Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.'[103] In one view of the matter, if the applicants had truly abandoned the challenge to Regulation 3(b) as such, they might not have been entitled to a decision on the substantive constitutional issue.

In another context, great significance may attach to the question whether a litigant is relying on legislation, perhaps urging it to be read in light of the Constitution as required by section 39(2)[104] or whether a litigant asserts a free-standing claim on the Constitution itself. At the end of the day, the Constitutional Court in *Mazibuko* determined that it need not address the subsidiarity issues because, in the Court's view, the applicants could not make out their substantive constitutional claim. Therefore, I, too, set these issues aside. The discussion below focuses on how the Courts read the section 27 right of access to sufficient water and how they approached the question of assessing what section 27 requires. Section 2 of the Constitution provides: 'law or conduct inconsistent with [this Constitution] is

[103] *Mazibuko CC* (n 4 above) para 73. At least as it appears to the untutored US eye, still further issues remain, as yet unresolved in South Africa, regarding the precise nature of the cause-of-action by which one challenges legislation.

[104] Section 39(2) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

invalid[.]' For present purposes, nothing turns on whether the constitutional adequacy of the City's water policy is examined in a challenge to legislation or in some form of free-floating constitutional claim.

3.3 The judgment of the High Court

The High Court determined that the system of pre-paid water meters used in Phiri Township was unconstitutional, that each stand in Phiri must have an option of a metered water supply on credit with the meter installed at the City's cost, and that residents of Phiri were constitutionally entitled to a free basic water supply of 50 litres of water per person per day rather than six kilolitres per household.

Relying on various provisions from international law,[105] the High Court rejected the respondents' argument that they are under no obligation to provide free basic water to the poor.[106] The Court then addressed whether the amount designated as 'Basic Water Supply' in Regulation 3(b) falls short of the guarantee of access to sufficient water contained in section 27(1) of the Constitution. The Court found that, given South Africa's water scarcity, it was not unreasonable for the DWAF to set the minimum amount of water that must be provided by each Water Services Authority (WSA) throughout the country at six kilolitres per household per month.

But, the Court went on to rule that, because section 27(2) of the Constitution requires WSAs to realise the right to access to sufficient water progressively, WSAs that possess the resources to do so must progressively adopt reasonable measures to supply higher amounts of water in order to comply with section 27(1) of the Constitution. In other words, Regulation 3(b) 'must be viewed "*as a floor and not as a ceiling*".'[107] The Court noted that other WSAs in South Africa had implemented an FBW supply in excess of the minimum amount mandated in Regulation 3(b).[108] Interpreting Regulation 3(b) as merely stating a minimum, the Court found that it was not unconstitutional.

Building on this ruling, the High Court held that the City is required to provide more than the minimum of Regulation 3(b) 'if its

105 Section 39(1)(b) of the Constitution requires South African Courts, in interpreting the Bill of Rights, to take into account relevant international law, and section 233 mandates that courts prefer a reasonable interpretation of South African legislation that is consistent with international law norms to one that is not. On several issues, the High Court judgment incorporates international norms.

106 *Mazibuko HC* (n 4 above) paras 41-42.

107 *Mazibuko HC* (n 4 above) para 53.

108 *Mazibuko HC* (n 4 above) paras 50-51, referencing the local authorities of Volksrust in KwaZulu-Natal and Mogale City.

residents' needs so demand and they are able, within their available resources, to do so'.[109]

In asking the Court to sustain its policy, the respondents relied on the reasonableness test established in *Government of the Republic of South Africa v Grootboom* (*Grootboom*)[110] and *Minister of Health v Treatment Action Campaign* (*TAC*).[111] According to the *Grootboom* case, when a legislative or executive action giving effect to a social or economic right is challenged, the court's role is to determine 'whether the measures taken by the State ... are reasonable.'[112] The High Court stated that respondents argued that their policies were reasonable because they carried out periodic revisions in light of new circumstances, such as the implementation of the Special Cases Policy — later renamed the Indigent Persons Policy — in June 2002. However, the Court noted numerous problematic features of the indigent system: people were reluctant to register for fear of social stigma, the additional four kilolitres was granted only to account-holders — so that additional households residing on a stand were excluded from the program completely, and inflexibilities in the system resulted in a small number of registrations.[113] Judge Tsoka found that these policies were unreasonable and that 'the residents of Phiri are not in a better position that [sic] they were on 14 June 2002 when the Special Cases Policy was first introduced.'[114]

Finally, the court dealt with the applicants' request for a declaratory order that each of them was entitled to 50 litres of water per person per day. The Court found that it was common cause that the Phiri households had more members than the average of eight persons assumed by the formula of 25 litres per person, and that, therefore, an allocation of six kilolitres per month did not even provide each person in the household with 25 litres per day.[115]

Peter Henry Gleick, the President of the Pacific Institute for Studies in Development, Environment and Security, stated in an affidavit presented by the applicants that even if 25 litres were provided for each additional individual — over eight — per day, that amount would be insufficient to meet basic water needs given

109 *Mazibuko HC* (n 4 above) para 126.
110 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC).
111 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC); 1996 10 BCLR 1253 (CC).
112 *Grootboom* (n 110 above) para 33.
113 *Mazibuko HC* (n 4 above) para 146.
114 *Mazibuko HC* (n 4 above) para 148.
115 *Mazibuko HC* (n 4 above) para 168.

conditions in Phiri and Soweto generally. He estimated the need at 50 litres per day per person.[116]

In addition, affiant[117] Desmond James Martin, the President of the Southern African HIV Clinicians Society, documented the extra water needs of people with and caretakers of people with HIV or AIDS, including frequent bathing to avoid skin infections, extra care in food preparation to minimise infection by gastro-intestinal pathogens, extra drinking water necessary to counteract dehydration that results from diarrhoea, and so on. He noted the importance of an additional water supply in households with HIV or AIDS members so that others do not have to suffer lack of sufficient water.[118]

It was uncontested that the City had the financial resources to increase the amount of water supplied to impoverished areas.[119] Accordingly, Judge Tsoka held that Johannesburg's efforts fell short of its constitutional obligations, even when qualified by the 'progressive realisation' limitation, and he ordered the City to provide each applicant and other similarly placed resident of Phiri with a FBW supply of 50 litres per person per day.

3.4 The judgment of the Supreme Court of Appeals[120]

The SCA affirmed the High Court's judgment that installation of the prepayment water meters in Phiri was unlawful. The SCA also affirmed the ruling that the City's FBW policy did not satisfy its constitutional obligation in terms of section 27(1).[121]

> A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows that a right of

116 Five litres per day for drinking water given the hot, dry climate, a minimum of 20 litres for basic sanitation in a densely populated neighbourhood like Phiri and up to 75 litres if 'the houses are connected with inefficient conventional sewerage systems such as is common in South African townships,' 15 litres for bathing since urban residents cannot use rivers, and 10 litres for basic washing and cooking of food since much of the residents' food is bought through 'lower quality outlets.' Supporting Affidavit of Peter Henry Gleick, High Court, *Mazibuko v City of Johannesburg*, date unknown, paras 22.1-22.4, available at http://web.wits.ac.za/NR/rdonlyres/0FC8A576-13BF-417C-81120-D5DC1B327940/0/GleickaffidavitFinal.pdf (accessed 24 January 2011).

117 I use the US term 'affiant' here to refer to the person who made an affidavit, rather than the term 'deponent', which, I am told, applies for this purpose in South Africa.

118 Supporting Affidavit of Desmond James Martin, High Court, *Mazibuko v City of Johannesburg*, date unknown, paras 9–10, available at http://web.wits.ac.za/NR/rdonlyres/225D3B4E-F42D-40E7-AD55-864B8D27791B/0/Martinaffidavit0Final.pdf (accessed 24 January 2011).

119 *Mazibuko HC* (n 4 above) para 181.

120 *Mazibuko SCA* (n 4 above).

121 *Mazibuko SCA* (n 4 above) paras 17-18.

> access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence ... The quantity of water that is required for dignified human existence would depend on the circumstances of the individual concerned.

However, the court concluded that an amount of 42 litres per person per day — as opposed to 50 litres as specified by the High Court — was sufficient to sustain a dignified human existence. The SCA was more persuaded by the evidence submitted by the City's expert, IH Palmer, than that submitted by Mr Gleick for the applicants.

The SCA affirmed the High Court's ruling that the designation in DWAF regulation 3(b) of 25 litres per person was a floor, not a ceiling. In doing so, the SCA cited the DWAF's White Paper, 'Water supply and sanitation policy,' issued in November 1994.[122]

> Basic water supply is defined as 25 litres per person per day. This is considered to be the minimum required for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.

The Court also referred to a Strategic Framework for Water Services issued by respondent DWAF in September 2003 which stated that basic service levels would be 'reviewed in future to consider increasing the basic level from 25 to 50 litres per person.'[123]

The SCA expressly declared itself to be addressing the case in the spirit of judicial deference required by separation of powers doctrine. It stated that 'it would be irresponsible of a court to usurp the function of the City and to itself revise the City's free water policy. The court is in no position to do so whereas the City should have the knowledge and expertise required to do the exercise.'[124] However, the SCA ordered the City to formulate a revised water policy in light of the finding that they are constitutionally obliged within available resources to provide 42 litres free water to each Phiri resident who cannot afford to pay for such water. As interim relief, the court ordered the City to provide 42 litres to each person who was registered as indigent.[125] Thus, the SCA saw no inconsistency between its general premise — that devising social programs is for the legislature or executive subject to deferential judicial review — and its utilisation of specific, quantitative measures as general targets for government planners and benchmarks in interim remedial measures.

122 *Mazibuko SCA* (n 4 above) para 19.
123 *Mazibuko SCA* (n 4 above) para 20.
124 *Mazibuko SCA* (n 4 above) para 42.
125 *Mazibuko SCA* (n 4 above) paras 62. The relief afforded by the SCA judgment was problematic from the Phiri residents' perspective in a number of other respects that are beyond the scope of this article.

3.5 Judgment of the Constitutional Court of South Africa

The applicants sought leave to appeal to the Constitutional Court against the order of the SCA, seeking a reinstatement of the High Court order. The City applied conditionally for leave to cross appeal in the event that the Court granted the applicants' leave to appeal. Among other issues, the City sought leave to cross appeal against the SCA's order setting aside the City's FBW policy as unlawful and declaring that 42 litres of water per person per day constituted sufficient water within the meaning of section 27(1) of the Constitution.

Issued on 8 October 2009, the Constitutional Court judgment in *Mazibuko* was written by O'Regan J for a unanimous court.[126] Justice O'Regan began with powerful and emotive rhetoric about the importance of water rights.[127]

> Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.
>
> Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps.

As quoted at the outset, the Court also eloquently articulated a vision of the role of litigation in giving life and providing content to constitutionally based social and economic rights. Despite the lofty rhetoric, the Constitutional Court set aside the judgments of the SCA and the High Court. [128]

The SACC viewed the applicants as making four claims regarding the free basic water policy:[129]

126 Langa CJ and Yacoob J did not participate in the ruling.

127 *Mazibuko CC* (n 4 above) paras 1-2.

128 Initially the Court dealt with the question of whether new evidence should be admitted by the respondents that reflected changes in policy since the instigation of the litigation. Although the Court found that in cases concerning the state's obligation regarding social rights, such evidence might be admissible for purposes of showing the City's ensuring progressive realisation of rights, it was not necessary to admit the evidence in this case given the conclusion that the Court reaches regarding reasonableness.

129 *Mazibuko CC* (n 4 above) para 44.

> (1) That the Court should determine a quantified amount of "sufficient water" consistent with section 27(1)(b), and that the Court should set that amount at 50 litres per person per day.
>
> (2) That the Court should hold that regulation 3(b) of the National Water Standards Regulations is a minimum standard and that the Court is free to impose higher standards.
>
> (3) That the Court should determine that the free basic water policy of six kilolitres per stand per month by the City is unreasonable pursuant to section 27 of the Constitution and/or the Water Services Act in that (a) it allocates an equal amount to both rich and poor, (b) it allocates per stand rather than per person, (c) it was based on a misconception that the City did not consider itself bound to provide any free water, (d) it is insufficient, and (e) it is inflexible.
>
> (4) That the Court should hold that the indigent registration policy is unreasonable because it is demeaning, or, in effect, under-inclusive.

The applicants might question whether the Court formulated their arguments precisely as they were made; however, I leave this point aside.

The Constitutional Court rejected the argument that it should quantify the amount of water that is 'sufficient' within section 27(1)(b) for two main reasons. First, the SACC viewed judicial assignment of a quantitative amount to a guaranteed social good as equivalent to proclaiming that all citizens had a right to claim that amount from the state immediately.[130] That is, the Court equated the applicants' position to an argument that social and economic rights contain a 'minimum core' content that everyone may demand from the government. The Court stated that such an argument was definitively rejected for all social and economic rights in Grootboom[131] and TAC[132] cases in favour of a reasonableness or progressive realisation approach sensitive to context and evolution.[133]

> Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places

130 *Mazibuko CC* (n 4 above) para 57.

131 n 110 above.

132 *TAC* (n 111 above). I do not here provide a critique of the Constitutional Court's interpretation of *Grootboom* and *TAC* which has been analysed elsewhere. Liebenberg (n 5 above) 469-470.

133 *Mazibuko CC* (n 4 above) paras 59-60. Professor Sandra Liebenberg presaged the complexity of this comment, noting that reasonableness review can result in very different interpretations. On the one hand, reasonableness review 'avoids closure and creates the on-going possibility of challenging socio-economic deprivations in the light of changing contexts.' On the other hand, '[t]he danger is that reasonableness review becomes a proxy for the courts endorsing the State's own views about the justifiability of its policies.' S Liebenberg 'Needs, rights and transformation' (2006) 17 *Stellenbosch Law Review* 1 5 & 30.

> context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.

Second, in rejecting what it took to be the applicants' argument, the Court articulated a vision of the proper role of the judiciary in giving content to social and economic rights.[134]

> [I]t is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

Then the Court stated:[135]

> 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.

O'Regan J noted four instances when judicial 'second-guessing' is appropriate: (1) when the government has taken *no steps* to give effect to the right; (2) when it has adopted measures that are unreasonable in that the state's policy makes *no provision* for those most desperately in need (as in the *Grootboom* case); (3) when the policy has unreasonable limitations or exclusions (as in the *TAC* case); or finally, (4) when the government fails to continually review its policies to ensure the achievement of progressive realisation of the right.[136] The Court provided few specifics or standards for judicial review even in those limited situations other than adverting to the facts of the *Grootboom* and *TAC* cases.

The Court did not reach or decide the applicants' arguments regarding Regulation 3(b). It said that there was no need to do so given the Court's conclusion on the third issue of reasonableness. In the course of its discussion of Regulation 3(b), the Court stated that it is important for the national government to set targets that it seeks

[134] *Mazibuko CC* (n 4 above) para 61.
[135] *Mazibuko CC* (n 4 above) para 66.
[136] *Mazibuko CC* (n 4 above) para 67.

to achieve with respect to social and economic rights in part because this 'empowers citizens to hold government accountable through legal challenge if the standard set is unreasonable.'[137]

Turning to the applicants' third claim, the Court articulated its understanding of the reasonableness test in challenges to social and economic policies:[138]

> A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy. This case provides an excellent example of government doing just that. Although the applicants complained about the volume of material lodged by the City and Johannesburg Water in particular, which covered all aspects of the formulation of the City's water policy, the disclosure of such information points to the substantial importance of litigation concerning social and economic rights. If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.

As formulated by the Court, the question was whether the Phiri residents had, through their legal challenge, had an appropriate and sufficient opportunity to hold the government to account, thereby contributing to a deepening of the democratic process.

The crux of the Court's judgment that bears comparison to *Hartz IV* is in its discussion of whether the City's FBW policy was unreasonable.

The Court addressed in one paragraph whether it was unreasonable for the City to provide six kilolitres of free water to both rich and poor alike.[139]

> The City asserts that the fact that the benefit is afforded to all is reasonable for two reasons. First, it asserts that the rising block tariff structure means that wealthier consumers, who tend to use more water, are charged more for their heavier water usage. The effect of this is that the original 6 kilolitres that is provided free is counterweighed by the extent to which heavy water users cross-subsidise the free allocation. Secondly, the City points to the difficulty of establishing a method to target those households who are deserving of free water ... In my view,

137 *Mazibuko CC* (n 4 above) para 70.
138 *Mazibuko CC* (n 4 above) para 71.
139 *Mazibuko CC* (n 4 above) para 83.

> these reasons are persuasive and rebut the charge of unreasonableness on this ground.

The Court, in a single paragraph, rejected the applicants' argument that the FBW should be provided per person rather than per stand.[140]

> [T]he city presents cogent evidence that it is difficult to establish how many people are living on one stand at any given time; and that it is therefore unable to base the policy on a per person allocation. This evidence seems indisputable. The continual movement of people within the city means that it would be an enormous administrative burden, if possible at all, for the City to determine the number of people on any given stand sufficiently regularly to supply a per person daily allowance. The applicants' argument on this basis too must fail.

The Court rejected the applicants' argument that six kilolitres was insufficient for large households.[141] O'Regan J noted that the number of people per household in Johannesburg — as a whole — is dropping to 3.2 people in 2001; however she recognised that often more than one household relies on a single water connection in townships where there remains an acute housing shortage as a legacy of apartheid urbanisation policy.[142]

> Where the household size is average, that is 3,2 people,(footnote omitted) the free basic water allowance will provide approximately 60 litres per person per day, considerably in excess of the amount the applicants urge us to establish as the sufficient amount of water as contemplated by section 27 of the Constitution. The difficulty is that many households are larger than the average, particularly where there is more than one family or house on a stand as is the case in Phiri and many other poor areas. Yet, to raise the free basic water allowance for all so that it would be sufficient to cover those stands with many residents would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents.
>
> Establishing a fixed amount per stand will inevitably result in unevenness because those stands with more inhabitants will have less water per person than those stands with fewer people. This is an unavoidable result of establishing a universal allocation. Yet it seems clear *on the City's evidence* that to establish a universal per person allowance would administratively be extremely burdensome and costly, if possible at all. The free basic water allowance established is generous in relation to the *average household size in Johannesburg*. Indeed, in relation to 80% of

140 *Mazibuko CC* (n 4 above) para 84.

141 I do not address here the Court's rejection of the SCA's reasoning that the policy was unreasonable because the City did not consider that it was bound to provide a specified amount of free water to citizens. The SACC relied on its prior reasoning (*Mazibuko CC* (n 4 above) paras 46-67) that the City was not obligated to provide any specific amount of free water, but only to take reasonable measures for progressive realisation. *Mazibuko CC* (n 4 above) para 85.

142 *Mazibuko CC* (n 4 above) paras 86-87 (footnote omitted).

> households (with four occupants or fewer), the allowance is adequate even on the applicants' case. In the light of this evidence, coupled with the fact that the amount provided by the City was based on the *prescribed national standard* for basic water supply, it cannot be said that the amount established by the City was unreasonable.[143]

The Court rejected the applicants' argument that the FBW quantity was inflexible in that it did not provide for any individualised variation for larger households or households with special needs.[144]

> The Constitution requires that the state adopt reasonable measures progressively to realise the right of access to sufficient water. Although the free water policy did not contain any provision for flexibility when it was introduced in 2001, the record makes plain that the City was continually reconsidering its policy and extremely informative and candid answering affidavits lodged by the City make it plain that for the City the task was a challenging one, both administratively and financially.
>
> If the City had not continued to review and refine its Free Basic Water policy after it was introduced in 2001, and had taken no steps to ensure that the poorest households were able to obtain an additional allocation, it may well have been concluded that the policy was inflexible and therefore unreasonable. This would have been so, in particular, given the evidence that poorer households are also often larger than average and thus most prejudiced by the 6 kilolitre cap. However, the City has not set its policy in stone. Instead, it has engaged in considerable research and continually refined its policies in the light of the findings of its research.

Finally, the Court rejected the applicant's fourth argument that the Indigent Registration Policy was unreasonable based on: (1) the fact that it was demeaning for citizens to be required to register as indigent, and (2) that policy was under-inclusive (only approximately 1/5 of those eligible are registered). The Court relied on the affidavit of a City official who described the relative advantages of implementing a universal program as opposed to a means-tested program. The affidavit attested that one of the disadvantages of a means-based program is that it is 'often regarded as undignified, and it results in a situation where many potential beneficiaries prefer not to come forward.'[145]

> Although a means-tested policy requires citizens to apply for benefits and so disclose that they are poor, to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in

143 *Mazibuko CC* (n 4 above) paras 88-89 (my emphasis added).
144 *Mazibuko* CC (n 4 above), paras 94-95.
145 Supporting Affidavit for the First Respondent of Rashid Ahamed Seedat (n 94 above) para 28.3.

> need. Indeed, nearly all social security benefits afforded by the national government are based on means-testing. If means-testing were to be found to be unconstitutional, government would only be permitted to afford social grants on a universal basis. Such a result would be costly and have the result that those who do not need social benefits would receive them. Means-testing may not be a perfect methodology because it is under-inclusive ... and it may be that those who apply for means-tested benefits dislike doing so, but these considerations must yield to the indisputably laudable purpose served by means-testing: it seeks to ensure that those most in need benefit from government services. In their affidavits, the applicants proposed no third way as an alternative to the provision of universal benefits or means-tested benefits. Nor did their counsel propose one in Court.
>
> What is clear is that the City recognises the dilemma posed by both a universalist policy and a means-tested one. The dilemma is not readily solved. The City continues to review and revise its policy in the light of its administrative experience and information gained from research. In so doing, it cannot be said that the policy as formulated at the time this matter was heard by the High Court was unreasonable.[146]

In the result, the judgments below were set aside and all of the applicants' claims regarding the FBW policy were dismissed.

4 Operationalising judicial deference in quantitative-implementation cases

Hartz IV and *Mazibuko* raise a number of issues in the context of quantitative-implementation cases: are courts empowered to assign quantitative values or quantitative minima to social and economic rights contained in constitutions? If not, how may reviewing courts give substantive content to social and economic rights that involve the delivery of social goods? What is the proper relationship between the judicial branch and the elected branches in quantitative-implementation cases? If the courts have any proper role in this area, what scope of inquiry should they undertake and what range of remedies is available to the judiciary in enforcing social and economic rights in quantitative terms, consistent with due regard for separation of powers?

A comparison of the two cases appears to show that the answers to these questions cannot easily be derived from existing separation of powers or institutional competence doctrine. Typically, debate regarding the relative degrees of appropriate deference that courts owe to the elected branches in social and economic rights cases turn on abstractions— 'reasonableness,' 'minimal rationality,' 'strict

[146] *Mazibuko CC* (n 4 above) paras 101-102.

scrutiny,' 'proportionality,' and so on. This discourse often boils down to saying that courts should either give 'great,' 'medium,' or 'little' deference to the legislature, depending on the nature of the case — for example, if the policy under review utilises racial categories, stricter scrutiny might be required, whereas if the policy makes no invidious distinctions, it is entitled to 'great' or 'medium' deference. Many jurists write as though the operational content of these abstractions is self-defining, so that if a judge identifies the correct standard of review applicable to a case, say, 'reasonableness,' she will know how to apply that standard to the evidence.

But suppose in a given case that all parties and the court agree on the proper standard of review, say 'reasonableness.' This is only the beginning of the discussion about what judicial deference means, not the conclusion. *Actually testing* the reasonableness of the policy under review will require the court to make numerous, very concrete choices about how reasonableness or the lack thereof is demonstrated. Responsible jurists faithful to the philosophical underpinnings of separation of powers and institutional competence theory can disagree about how to test or measure reasonableness. The concept of 'reasonableness' itself cannot answer questions of that type. Resolving such questions simply re-opens for the court, albeit at a much less visible level, the grand debate about separation of powers and institutional competence. These questions cannot be answered in a 'separation-of-powers neutral' or an 'institutional-competence neutral' manner, that is, by a decision procedure that entirely excludes the judge's values, sensibilities, and political outlook.

To focus on the example provided by these cases, a prominent and ever-more likely recurring issue in social and economic rights cases is the following question: when a social program designed to give effect to a constitutional entitlement to a social good — water, food, housing, and so on — turns on the amount — or minimum amount — of the good the government must provide in order to fulfil its constitutional obligations, to what extent, if any, may courts inquire into, demand explanation of, interrogate, and/or second-guess the government's data and calculation methods?

Reasonable jurists applying a reasonableness standard of review could disagree as to whether a court may ask the legislature or executive to justify the adequacy and coherence of its statistical methods and calculations and, if so, in what degree of detail a court may press the government about its numbers. Indeed, a jurist might take the view that reasonableness oversight of calculation methods is appropriate in some cases but not others, depending on the nature of the right, the economic, social, and historical context, the connection between fulfilment of this right and realisation of other constitutional

rights and aspirations, the situation of the claimants, the nature and complexity of the formulae and calculations at issue, and other pertinent considerations.[147] When a court concludes in a particular quantitative-implementation case that judicial oversight of calculation methods is or is not appropriate, that conclusion must be based on something more than mere recitation of the 'reasonableness' standard. That 'more' — the judicial intuition that might, for example, induce a court to ask the legislature to justify the coherence of its calculation methods — will necessarily reflect values, sensibilities, and concerns that go well beyond the general, democratic commitment to judicial deference in social and economic rights cases. Consciously or otherwise, explicit or tacit, such a contextual judgment will and must reflect the court's sense of the importance of the right to fulfilment of the constitution's aspirations. In the context of South Africa, courts' judgment and intuitions about such matters should reflect the transformative and social justice aspirations of the 1996 Constitution.[148]

Conducting inquiry into the proper role of reviewing courts in social and economic rights cases at the customary level of abstraction gets us only so far. The abstract categorisation of levels of review tells us very little about how to operationalise and conduct the review even if the level of deference is uncontested. What 'deference', for example, 'reasonableness review' requires in operational terms cannot be deduced either from the concept of deference itself or from its underlying philosophical rationale. The concepts and philosophy are helpful of course, but only in the sense of providing very general guidance; by themselves, the general concepts and principles do not and cannot answer operational questions about how to conduct the review.

The distinction I am striving for is between the *doctrine* of judicial deference and the *practice* of judicial deference. A question such as the following raises a doctrinal matter — 'If the policy under review utilises gender classifications in the distribution of social benefits, should a court apply vigorous or strict review to the policy?' Something like the following is a question implicating the practice of judicial deference — 'When a court gives substantial deference to the legislature in calibrating welfare benefits, may it or may it not ask the legislature to explain and justify its calculation methods?'

[147] Another issue earnestly debated is whether a court should proceed differently in cases challenging the state's effort to give effect to a 'positive obligation' as compared to cases concerning 'negative' constitutional infringements. For a discussion questioning the positive obligation/negative infringement divide, see Liebenberg (n 5 above) 54-59.

[148] Much has been written in South Africa about the reasonableness standard. I have found particularly helpful the work of Liebenberg (n 5 above) 131-228 and Brand (n 2 above).

In this section, I review some similarities between the cases and some relevant German and South African doctrinal differences. I argue that these national doctrinal differences do not satisfactorily explain the differences in the Courts' respective approaches. I then juxtapose the divergent results flowing from the two courts' approaches and the different type of remedies they imposed, focusing primarily on the South African case. I conclude with a defence of my central point, which is that separation of powers doctrine itself – at least in the way courts customarily talk about it – does not explain the contrasting outcomes in these cases. The critical factor is how a court works with and gives practical meaning to the constraints imposed by separation of powers doctrine. The judiciary has wide discretion in giving operational meaning to the various levels of judicial deference. It follows that courts have ample room within the strictures of separation of powers doctrine to influence outcomes. I argue that courts implementing a transformative constitution such as the South African Constitution, which is expressly committed to the values of equality and social justice, should use this room to manoeuvre in a manner that does justice and gives meaningful content to social and economic rights.

4.1 Review of the two cases and their doctrinal settings

Despite the vastly different legal cultures and stages of economic development in Germany and South Africa, respectively, there is much in common between the two countries' constitutions and their jurisprudence of judicial deference.

The German and South African constitutions both were drafted in the wake of traumatic historical events in which individual and group rights were diminished or annihilated. In response to grievous past injustice, each country has chosen, either directly in the text or through its constitutional jurisprudence to entrench social and economic rights and views its constitution as transforming society.[149]

Both the FCC and the SACC operate within a doctrinal framework that affirms a commitment to separation of powers among the various branches of government and to an obligation of the judiciary to give deference to the elected branches on matters of social policy. In this respect, the German Court does not assert a significantly different understanding of separation of powers than that which the SACC claims is its proper role in *Mazibuko*.

Both Courts take the view that, within a separation of powers doctrine, the assignment of quantitative measures to constitutionally

[149] See n 7 above.

entrenched social and economic rights is for the elected branches, subject to limited judicial review.[150] Neither the German Federal Constitutional Court nor the South African Constitutional Court thought it appropriate for a reviewing court to assign a specific quantitative value to basic subsistence income consistent with human dignity or sufficient free basic water supply, respectively. Both Courts determined that they were not empowered by their Constitutions to compel the legislative and executive branches to meet any specific standard.

It is tempting to explain what appears to be the FCC's more 'hands on' approach to judicial review with reference to differences in the relevant German and South African constitutional provisions. Germany has incorporated in its Constitution and jurisprudence an inviolable right to human dignity. This is an absolute or fundamental right that may not be constitutionally amended. Technically, the legal test being applied is not a reasonableness test; with respect to dignity in German jurisprudence, the state's action or policy is held to an absolute standard to which the state must adhere. However, considerations of reasonableness and/or proportionality are infused into judicial decision-making even when 'absolute' entitlements are at issue. As argued above,[151] while treating dignity as an absolute right in doctrinal terms, throughout its actual analysis of the problem, the FCC in Hartz IV frames its inquiry in the discourse of 'reasonable' and 'justified.'

Under South African doctrine, by contrast, the social and economic rights contained in sections 26 and 27 are subject to a standard of 'reasonableness review.' However, the SACC has made very clear that its obligation of deference in social and economic rights cases under reasonableness review does not imply rubber-

[150] Note that the catch-phrase 'limited judicial review' is not self-defining and leaves considerable leeway for different approaches. Other options are quite consistent with a separation of powers framework. Indeed, the South African Supreme Court of Appeals in *Mazibuko* established an amount, but then sent implementation back to the City. The apex court of New York State (the New York Court of Appeals) in *Jiggets v Grinker*, found that the State Commissioner of Social Services had a statutory duty to establish adequate shelter allowances for recipients of a social service program and ordered that the allowance amount had to bear a reasonable relationship to the actual cost of housing in New York City. *Jiggetts v Grinker* 554 NYS 2d 92 (1990). The Court found that this ruling did not bind the Legislature to appropriate funds and remanded to a lower court to hold an evidentiary hearing on the adequacy of current shelter allowances. The lower court ordered interim relief to recipients who were being legally threatened with eviction, in the form of higher monthly shelter allowances, which money was appropriated. Ultimately, the challenged allowance was determined to be illegal because it was not reasonably related to the housing costs in New York City and the state was ordered to develop a new reasonable shelter allowance. That judgment was upheld by the Appellate Division of the Supreme Court (689 NYS 2d 482 (1999)).

[151] See text accompanying n 61 above.

stamping state policy without analysis. Earlier SACC cases in the area of social and economic rights provided a framework for much more substantive engagement with separation of powers issues than that employed in *Mazibuko* within a reasonableness review context. For example, while O'Regan J correctly cites the *TAC* judgment for the general propositions that section 27(1) should be read in conjunction with section 27(2), incorporating the reasonableness and progressive realisation aspects of South African constitutional jurisprudence,[152] the *Mazibuko* judgment does not follow the path taken by the *TAC* Court to give the idea of accountability a searching and robust content. In *TAC* the Court scrutinised the government's explanations and justifications of its policy with some care and rejected important aspects of it on the basis of evidence in the case (for example, with regard to the safety and efficacy of Nevirapine).[153]

In addition, O'Regan does not even mention *Khosa & Others v Minister of Social Development & Others* (*Khosa*)[154] in which the SACC determined that permanent resident non-citizens within South Africa must be given eligibility for various social assistance grants. In that case Mokgoro J rejected the government's argument that non-citizens should be excluded from the social assistance system due to resource constraints because the Court found that the government evidence did not support this claim.[155]

In addition, Mokgoro J rejected the government's reliance on a US appellate court decision upholding the disqualification of legal permanent residents who were non-citizens from a US social welfare scheme. The US court had held that the disqualification did not violate the equal protection clause of the US Constitution, finding that it was sufficient 'that there was a rational connection between the federal government's immigration policy and its welfare policy of encouraging the self-sufficiency of immigrants.'[156]

> The test for rationality [in the US] is a relatively low one. As long as the government purpose is legitimate and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met (citation omitted). Despite the failure of many of the respondents' [arguments with respect to the purpose of the exclusion of permanent residents from the social-assistance scheme], I am prepared to assume that there is a rational connection between the citizenship provisions of the Act and the immigration policy it is said to support. But that is not the test for determining constitutionality under our

152 *Mazibuko CC* (n 4 above) paras 49-50. The SACC also discussed *TAC* as rejecting a 'minimum core' framework, an argument that the applicants were not asserting and which is beyond the scope of this article.
153 *TAC* (n 111 above) paras 57-62.
154 *Khosa & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC).
155 *Khosa* (n 154 above) paras 60-62.
156 *Khosa* (n 154 above) para 66.

> Constitution. Section 27(2) of the Constitution *sets the standard of reasonableness which is a higher standard than rationality.*[157]

The Court has also developed specific indicators of 'unreasonableness,' that Justice O'Regan expressly acknowledged in her judgment. For example, in the *Grootboom* case, Yacoob J held that the government's measures to supply housing would be deemed unreasonable if they did not specifically account for those most desperately in need.[158] In the *TAC* case, the Court issued mandatory orders that unreasonable limitations or exclusions be removed from the government's health care policy.[159]

Therefore, the doctrinal distinction between German and South African systems does not fully explain the contrasting approaches of the two courts when one looks at how the courts *actually conducted* their review, as distinct from what they might have *said* about what they were doing. While the courts agreed in general terms that the judiciary lacks power or competence to set specific quantitative amounts, they diverged significantly on the degree to which they examined the rationales provided by the elected branch when it assigned quantitative amounts to rights of access to social goods. The critical distinction is not found in the doctrine, but in the different approaches of the respective Courts to the evidence and remedies.

4.2 Juxtaposition of *Hartz IV* and *Mazibuko*

> A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy ... If the process followed by the government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation. [160]
>
> In order to calculate the extent of the entitlement, the legislature has to assess all expenditure that is necessary for one's existence in a transparent and appropriate procedure, based on the actual need,

157 *Khosa* (n 154 above) para 67 (my emphasis).
158 n 110 above, para 44.
159 n 111 above, para 135. Although the question of budgetary implications fell outside the scope of the *TAC* case, the Court noted in passing that '[t]here is ... no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.' (para 99).
160 *Mazibuko CC* (n 4 above) para 71.

> hence in line with reality ... To enable [the Constitutional Court to assess whether the legislature has achieved this goal], the legislature has to comprehensibly disclose the methods and steps of calculation used in the legislative process to determine the minimum of subsistence.[161]

These two quotations from *Mazibuko* and *Hartz IV*, respectively, read as if the judgments are quite consistent in their view of appropriate judicial oversight. Each seems to mandate transparency of the legislative process and grants the courts an important role in ensuring transparency without dictating policy. But the two courts gave very different operational content to this seemingly shared concept of the role of judicial review.

The German approach allows a more robust role for the Court both in providing content to social and economic rights and in pushing the elected branches to live up to its vision of what these rights entail. The South African approach, at least in the *Mazibuko* case, steps back from a robust role for reviewing courts. As a consequence, the South African approach provides much less guidance to litigants and the public. The irony of the South African judgment is that, while O'Regan J provided a visionary description of the role that social and economic rights litigation should play in a transformative constitutional setting, the balance of her judgment on the free basic water question deprives the courts of tools they need to fulfil her own understanding of their proper role.

In practical or operational terms, the most significant differences between the German and South African judgments are found not in doctrine but in (1) how the two courts assessed and the degree to which they probed the evidence supplied by the government to justify its policies; and (2) their creativity in developing criteria and remedies to improve the legislature's justification of its policies.

In the *Hartz IV* judgment, the FCC provided a detailed scrutiny of the evidence regarding the legislature's methodology in determining the standard benefit amount, reviewing the calculations in its judgment and assessing whether both the initial calculations and subsequent changes in the calculations were empirically based and therefore justifiable. The FCC articulated that the constitutional fundamental right to human dignity in Article 1(1) mandated a transparent calculation of subsistence minimum. The ultimate judicial review must assess the accuracy of the calculation and determine if it meets constitutional mandates. The Court gave the legislature the opportunity to explain its methodology – indeed mandates that it do so – and then is responsible for assessing the

[161] *Hartz IV* (n 3 above) paras 139 & 144.

reasonableness of that methodology. Ultimately the FCC in *Hartz IV* required the legislature to amend the challenged legislation within a specific timeframe and provide a transparent explanation of its methodological assessment that presumably could be reviewed by the Court.

In contrast, the Court in *Mazibuko* did not understand its role as obliging or permitting it to inquire deeply into or analyse the evidence of record with respect to the question of how the City arrived at its quantitative targets. Rather, it upheld the City's FBW policy under a reasonableness standard in terse, conclusory language without providing the probing analysis that the German FCC developed. In effect, the Court gave presumptive validity to the City's data and calculation methods, thereby failing to hold the City accountable in any meaningful way — as the Court says it is the purpose of public interest litigation to do. The Court provided minimal direction for the elected branches in setting standards and minimal guidance to future litigants and the public about what criteria and inquiries will ultimately comprise reasonableness review in cases involving social and economic rights.

Specifically, in contrast to *Hartz IV,* the SACC did not view a reasonableness review as one that at the very least should include a judicial assessment of whether the elected branch made a transparent and reasonably sound calculation of need in light of the mandate of progressive realisation.

I should be absolutely clear that I am not offering my own assessment of the reasonableness or appropriateness of the City's calculations nor am I asserting that Justice O'Regan was mistaken in concluding that the City's program passes reasonableness review. The Court may very well have reached the correct conclusion. Moreover, I have no doubt that O'Regan J believed that her implementation of reasonableness review was consistent with the Court's prior cases and, in particular, faithful to the teaching of the *Khosa* case that South African 'reasonableness' is a more demanding standard than US 'minimum rationality'.

That being said, the way in which the *Mazibuko* Court *operationalised* its review of the City's program brought a very different — much lower and more cursory — level of attention to the evidence regarding the City's calculations than was shown by the FCC in reviewing welfare benefits in *Hartz IV*. If the SACC interrogated the evidence regarding the government's statistics and calculation methods, the Court does not indicate this in the opinion, nor does it provide much guidance for future courts and litigants regarding how — operationally — reasonableness review is to be conducted in quantitative-implementation cases. In practice, if not in doctrine, the

level of scrutiny O'Regan J applied to the City's water policy is much closer to American 'minimum rationality' than to South African 'reasonableness'.

I will give a few examples based on my reading of the record evidence to illustrate this point.[162] I am aware that in *Mazibuko*, the respondents vigorously challenged the reliability of the evidence submitted by the applicants, and the applicants came back with a vigorous defence of their evidence. I remind the reader that this article does not purport to draw any substantive conclusions about the quality of the evidence. I focus only on the respective courts' understanding of their proper role (in separation of powers terms) in *engaging* with this type of evidence.

At least insofar as the judgment reveals, O'Regan did not see the role of the reviewing court as engaging searchingly with the evidence in cases of this type to determine whether the government's actions and calculations were reasonable. She tells us very little about how the Court reached its conclusion in the case. I do not claim that the SACC necessarily *should* have addressed each of the issues below. Surely this is a matter on which judges and advocates can disagree and ought to debate. Rather, my point is that the case left many open spaces where courts so inclined could give more substantial meaning to social and economic rights while remaining faithful to separation of powers doctrine and the principle of judicial deference.

(1)The judgment ignored important, but contrary, evidence of record, specifically in its discussion of the expert affidavits regarding sufficient water needs of Phiri residents:

In discussing the amount of water that must be provided by the City in order to give effect to the right to dignity in terms of section 10 and the right of access to sufficient water in terms of section 27(1), the SCA reviewed and compared the respective calculations of water needs presented by the City's expert — Palmer — with the applicants' expert — Gleick — before accepting Palmer's calculations and determining that 42 litres water per person per day constitutes sufficient water in terms of section 27(1). However, in deference to the City, the SCA did not order the City to provide this amount to the Phiri residents, but instead took the less intrusive step of ordering the City to reformulate its water program in light of the finding that it is constitutionally obliged within available resources to provide 42 litres free water to each Phiri resident who cannot afford to pay for such water. The SCA judgment leaves open — it virtually invites — the possibility that the City will come back with a plan revised in good

[162] I have reviewed much of the evidence, but do not hold myself out as an expert on the full extent of the evidence in *Mazibuko*.

faith but providing that 42 litres is an impossible target, or not within its available resources, or ill-advised for some other reason. The court might then find that the City's efforts to revise the policy pass reasonableness muster, or perhaps it might find the City's conclusions unreasonable. In this manner, a dialogue is fostered among the three branches of government as well as civil society, albeit that the discussion's frame of reference is the ultimate supremacy of the legislature on social policy matters. The SACC's approach forestalls this possibility.

The SACC did not discuss either of the above mentioned expert affidavits or calculations, or any of the other expert affidavits which, by my reading, relied on international studies which did not reflect the specific needs of the applicants. Rather the Court stated: '[T]he expert evidence on the record provides numerous different answers to the question of what constitutes "sufficient water." Courts are ill-placed to make these assessments for both institutional and democratic reasons.'[163] Perhaps the evidence was adequate to sustain the reasonableness of the City's calculations; perhaps a court would overstep its rightful boundaries by insisting on local evidence. But the Court gave the parties and the public no reason or explanation as to *why* this is so.

(2)The judgment does not indicate that the Court reviewed the City's calculation methods with an eye toward determining whether they were minimally or reasonably accurate and coherent. If the Court did undertake this exercise, its judgment does not so indicate or otherwise reassure. It may be that the Court was perfectly correct in concluding that the City's calculations and data were adequate under the reasonableness standard of review. My point is that the parties and the public are not brought into the picture or told why or how the Court reached this conclusion.

Two examples illustrate this point: the City's method of calculation of the six kilolitre basic water supply and resulting FBW figure and the Court's assessment of policy revisions undertaken by the City during the course of the litigation.

As noted earlier, there appears to have been no agreed empirical methodology for determining national basic water supply standards as set forth in Regulation 3(b), or for making the determination that six kilolitres of free basic water supply sufficed. The Macleod affidavit[164] appears to show that this six kilolitre figure was based on, what the FCC might term, a 'random estimate.' The SACC judgment did not address the evidence of the development of the national water

[163] *Mazibuko CC* (n 4 above) para 62.
[164] See text accompanying n 87 above.

standard as described in the affidavit of Neil Macleod, head of Water and Sanitation of the eThekwini Municipality, it did not discuss documentation regarding the reasonableness of the calculation, nor did it support whether respondents had provided a transparent justification of that level of need for poor people in an HIV/AIDS ravaged area. While there may have been evidence upon which a conclusion of reasonableness could have been supported, that is not evident in the opinion.

In the Court's assessment of the City's revisions in policy since the instigation of the judicial action, the SACC did not analyse or engage with the substantial evidence relating to the City's review of its policy which led to ongoing changes, particularly the significant problems that poor people faced in attempting to apply for the additional four kilolitres FBW that they could receive if they registered on the City's Indigency Registration Policy. The Court did not scrutinise the Indigency Registration Policy from a dignity standpoint nor did it respond to the many detailed claims of flaws in the policy pointed out by the applicants.

The Court referred to the affidavit submitted by the City which describes the administrative difficulties of the initial Special Cases policy. It then goes on to state that the City's affidavits 'make it plain' that the City had taken on a challenging task.[165] Surely a reviewing court could tell us more than this without stepping outside the proper boundaries of its obligation of deference.

In addition, the Court does not address the methodological soundness of the City's modest revisions in FBW amount. It merely asserts the fact that the City in reviewing its FBW policy complies with the mandate for 'progressive realisation.'

In contrast, the FCC assessed the changes made in the SGB II since the Hartz IV legislation was implemented. For example, in reviewing the €100 benefit amount which the legislature had added for student benefits, the Court determined that the legislature had not provided a transparent and justifiable explanation for that calculation. Therefore, the Court required the legislature to recalculate the benefits, justifying the assessment in a manner that could be judicially reviewed.

O'Regan assures the reader of her conclusion — which may be well-founded — that the City used coherent and valid methods, but she gives the reader no evidence of that, and, indeed, in reading the evidence, there is reason for pause on that point. This type of

[165] Reference to Supporting Affidavit for the First Respondent of Rashid Ahamed Seedat (n 94 above) paras 91, 94.

conclusory account dilutes reasonableness review into minimum rationality. In addition, it is detrimental to the aspiration that social and economic rights litigation should contribute to the deepening of democracy and grass-roots participation. If it is enough for a court to give a cursory and conclusory assertion of rationality, future challenges are almost always destined to fail, litigation will not provide a tool to hold the government accountable in any meaningful way nor will it provide the public a means to render the government's calculation methods transparent, and civil society and litigants will not be in a position to play a meaningful role in the progressive achievement of social justice contemplated by the Constitution.

(3)In its treatment of the City's reliance on city-wide average household size and on the per account-holder (rather than per-person) allocation of FBW supply, the judgment sustained as reasonable calculation methods used by the City which the Court itself acknowledges result in adverse racial and class consequences.[166] No doubt the responsible City officials intended nothing of the kind. Yet despite the City's best efforts, its water program carries forward the legacy of apartheid.

As noted, all account-holders in the City, regardless of race and class, receive six kilolitres FBW. This level of FBW supply is based on the assumption that an account-holder maintains a household of no more than eight people. Applicants argued that this assumption is inconsistent with variations in family size and form between white and non-white South Africa and with the fact that many stands in townships commonly service multiple households. The Court apparently accepted that black households are significantly larger on average than white households. In other words, the Court acknowledged that 'average household size' in a city such as Johannesburg is a statistic that glosses over the apartheid legacy of residential segregation. Despite the strides made since democratic transition in 1994, residential segregation by race remains an indelible feature of South African life. This will probably be true for at least a generation. In that setting, use of a city-wide average of household size as the basis for calculating FBW allocations treats the predominantly black and predominantly white zones equally, to the great disadvantage of the predominantly black zones such as Soweto.

In urban South Africa, geographic zone is usually a reliable surrogate for racial difference. In substance, this is one of the holdings of the great case of *Pretoria City Council v Walker*.[167] In a

[166] *Mazibuko CC* (n 4 above) para 87.

[167] In *Pretoria City Council v Walker*, the majority concluded, over dissent, that urban geographic distinctions often reliably reflect racial divisions (1998 2 SA 363 (CC) para 33; 1998 3 BCLR 257 (CC) para 33).

city with Johannesburg's history, a policy premised on calculations using city-wide average household size as a key indicator should have set off alarm bells for any reviewing court, even if the standard of review were US-style minimal rationality. Without some explanation, such a policy is patently unreasonable. O'Regan J is as sensitive to and thoughtful about these matters as anyone on the bench.[168]

Yet the Court found it reasonable that the City relied on estimates of average household size for the entire municipality of Johannesburg. The Court did not ask the City to provide an explanation for why it did not or was unable to compute average household size in more discrete areas of the city. There was disputed evidence about household size in various areas of Johannesburg, but the Court does not address this evidence. Despite that the applicants raised this matter, the Court appears not to have inquired whether, and no reason is given why, if it is possible and convenient to calculate average household size across Johannesburg as a whole, it is unreasonably difficult or burdensome to calculate average household size in the townships as distinct from the predominantly white areas of the City.

The applicants presented evidence that per person delivery could be achieved by adding another record to every bill, allowing account-holders to designate how many persons were receiving water as long-term residents of that household.[169] The SACC judgment does not address this possibility, or whether there was evidence indicating that it is unworkable or overly burdensome; it does not even state why it rejected the applicants' proposed administrative alternatives for arriving at a more equitable allocation. Literally all the Court tells us is that the 'evidence seems indisputable' that it would be administratively impossible to allocate the FBW supply on a per person basis versus per account-holder.

Even if the SACC thought there were ample reasons to reject or pass over the applicants' proposals, other alternatives existed that, even if not suggested by the applicants, a Court as sophisticated as the SACC should have explored.[170] One is obvious: the Court might

[168] See, for example, her compelling discussion of the legal relevance of South Africa's history of 'spatial planning' in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2004 ZACC 20 para 8; 2005 2 SA 359 (CC) para 8; 2005 4 BCLR 301 (CC) para 8.

[169] Replying Affidavit of Patrick Bond, High Court, *Mazibuko v City of Johannesburg*, date unknown, paras 18 & 25, available at http://web.wits.ac.za/NR/rdonlyres/9A1F927B-7B33-49D7-8A58-65D6D29BD762/0/SupplementaryReplyingAffidavitofPatrickBond.pdf (accessed 24 January 2011).

[170] In a slightly different context, *Carmichele v The Minister of Safety and Security and Another* teaches that it is the duty of the court to be alert to and raise constitutional issues, even when the litigants have failed to do so (2001 ZACC 22; 2001 4 SA 938 (CC); 2001 10 BCLR 995 (CC)).

have asked the City whether it could refine its calculations by distinguishing between geographic zones within Johannesburg, for example, by using average household size in Soweto, not the city as a whole. Beyond this, the Court would not have been overreaching if it had asked the City to conduct a pilot project in Phiri to determine whether per-person information could be collected without a serious administrative burden.

A judge of O'Regan's insight and compassion should have been able to envision remedies that would have acknowledged the hardship of the residents in Phiri while also respecting the City's prerogatives. Her imagination in fashioning remedies consistent with a transformative conception of adjudication has been evident in numerous other judgments.[171]

Yet her stated approach in *Mazibuko* is internally contradictory. For example, she reaches the conclusion that the Court is not an appropriate forum to set a quantitative figure for sufficient water. But in dictum regarding her discussion of subsidiarity, she states that future litigants will have to 'challenge the minimum standard set by the legislature or the executive ... to establish that a policy based on that prescribed standard is unreasonable'.[172] Therefore the courts must inevitably render opinions in the nature of 'how much is enough'. Of course, that is a different determination from a court's establishing a precise number as to the content of a constitutional right. However, separation of powers and institutional competence objections would appear to apply equally when a court is assessing the adequacy of the government's figure.

In addition, the judgment frequently views remedies in binary terms. In terms of quantitative implementation, for example, there seem to be only two possibilities: either courts must not determine constitutional sufficiency in quantitative terms at all, or courts have the power to determine a precise quantity for a socio-economic right, which will then be set in perpetuity. This latter possibility the Court views – appropriately – as counterproductive because it prevents the ongoing development of rights within context. However, the Court fails to explore the many other possibilities in quantitative-implementation cases, such as using a specific number in the remedial phase of the case as a temporary or interim benchmark; referring the

[171] See *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 ZACC 1; 2008 3 SA 208 (CC); 2008 5 BCLR 475 (CC) which required engagement between the parties to attempt to resolve the dispute and *Residents of Joe Slovo Community v Thubelisha Homes & Others* 2009 ZACC 16; 2009 9 BCLR 847 (CC), which set forth detailed instructions for the engagement process and in which the Court retained jurisdiction of the case for further reporting on the engagement and options for the parties to seek further relief from the Court.

[172] *Mazibuko CC* (n 4 above) para 76.

case back to the government to determine a plan for reaching that benchmark or returning with an alternate proposal of the maximum amount that the governmental entity believes it can achieve in an interim period; ordering that the more destitute receive a designated amount until the government's program can be placed on a constitutionally adequate basis,[173] or using precise numbers to monitor and track the process of 'progressive realisation'.

Likewise, the Court accepts the City's perspective that the only two options for a water supply program are a universalist policy that gives a greater FBW supply to all households and a means-tested policy and views the applicants as attacking both.[174] From my reading, the applicants were proposing a different approach, based on a per person allocation that would have addressed many of the inequitable results of apartheid. By failing to carefully explore this and other of the more nuanced remedies suggested in this section, the Court placed the applicants in an impossible bind. The Court faults the universalist approach because, if the Court orders more FBW per account-holder, it will disproportionately benefit those who do not need the additional FBW supply. However, the Court does not explore any means for providing additional FBW to the applicants without giving it to them through an allegedly flawed, means-tested program. So the Court simply determines as a constitutional matter that the means tested program, the Indigency Registration Policy implemented by the government, is reasonable without addressing the applicants' concerns or the 'dignity' implications.

Overall, the opinion contains internal tensions. O'Regan J discusses the critical importance of judicial enforcement of social and

[173] The Constitutional Court of Colombia has been exceptionally creative in devising remedies and procedures that put substance into the enforcement of social and economic rights while at the same time respecting separation of powers. The case seeking access to health-care by internally displaced persons (IDPs) confronted a problem affecting millions of people, but as to which the state's institutional and financial capacity to respond was precarious. The Court ordered the immediate delivery of humanitarian aid to identified IDPs who had brought the case. The Court did not order the government immediately to deliver constitutionally adequate health-care but, on behalf of all IDPs in Colombia, past, present and future, whether or not identified, the Court developed and instituted a new remedy, namely, the declaration of the existence of an "unconstitutional state of affairs" (herein, DEUSA). Pursuant to this declaration, the Court retained jurisdiction of the case; obliged the government periodically to submit reports, including cost estimates of potential solutions; and required the government to negotiate with the relevant stakeholders and NGOs. The DEUSA left to the government a determination of whether and when it could afford constitutionally adequate delivery of health care to IDPs. However, in the event that it concluded that a solution is not presently affordable, government was required to declare publicly that it is 'regressing' in the enforcement of rights. In that event, the Court would retain jurisdiction and require the government to make plans to provide for the development of the necessary state capacity to bring an end to the unconstitutional state of affairs at some future date. Tutela 025/2005.

[174] *Mazibuko CC* (n 4 above) paras 99-100.

economic rights as a forum of democracy; she discusses the fluidity of social and economic rights; she discusses the importance of viewing social and economic rights within context, indeed 'placing context at the centre of the enquiry.'[175] Yet the judgment deployed an unnecessarily limiting concept of judicial deference, resulting in an outcome that was inconsistent with the aspirations reflected in the vision she articulated.

4.3 Separation of powers doctrine

The two cases discussed in this article reflect that the separation of powers doctrine is so ambiguous and indeterminate that courts which are fully committed to and respectful of separation of powers can take quite different approaches to cases involving social and economic rights. Deference can be operationalised or practised in many different ways or degrees. The imperative of deference and the doctrines of separation of powers do not, in and of themselves, impose a specific limiting constraint on the judiciary's role. While the appeal of a separation of powers framework is that it will provide guidance for courts adjudicating constitutional cases involving social and economic rights, these doctrines and concepts are simply too open ended to do so. Courts can take many approaches and fashion many remedies while remaining faithful to the principle of judicial deference to the elected branches.

This article has presented a contrast of how courts assess remedies when presented with a quantitative question about the provision of economic rights. Both Courts recognised the primacy of the legislature in making these determinations. However, the German FCC saw its role as ensuring at a minimum that the legislature provides transparent calculations and methodology that could be subject to review. It appears that the FCC is prepared to give very deferential review regarding the ultimate amount,[176] but it believes that the judiciary has a role in assessing the methodology, what one might call the 'reasonableness,' of the calculations. The calculations cannot be based on a random assessment.

The SACC apparently did not take this approach, but rather thought that it would be too intrusive to analyse the methodology. However, failure to publically engage with the evidence to develop remedies in terms of future actions regarding social and economic rights undercuts the Court's eloquent language in *Mazibuko* about the importance of social and economic rights litigation.

[175] *Mazibuko CC* (n 4 above) para 60.

In my view, the reason that the judgment in *Hartz IV* provided a more active role for judicial oversight was not because of a doctrinal discussion of separation of powers or because the FCC gave less deference to the German legislature than the SACC did to the City and the DWAF. The doctrinal formulations actually exercise very little constraint on the decision making process. This is not a case in which the FCC was applying what in the US is called 'strict scrutiny' and the SACC is applying 'minimum rationality.' Both courts believed that they were according reasonable deference to the legislature.

I am not claiming that the German approach will necessarily guarantee more redistributive results, or that the FCC will consistently apply this approach in the future. It is quite possible that a case will arise in which the methods of judicial review utilised in *Hartz IV* will be deployed against social justice and contrary to a democratic mandate. But the same could also be said of 'reasonableness review.' What is important is that each Court easily could have reached an opposite result consistent with its own framework of separation of powers doctrine, and, in the *Mazibuko* judgment, one that was more faithful to the transformative aspirations of the South African Constitution.

5 Conclusion

The key explanation of the difference in the German and South African cases is not in the doctrine that the Courts say they are applying, but rather in what the Court actually does — which is based on the different understandings the respective Courts have of their

[176] As of the publication of this article, in spite of the fact that the FCC ordered the legislature to implement a methodologically sound procedure for determining realistic benefit amounts by 31 December 2010, there has not been a final resolution on a package in response to the decision. On 17 December 2010, the *Bundesrat* (the upper house in which the coalition government recently lost its majority) rejected the chancellor's proposal and a conciliation committee of both the *Bundesrat* and the *Bundestag* was established to negotiate a compromise. 'German coalition suffers first defeat' *Financial Times* 17 December 2010 http://www.ft.com/cms/s/0/95c4e834-0a06-11e0-9bb4-00144feabdc0.html#axzz1F11Am0Lq (accessed 23 February 2011). On 21 February 2011, after eight weeks of negotiation between the government and opposition parties, a compromise was reached which will provide for an increase of €5 to €364 a month retroactive to 1 January 2011 and an additional €3 increase as of 1 January 2012, plus adjustments for inflation and wage growth. In addition, the compromise includes an additional €400 million between 2011 and 2013 to provide about 2.5 million needy children with special subsidies for warm lunches and tutoring. While it appears that this will now pass the legislature, it is unclear whether it will be challenged in the FCC. 'Breakthrough forged in Hartz IV welfare talks' *The Local--Germany's News in English* 21 February 2011 http://www.thelocal.de/politics/20110221-33235.html (accessed 23 February 2011). 'Reforms on welfare payments agreed after long political battle' *Deutsche Welle* 21 February 2011 http://www.dw-world.de/dw/article/0,,14857121,00.html (accessed 23 February 2011).

constraint to address an issue of social and economic rights and the limits of their creativity in a separation of powers doctrine to call the elected branches to account and engage civil society in a democracy. This understanding is inextricably linked to controversial political and philosophical values and assumptions and reflects the court's commitment to social transformation.

Hartz IV provides an example of a quantitative-implementation case in which a court is committed to separation of powers and legislative supremacy, but crafts the form of judicial review in such a way that is better suited for dialogue between the legislature and the courts, which may improve the performance and democratic accountability of both. It likewise creates a forum for public discussion which enhances democratic involvement of the community.