

**PROPORTIONALITY, REASONABLENESS,  
AND ECONOMIC AND SOCIAL RIGHTS**

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*in*

**PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES**

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**INTRODUCTION**

The textual guarantees of economic and social rights are saturated by standards. Using the example from international law, the right to “an adequate standard of living”,<sup>1</sup> to “adequate food, clothing and housing”,<sup>2</sup> to variously targeted levels of education,<sup>3</sup> and to “the highest attainable standard of physical and mental health”<sup>4</sup>, which are to be “progressively realized”<sup>5</sup> subject to “maximum available resources”,<sup>6</sup> all beg a kind of

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<sup>1</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], art. 11(1). For commentary on the shared influence between human rights treaties and constitutional rights, see Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. Int'l L. J. 61 (2013). Yet evidence on the influences between international and constitutional economic and social rights indicates a far more idiosyncratic dynamic within different systems: see, e.g., Daniel M. Brinks, Varun Gauri & Kyle Shen, *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 Ann. Rev. Law Soc. Sci. 289, 297-300 (2015). A focus on judicial methodology, rather than merely text and/or broader legal mobilization, is thus fruitful for economic and social rights.

<sup>2</sup> ICESCR, art. 11(1).

<sup>3</sup> *Id.*, art. 13.

<sup>4</sup> *Id.*, art. 12(1).

<sup>5</sup> *Id.*, art. 2(1).

<sup>6</sup> *Id.*

reasoned assessment of what might be considered adequate, appropriate, available, or attainable, in context. Less frequent, although certainly apparent, are the sorts of bright-line rules that are said to make rights-adjudication and rights-enforcement a more constrained interpretive exercise.<sup>7</sup> Even the negative obligations attached to economic and social rights, such as the prohibition against forced eviction,<sup>8</sup> or denial of emergency medical treatment,<sup>9</sup> may countenance some form of limitation, mediated by standards.<sup>10</sup>

In this context, one would expect that the most disciplined sort of standards-based reasoning in rights adjudication – that of the sequenced and structured proportionality test or protocol, often named “proportionality analysis”<sup>11</sup> – would have become prevalent for economic and social rights. For its proponents, proportionality analysis is integral to a new “global model of constitutional rights”,<sup>12</sup> providing a “key to the door of an international community of judges”<sup>13</sup> for disciplining and constraining the inevitable

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<sup>7</sup> For a very useful articulation of this difference, in the American context, see Kathleen M. Sullivan, *The Supreme Court, 1991 Term -- Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22-123 (1992); for a more cross-doctrinal distinction between rights and principles, see ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 45-110 (2002). I discuss the parallels between conceptions of rules versus standards, and rights versus principles, in KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 128 (2012).

<sup>8</sup> *E.g.*, U.N. Committee on Economic, Social & Cultural Rights, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions; see also Sth. Afr. Const., § 26(3).

<sup>9</sup> *E.g.*, U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 28; Sth. Afr. Const., § 27(3).

<sup>10</sup> For broader analysis of the different institutional instantiations of such limitations, see Young, *supra* note 7, ch. 4.

<sup>11</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 73 (2008). While I define proportionality analysis more fully in Part II, *infra*, it is worth stating at the outset that proportionality analysis typically follows a first stage of inquiry, in which a *prima facie* infringement of a right is demonstrated, and a second, in which the aims of the identified measure, and principles of its suitability, necessity, and balancing or proportionality in the narrow sense, are established. B. Schlink, *Proportionality*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* (M. Rosenfeld & A. Sajo, eds., 2012) 721. See further text accompanying *infra* note 69.

<sup>12</sup> KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 277-314 (2012)

<sup>13</sup> MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* (2013).

discretion opened up by rights adjudication and enforcement. If economic and social rights are part of that global model, a suggestion supported by recent empirical analysis,<sup>14</sup> there are numerous sites on which to establish the proportionality analysis. And yet, the comparative constitutional practice around economic and social rights reveals little resembling proportionality analysis, otherwise so “ubiquitous”<sup>15</sup> in constitutional rights adjudication. Instead, the adjudication of economic and social rights integrates notions of proportionality in a seemingly indirect fashion, through giving substance to standards of “reasonableness”,<sup>16</sup> “appropriate measures”,<sup>17</sup> and “progressive realization ... according to maximum available resources”.<sup>18</sup> These standards share with proportionality analysis the rejection of more content-driven, results-oriented, or rule-like conceptions of economic and social rights, such as the minimum core.<sup>19</sup> But that rejection alone does not answer the question how proportionality, whether as principle or structured approach, relates to these new standards, particularly to that of reasonableness, a standard that now sets the framework for previously-absent international scrutiny on economic and social

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<sup>14</sup> Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 610 Am. J. Comp. L. 1043 (2014) (counting a full third of constitutions, mainly from Latin America and Eastern Europe, and mainly from civil law jurisdictions, with justiciable economic and social rights guarantees.)

<sup>15</sup> MÖLLER, *supra* note 12. *see* Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or A Bridge Too Far?* in this collection.

<sup>16</sup> Grootboom, *see infra* Part I.

<sup>17</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 9: The domestic application of the Covenant (UN doc. E/C.12/1998/24); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (later reissued as UN document E/C.12/2000/13); *see further* Olivier De Schutter, *Editor's Introduction* to ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS (Olivier De Schutter, ed., 2013).

<sup>18</sup> ICESCR, art 2(1).

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, U.N. Doc. E/1991/23 (Dec. 14, 1990); *see also* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

rights.<sup>20</sup> An identified “new aspect of the principle of proportionality”,<sup>21</sup> described in the context of the massive reduction of social welfare protections across Europe in the wake of the global financial crisis, delinks proportionality as *principle* and proportionality analysis as a structured *doctrine*, and connects the principle of proportionality within broader standards of reasonableness.

In this chapter, I examine the relationship between reasonableness review and proportionality within the context of economic and social rights. Both standards hew closely to the ideal of a “culture of justification”.<sup>22</sup> Both too set out a measured assessment of the principle of proportionality, which we might summarize as the view that “the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required.”<sup>23</sup> Yet they do so under methodologies that are critically different. In outlining the differences of the two approaches, I present the developing approach to reasonableness review in South African constitutional law in Part I. The choice of this jurisdiction is pertinent as an early, sophisticated and influential

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<sup>20</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights art. 8(4), G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Mar. 5, 2009) [hereinafter OP-ICESCR]. See *I.D.G. v. Spain*, Communication No. 2/2014, para 14. (UN Committee on Economic, Social and Cultural Rights first answer to a complaint under the Optional Protocol, concluding that the Spanish Court did not take all reasonable measures to adequately notify the complainant of the impending application for mortgage enforcement).

<sup>21</sup> Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT’L J. CONSTITUTIONAL L. 660 (2012); David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine: A Rejoinder to Xenophon Contiades and Alkmene Fotiadou*, 12 INT’L J. CONSTITUTIONAL L. 710 (2014).

<sup>22</sup> Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464 (1992).

<sup>23</sup> For reference to this well-cited formula, from much comparative case law, see, e.g., Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z. LAW REV., 423, 433; Compare with the Law of Balancing expressed by Alexy: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”: ALEXY, *supra* note 7, at 102.

example of the reasonableness standard, which was forged by the court in the presence of both clearly enumerated and justiciable constitutional economic and social rights, and a structured limitations clause.<sup>24</sup> In Part II, I contrast this approach with proportionality analysis, which has been deployed in civil and political constitutional rights cases in South Africa, but far fewer economic and social rights cases. In Part III, I discuss a more direct integration of proportionality into reasonableness review, and suggest what is gained, and what is lost, by this approach. A final question is whether reasonableness review, developed out of largely common law traditions, will travel as well as proportionality analysis purports to do.

## I. REASONABLENESS REVIEW

The South African Constitution provides a useful case study in which to evaluate the connections between reasonableness, proportionality and economic and social rights. With an expansive text,<sup>25</sup> and the rights-promoting legacy of the anti-apartheid struggle,<sup>26</sup> the Constitutional Court's approach to interpreting the constitutional rights to housing, health care, food and water, social security, and education has drawn a great deal of comparative attention. And if proportionality analysis jurisprudence is usually developed

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<sup>24</sup> Sth. Afr. Const. §§ 26-29 (rights to housing, healthcare, food, water and social security, children's rights, and education); § 36 (limitations of rights).

<sup>25</sup> *Id.*

<sup>26</sup> For analysis, see Karl E. Klare, Legal Culture and Transformative Constitutionalism, 14 S. AFR. J. HUM. RTS. 146 (1998); THEUNIS ROUX, THE POLITICS OF PRINCIPLE (2013).

through the textual hook of a limitations clause,<sup>27</sup> South Africa does not lack this feature.<sup>28</sup> Yet the Constitutional Court has spearheaded a very different approach for economic and social rights adjudication, which now garners significant worldwide influence.<sup>29</sup>

In the duly famed *Grootboom* decision,<sup>30</sup> the first successful case under the constitutional guarantee of a right to housing, the South African Constitutional Court adopted, with attention to constitutional text,<sup>31</sup> a particular standard for reviewing economic and social rights cases – the approach known as “reasonableness review”.<sup>32</sup> This approach engages a means-end inquiry, but in a version distinctly more searching than mere “rationality review”.<sup>33</sup> Like proportionality analysis, reasonableness review presses for a justification, in order to enhance the accountability of official decision makers and the transparency of their decisions. But it would be a mistake to see this test as merely the first two (or even

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<sup>27</sup> Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHICS HUM. RTS. 140 (2010).

<sup>28</sup> Sth Afr. Const. § 36.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

<sup>29</sup> See *infra* note 122 and accompanying text.

<sup>30</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (‘Grootboom’).

<sup>31</sup> Sth. Afr. Const., § 26(2) (“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right” for housing); see also § 27(2) (reasonable measures for healthcare, food, water and social security), § 29(1)(b) (reasonable measures for further education).

<sup>32</sup> For an extensive presentation and assessment of reasonableness review, see SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 141 (2010).

<sup>33</sup> See Geo Quinot and Sandra Liebenberg, *Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa*, in *LAW AND POVERTY* (Sandra Liebenberg & Geo Quinot, eds., 2012) 197.

final) prongs of proportionality analysis.<sup>34</sup> It is worth setting out the features of reasonableness review, and the early setting in *Grootboom*: a more-than-administrative, less-than-categorical, attention to the needs of the most vulnerable.

First, the conception of reasonableness employed in South Africa is far greater than a traditional administrative law model of review. The relationship between reasonableness and administrative law has been much debated in this context, and requires an excursion into comparative administrative law. For, if proportionality can be said to have administrative law roots, even as it now resembles a central feature of global constitutionalism,<sup>35</sup> so too can the standard of reasonableness, but they are of English, rather than Continental, origin. That is, the review of reasonableness in administrative law emerged as a stronger incarnation of the very deferential administrative standard of *Wednesbury* review.<sup>36</sup> That standard, which asked if the decision is so unreasonable that no decision maker could have made it, was a relaxed form of rationality review that could rarely defeat an administrative decision.

Over time, *Wednesbury* began to heighten in intensity, with the courts identifying a general rule that “the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required.”<sup>37</sup> Prior to the enactment of the

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<sup>34</sup> Cf. MÖLLER, *supra* note 12, at 179.

<sup>35</sup> Cohen-Eliya & Porat, *supra* note 13; Stone Sweet & Mathews, *supra* note 11.

<sup>36</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (UK).

<sup>37</sup> Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z. LAW REV., 423, 433, citing Sir John Laws, “Wednesbury”, in *THE GOLDEN METWAND AND THE CROOKED CORD: ESSAYS ON PUBLIC LAW IN HONOUR OF SIR WILLIAM WADE* (Forsyth & Hare eds., 1998) 185.

Human Rights Act 1998 (UK) (before proportionality analysis had made its leap to the British legal system via the European Convention on Human Rights (ECHR)), *Wednesbury* review had developed this more robust operation, in connection with a developing “human rights-consciousness infiltrat[ing] administrative law”, and equivalents were established in Anglo-Australasian public law.<sup>38</sup> Ultimately, however, it was replaced in the UK, after the domestication of the ECHR, with the “more precise and more sophisticated” criteria of proportionality analysis, and its “somewhat greater” intensity of review.<sup>39</sup>

In South Africa, where these developments were acknowledged and integrated,<sup>40</sup> the reasonableness standard also received a new human rights-protecting orientation, via its development in the context of the Bill of Rights. Here, the standard represented a more radical departure from its *Wednesbury* origins. This was notable in relation to the developing administrative law jurisprudence, but also with respect to economic and social rights.<sup>41</sup> When, in early commentary on *Grootboom*, Cass Sunstein celebrated the case’s

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<sup>38</sup> Taggart, *supra* note 37, 432.

<sup>39</sup> *Id.* at 438; see *R (on the application of Daly) v Sec. State for the Home Dept* [2001] 2 AC 532 (HL), para 27. Thus, held Lord Steyn, while “most cases would be decided in the same way whichever approach is adopted”, proportionality “may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational and reasonable decisions”; and secondly, the test may go further than the assessment of relevant considerations, “inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations”. *Id.* See also Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 Am. J. Comp. L. 583 (2012).

<sup>40</sup> E.g., *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs* 2004 S SA 490 (CC); *Minister of Health v. New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (SA) para 108, with Chaskalson CJ noting that reasonableness under s 33(1) of the Sth Afr. Const. “is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions that would have been competent under the interim Constitution”.

<sup>41</sup> Quinot & Liebenberg, *supra* note 33, 202-3, 210-9.

“administrative law model” of economic and social rights adjudication,<sup>42</sup> South African commentators pointed out its decidedly more robust role.<sup>43</sup> The housing program at issue in *Grootboom*, for example, would have met the requirements of coherence and comprehensiveness at issue under *Wednesbury*,<sup>44</sup> yet it failed to pass constitutional muster under the developing standard of reasonableness. This standard required, not only that a program implemented in order to realize an economic and social right be “coherent”,<sup>45</sup> “balanced and flexible”,<sup>46</sup> and “comprehensive and workable”,<sup>47</sup> but even greater scrutiny. For example, the Court noted that a “program that excludes a significant sector of society cannot be said to be reasonable”.<sup>48</sup> In particular,

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable

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<sup>42</sup> CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 234 (2001).

<sup>43</sup> *E.g.*, Theunis Roux, *Understanding Grootboom—A Response to Cass R. Sunstein*, 12 CONST. F. 41, 46-47 (2002). For continued warnings of the standard’s regression into this model, *see, e.g.*, Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence*, in *RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION* 33 (H. Botha et al, eds, 2003); Stuart Wilson & Jackie Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*, in *LAW AND POVERTY*, *supra* note 7, 222.

<sup>44</sup> Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. Afr. J. Hum. Rts. 284, 291 (2004).

<sup>45</sup> *Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), para 41, 95.

<sup>46</sup> *Grootboom* 2001 (1) SA 46 (CC), para 43.

<sup>47</sup> *Grootboom* 2001 (1) SA 46 (CC), para 38, 40.

<sup>48</sup> *Grootboom* 2001 (1) SA 46 (CC), para 43.

of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern.<sup>49</sup>

This standard of reasonableness requires, then, all sectors to be catered for in any given policy directed to housing, health care, food, water, social security, or education, including the most vulnerable.<sup>50</sup> Due to the Constitutional Court's attention to those in "crisis" situations,<sup>51</sup> some have suggested that the standard requires a short-term, as well as long-term, policy approach.<sup>52</sup> Others have pointed to the focus on the values of dignity and equality undergirding reasonableness review in relation to economic and social rights.<sup>53</sup> But it is the focus on the needs of the most vulnerable that links the approach to a conception of constitutional rights with due attention to those "whose needs are most urgent"<sup>54</sup> that directs our inquiry into its relationship with proportionality.

The target of this analysis is not the "discrete and insular minorities"<sup>55</sup> worthy of constitutional rights protection in the prominent U.S. model, which is based on a democratic justification of groups disproportionality underrepresented in political

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<sup>49</sup> *Grootboom* 2001 (1) SA 46 (CC), para 44.

<sup>50</sup> Roux, *supra* note 43.

<sup>51</sup> *Grootboom* 2001 (1) SA 46 (CC) at para. 43, 74.

<sup>52</sup> Wesson, *supra* note 44; cf. Roux, *supra* note 43 (no temporal priority). See also *Grootboom* 2001 (1) SA 46 (CC) at para 43 (holding that a program must "make appropriate provision for attention to housing crises and to short, medium and long term needs").

<sup>53</sup> Carol Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Rights Jurisprudence*, 123 S. Afr. L.J. 264 (2006).

<sup>54</sup> *Grootboom* 2001 (1) SA 46 (CC) (S. Afr.). See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (concerning the rights of people in desperate need of housing who are subject to eviction from land by private landowners.).

<sup>55</sup> *U.S. v. Carolene Products*, 304 US 144 (1938) (Justice Stone justifying "strict scrutiny" in cases in which legislation appears to be directed at 'discrete and insular' minorities, or groups of people who have historically been marginalised and subjected to prejudice.)

processes.<sup>56</sup> Instead, a policy must not leave out those whose vulnerability is dictated by simple material need. This can include attention to the needs of the elderly, children, persons with disabilities, and female-headed households,<sup>57</sup> but without a substantive (or, rather, court-driven) conception of the baseline of material provision that anyone cannot go without, or below.

Thus, while *Grootboom* represented a significant elevation of the reasonableness standard, it is also notable in rejecting a stand-alone “minimum core” approach, which would establish a minimum threshold right to access housing, for example, or health care.<sup>58</sup> While the adoption of the minimum core approach would not prevent an inquiry into justifiable limitations,<sup>59</sup> its advocates have suggested that it creates a more rights-supportive focus.<sup>60</sup> Yet in rejecting the minimum core as a standalone right, the Constitutional Court held open the possibility that the minimum core, understood as a

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<sup>56</sup> Compare the seminal theorization by JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); with Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985) (noting victims of sexual discrimination or poverty would have greater claim to *Carolene Products*’ concern, and yet not fall within the discrete, insular, or minority formulation). For a different set of criticisms of *Carolene Products*’ divisions, as against proportionality standards, see Vicki Jackson, *Constitutional Law in an Age of Proportionality*, in this volume (noting, in particular, *Dandridge v. William*, 397 U.S. 471 (1970) (Marshall, J., dissenting)).

<sup>57</sup> These factors are laid out in the Prevention of Illegal Evictions Act of 1998 (PIE Act) §§ 4, 6 (S. Afr.) and in the Court’s post-evictions jurisprudence since *Grootboom* 2001 (1) SA 46 (CC). For commentary, see Gustav Muller & Sandra Liebenberg, *Developing the Law of Joinder in the Context of Evictions of People from their Homes*, 29 S. AFR. J. HUMAN RTS. 554, 565 (2013).

<sup>58</sup> See Young, *supra* note 19, compare with DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS* (2007) (arguing for a minimum core approach for South Africa).

<sup>59</sup> Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clause*, 20 S. AFR. J. HUM. RTS. 448 (2004).

<sup>60</sup> E.g., Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise*, 16 S. AFR. J. ON HUM. RTS. 206 (2000); BILCHITZ, *supra* note 58.

relevant standard, could guide its assessment of reasonableness.<sup>61</sup> Arguably, a compelled attention to the needs of the most vulnerable fosters the same attitude of priority-setting as the minimum core inquiry, without “entrenching” the judiciary’s own articulation of what the minimum core demands. Instead, an approach inflected with a focus on the experience of vulnerability (and what I shall describe as the inflection of proportionality), is provided. Before moving to describe this standard in Part III, I will outline the features of the proportionality analysis that has been influential in constitutional rights adjudication elsewhere.

## II. PROPORTIONALITY ANALYSIS

Like reasonableness review, proportionality analysis provides a contextual standard for the judicial safeguarding of constitutional rights. Indeed, proportionality may be understood to be a subset of reasonableness – it has been counted among the leading manifestations of reasonableness in public law.<sup>62</sup> For example, the rationality behind the means-end analysis of an official decision or statute, that is part of the reasonableness inquiry, could not sustain a grossly disproportionate result.<sup>63</sup> Nonetheless, it is said to be proportionality analysis, rather than the principle of proportionality and its connection to

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<sup>61</sup> *Grootboom* 2001 (1) SA 46 (CC), paras 31-33; *See also Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC), paras 34-39.

<sup>62</sup> W. Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in REASONABLENESS AND LAW 129, 133-4 (Giorgio Bongiovanni et al. eds., 2009); Iddo Porat, *Some Critical Thoughts on Proportionality*, in REASONABLENESS AND LAW. This volume shows a series of differing views on this relationship.

<sup>63</sup> AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 371–78 (2012) (noting how “the marginal social importance of the benefits gained by achieving the law’s purpose have to be evaluated against the marginal social importance of preventing the harm caused to a constitutional right”).

rationality, that has purportedly swept the world.<sup>64</sup> In this section, I provide a description of this test, and its limited application, so far, in economic and social rights adjudication.

First, it is perhaps surprising that proportionality analysis, in the standard three or four-step variation that has been utilized by so many contemporary courts,<sup>65</sup> should be so absent from the adjudication of economic and social rights. If, in this era of “rights inflation”,<sup>66</sup> we can talk about whether a right to feed pigeons exists, so too might it be expected that we can inquire about a right to secure a basic material existence – and about proportionality’s method for operationalizing it. Of course, for economic and social rights, and particularly the positive obligations that flow from them, much turns on the question of resources and then on how to understand a kind of “best efforts”<sup>67</sup> institutional commitment in law. But if proportionality analysis is prescribed as the current answer to rights-induced juristocracy, due to its discipline and apparent consistency,<sup>68</sup> it is curious that it has had so little hold on the cases that raise the most persistent juristocratic fears. Yet, as will be shown in Part III below, the surprise relates only to the absence of proportionality analysis. The principle of proportionality, without the structured test, has found a home in economic and social rights adjudication. The

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<sup>64</sup> Compare, e.g., MÖLLER, *supra* note 12, with DAVID BEATTY, *THE ULTIMATE RULE OF LAW* 160 (2004) (suggesting the principle boils down to the requirement of judges “to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most”). Beatty suggests that “the principle of proportionality and the idea of fair shares” grounds economic and social rights. *Id.* at 139.

<sup>65</sup> MÖLLER, *supra* note 12.

<sup>66</sup> *Id.*

<sup>67</sup> Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663 (2008).

<sup>68</sup> Porat, *supra* note 13, at 246; Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. Toronto L. J. 383 (2007), at 395.

reasonableness standard, which directs attention to the gravity of the need, and the vulnerability of the rights-holder, makes proportionality – as principle, but not as structured test – inseparable from reasonableness review.

In its most widely defended theoretical exposition, proportionality analysis asks the following set of sequential questions (although there are somewhat different versions of this test<sup>69</sup>), once a prima facie infringement of a constitutional right has been found. (1) First, did the infringement further a legitimate aim? (2) Second, was the measure necessary? In the most rigorous version of this test, the measure is necessary if and only if there are no alternative, less restrictive means. (3) Third, do the benefits of the measure outweigh the costs imposed on the rights-bearer? This part introduces the balancing stage of the inquiry.

This is the proportionality analysis that has apparently travelled from German administrative law to German constitutional law,<sup>70</sup> to Canadian *Charter* jurisprudence,<sup>71</sup> to South Africa, New Zealand, Israel, Eastern Europe, and Central and South America, to the United Kingdom via Europe, and, of course, to the European Convention on Human Rights and the European Court of Human Rights.<sup>72</sup> In accompanying the rights revolution

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<sup>69</sup> Compare e.g., Schlink, *supra* note 11 with Sadurski, *supra* note 62.

<sup>70</sup> Cohen-Eliya & Porat, *supra* note 5; c.f. Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 83, 98-113 (Sujit Choudhry, ed., 2006) (grounding the postwar constitutional paradigm in the Warren era of the United States Supreme Court.)

<sup>71</sup> *R v. Oakes* [1986] 1 S.C.R. 103 (Can.).

<sup>72</sup> See, e.g., Stone Sweet & Mathews, *supra* note 11, 75; Cohn, *supra* note 39. The route has often been circuitous: see Nicholas Blake, *Importing Proportionality: Clarification or Confusion* [2002] EUROPEAN HUMAN RIGHTS LAW REPORTS 19, 23.

that prompted this migration, the test has both procedural and substantive appeal. Its chief German proponent, Robert Alexy, has provided a defense of proportionality analysis that argues that all rights can be optimized through the adoption of this assessment, rather than through a “firewall” of trumping or absolute protection.<sup>73</sup>

Alexy’s model of proportionality is critically important for economic and social rights, because it integrates the question as to how the state’s duty to protect (as well as respect) rights can be subject to disciplined balancing.<sup>74</sup> Nonetheless, despite the promise of this model for securing both the negative and the positive obligations that attach to economic and social rights, the deployment of the proportionality test has been largely asymmetrical in practice: it has mainly been reserved for “vertical” civil and political rights cases in their “negative” dimension.<sup>75</sup> In part, this is because of the asymmetrical protection of economic and social rights in the constitutions or treaty systems that are the heaviest utilizers of proportionality analysis.<sup>76</sup> But the South African example, which

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<sup>73</sup> ALEXY, *supra* note 7. Cf. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996), 258 (warning against a collapse of a constitutional firewall by irrational balancing).

<sup>74</sup> Robert Alexy, *On Constitutional Rights to Protection*, 3 *Legisprudence* 1, 13 (2009) (presenting the solution as a combination of proportionality with alternativity (which allows for alternatives in correcting an unconstitutional omission); see also BARAK, *supra* note 63, 422-434; MATTIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 85-108 (2012).

<sup>75</sup> MÖLLER, *supra* note 12, at 179.

<sup>76</sup> In the European Court of Justice, for example, the proportionality of a restriction on free movement rights, which conflicted with national laws aiming to uphold social rights, was weighted heavily on one side of the ledger. See the controversial judgments in the *Viking* and *Laval* cases, where the rights of trade unions under Swedish law to engage in industrial action to seek improvements in working conditions was subordinated to the right of employers to “post” workers across the border in line with EU freedom of labour rules: Case C-438/05, *International Transport Workers Federation, Finnish Seamen’s Union v. Viking Line*, 2007 E.C.R. I-10779; Case C-341/05, *Laval un Parneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767; see also Colm O’Cinneide, *Austerity and the Faded Dream of a “Social Europe”*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 169, 192 (Aoife Nolan ed., 2014). See also the assessment of Canada’s s 1 jurisprudence in Martha

includes economic and social rights with so-called “internal” limitations clauses, and those without (for example, that no one may be evicted without an order from court; and that no one may be refused emergency medical treatment),<sup>77</sup> has declined to integrate proportionality analysis in the adjudication of economic and social rights in all but two cases. Why is this so?

The South African Constitutional Court has employed proportionality analysis for other constitutional rights.<sup>78</sup> Indeed, it has relied on proportionality analysis to resolve some of the most dramatic rights controversies, starting with the early decision on the constitutionality of the death penalty.<sup>79</sup> A structured limitations clause, borrowed from Germany via Canada, provides that any prima facie violations of rights proceed through a multi-factored proportionality analysis.<sup>80</sup> The Constitutional Court, however, is not a strict adherent of the multipronged structure of the test: the Court considers the clause requires it to engage in “a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list”.<sup>81</sup> Thus, while:

As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be ... the question is one of

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Jackman & Bruce Porter, *Socio-Economic Rights under the Canadian Charter*, in SOCIAL RIGHTS JURISPRUDENCE 209 (Malcolm Langford, ed., 2008).

<sup>77</sup> Sth. Afr. Const., §§ 26(3), 27(3).

<sup>78</sup> *First National Bank v. Commissioner for the South African Revenue Services* 2002 (4) SA 768 (CC).

<sup>79</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) (under interim Constitution).

<sup>80</sup> Sth. Afr. Const., § 36; cf. Interim Sth. Afr. Const. § 33 (retaining an essence formulation).

<sup>81</sup> *S v. Manamela* 2000 (3) SA 1 at para. 32; *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 104. Applying to final Constitution: *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) SA 6 (CC) at para. 33–35.

degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.<sup>82</sup>

At the necessity stage, the Court has held that “when giving appropriate effect to the factor of “less restrictive means”, the court must not limit the range of legitimate legislative choice in a specific area.” For the Court recognizes that “such legislative choice is influenced by considerations of cost, implementation, priorities of social demands, and the need to reconcile conflicting interests.”<sup>83</sup>

Such case law suggests that proportionality analysis has only limited appeal, and a rather loose application, in other constitutional rights cases in South Africa, although the principle of proportionality itself is generally supported. And in only two economic and social rights cases – involving the right to housing and the right to social security – has the Court engaged in proportionality analysis. First, in *Jaftha*, the court held that where the state fails to honour its negative obligations with respect to the right to housing, the limitations analysis presented by § 36 rather than the reasonableness inquiry of § 26(2) should be considered. In that case, the Magistrates’ Court Act’s permission of a sale in execution of a person’s home on the basis of failure to pay a “trifling debt” was held by the Constitutional Court as not meeting the reasonable and justifiable standard, given the importance of access to adequate housing, its link to human dignity, the severity of the

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<sup>82</sup> *Manamela* 2000 (3) SA 1 at para. 33.

<sup>83</sup> *Id.* at para. 49.

impact on indigent debtors, and the existence of less restrictive means of execution.<sup>84</sup>

This approach to proportionality involves a baseline assessment of the gravity of certain laws and policies on the most vulnerable, including the most economically vulnerable.

Secondly, in *Khosa*, the Constitutional Court applied proportionality analysis to the state's positive obligations, finding the exclusion of permanent residents from the government's social assistance scheme constituted unfair discrimination and an unreasonable and unjustifiable limitation of the right to have access to social security.<sup>85</sup>

In this case, proportionality analysis was triggered not by a negative obligation, but by the separate equality aspects of the claim. The exclusion was held to be both unfair discrimination (§ 9, unjustifiable under § 36) *and* an infringement of the requirement to take reasonable measures to progressively realize the right of access to social security (§27(2)). The Court left open the possibility that the inquiry into reasonableness under the two constitutional provisions could constitute separate tests.<sup>86</sup> Observers have hypothesized that there may be different kinds of justifications at stake between the reasonableness inquiry that is established for the positive obligations under economic and social rights, and the approach to reasonableness within the proportionality analysis of the general limitations clause:

Whereas § 27(2) appears to limit our considerations to those justifications related to the means required to realize the purpose of the right (e.g., money) or the end

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<sup>84</sup> *Jaftha v Schoeman* 2005 (2) SA 140 (CC) at paras. 35–49. Compare §26(2); § 36.

<sup>85</sup> *Khosa v. Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>86</sup> *Id.* at para. 84.

of the right itself (e.g., social security), § 36 tells us that we may cast our justificatory nets as far as the needs of an open and democratic society based on human dignity, equality, and freedom will allow.<sup>87</sup>

Yet the Constitutional Court itself has declined to endorse any distinction between the two approaches. It is now worth examining the differences in the approaches to proportionality analysis and reasonableness review.

### **III. DISTINGUISHING THE TWO APPROACHES**

Proportionality and reasonableness may be analytically similar in the way they heighten the demand for justification according to the seriousness of the rights infringement; but their methodologies are critically distinct. There are three main differences: first, in the interpretation of the claimed right; second, in the approach to deference; and third, in the structuring of the limitation. These differences are outlined below, before turning to the question of how much turns on them, in actual practice.

#### **A. The Content Inquiry**

First, proportionality analysis and reasonableness review are distinct in the latitude they provide to judges in interpreting the claimed-for right. This is a consequential matter for

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<sup>87</sup> Stu Woolman & Henk Botha, *Limitations*, in *Constitutional Law of South Africa* (2<sup>nd</sup> ed, Original Service June 2008), 34.3-34.5.

economic and social rights, which are less developed, jurisprudentially, than their civil and political counterparts, highlighting a “paucity of normative resources on which the Court can draw in the interpretation of socio-economic rights or a clear purposive understanding of a transformative role of the Court in relation to socio-economic inequality”.<sup>88</sup>

Under proportionality analysis, the rights-granting clause is construed generously in favor of the claimant, who bears the onus of proving an infringement has occurred. Once made out, the onus of justification then shifts to the state. This general principle of construction accords readily with the observation of “rights-inflation” that is associated with proportionality more generally. In theory, a generous construction would lead to a broad acceptance of rights to access housing, health care, food, water, or education. One proponent of proportionality has suggested “the highest reasonable satisfaction” of the right in question could serve as the *prima facie* right.<sup>89</sup>

In contrast, under the present operation of reasonableness review, the interpretation of the right’s content is collapsed in an incremental, and context-driven inquiry. The Constitutional Court has interpreted the constitutional text as setting out no standalone

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<sup>88</sup> Dugard & Wilson, *supra* note 43, 229 (comparing this with “several centuries of history and a rich array of jurisprudence across a host of jurisdictions”; YOUNG, *supra* note 7 (discussing the “generational” idea between the different categories of rights)).

<sup>89</sup> Carlos Bernal, *The Constitutional Adjudication of Positive Social and Economic Rights by Means of the Proportionality Analysis*, in *ESSAYS IN HONOUR OF ROBERT ALEXY* (Martin Borowski, Stanley Paulson and Jan R. Sieckmann, eds., forthcoming) (proposing a standard of “highest reasonable level of satisfaction” to give content to the right.); *Cf.* MÖLLER, *supra* note 12 (discussing the steps involved in finding a right to feed pigeons).

right that is separately articulated, before reasonableness is applied.<sup>90</sup> By integrating the analysis of a right's progressive realization, within the state's available resources, in the same step as defining the right, there is no standalone content, inflated or otherwise. Thus, this form of review does little to outline the scope of the right, even while it may require proof from government that it has engaged in reasonable priority setting. Partly, this is because of the Court's insistence that it will not recognize a self-standing "minimum core" of economic and social rights.<sup>91</sup> But partly, this is due to the Court's reluctance to set any baseline entitlement or standard, outside of the legislative or common law context arising in each case.<sup>92</sup> This general approach is also compatible with the features of weak-form review applicable to South Africa, as elsewhere.<sup>93</sup>

Although the distinction is not used in South Africa, this way of defining content is more akin to setting out an institutional guarantee, enclosed in the garb of a justiciable, subjective right. Such an approach has the advantage of keeping the right open to new claims and articulations; nevertheless, it allows the court to obscure its own engagement with the underlying values behind particular rights and the impact of the deprivation on

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<sup>90</sup> Compare i.e. § 26(1) and 26(2); *see further* Iles, *supra* note 59.

<sup>91</sup> *See supra* text accompanying note 58.

<sup>92</sup> *See, e.g.*, A.J. Van der Walt's suggested principle of "subsidiarity", which requires that "direct application of the Constitution and the application and development of the common law should only come up in the absence of legislation ... [L]egislation either fails constitutional scrutiny or triggers a subsidiarity principle according to which the right must primarily be protected via the legislation and not via direct application of the constitutional provision or the common law: A.J. Van der Walt, Normative Pluralism and Anarchy, 1 CONST. CT. REV. 77, 108 (2008); *see also* Brian Ray, *Evictions, Aspirations and Avoidance*, 5 CONST. CT. REV. 173 (2015).

<sup>93</sup> MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

the claimant group.<sup>94</sup> For its critics, this refusal to define content allows reasonableness review to take place in “a normative vacuum”:<sup>95</sup> a criticism made more resonant after the minimal standard of reasonableness applied in recent cases.<sup>96</sup> In *Mazibuko*, for example, the Constitutional Court was required to assess whether Johannesburg’s reforms for providing water to Soweto residents, which allocated a minimum quota of free water and a new pre-paid metered delivery system, were consistent with the constitutional right to have access to water. In applying a highly deferential standard of reasonableness, the court refused to engage in the question of what a minimum requirement of water might be, despite evidence that the 8 kilolitre monthly quota would be too meagre for many households. It is worth questioning whether proportionality might have changed the court’s position in this determination. Below, I offer reasons as to why the principle of proportionality itself, and yet not proportionality analysis, would have assisted in this inquiry.

It is possible that the context-driven articulations of reasonableness can link the standard of review to the remedy. This is the case, for example, in doctrines such as “meaningful engagement” in the right to housing jurisprudence. The absence of a meaningful engagement between the parties, before an eviction, can point to the unreasonableness of government policy. But so, too, can meaningful engagement be prescribed as the remedy,

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<sup>94</sup> LIEBENBERG, *supra* note 32 at 175–76.

<sup>95</sup> Bilchitz, *supra* note 58, at 143.

<sup>96</sup> *Mazibuko v. City of Johannesburg* 2010 (3) BCLR 239; *see also Nokotyana v. Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312.

thus linking the two analyses,<sup>97</sup> in ways that may be less immediately obvious in proportionality analysis.

The divergence on the two approaches to interpreting the right becomes less sharp if one recognizes economic and social rights as principles, and there is nothing within the reasonableness assessment that prevents an open and broad statement of content before proceeding to the reasonableness inquiry. Nonetheless, the omission of this step has consequences for its placement of the burden of proof in rights adjudication. As a general matter, it is for the applicant to establish the breach of a fundamental right. Under proportionality analysis, the burden then shifts to the government to justify its *prima facie* infringement of the relevant right;<sup>98</sup> in reasonableness review, it may remain with the claimant, a not-insignificant barrier.<sup>99</sup>

These differing approaches to content are also distinct in relation to the minimum core idea. Certainly, reasonableness review may accommodate conceptions of a minimum threshold as one in a series of criteria that the Court will consider.<sup>100</sup> In contrast, the effect of the minimum core on the exercise of proportionality analysis is to minimize the right at both stages of the inquiry: in forming content and in justifying limitations.

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<sup>97</sup> For the importance of linking review with remedy, see Katharine G. Young, *A Typology of Economic and Social Rights Adjudication*, 8 INT'L J. CONST. L. 1 (2011).

<sup>98</sup> *S v. Makwanyane*, 1995 (3) SA 391, para 6; see also Woolman & Botha, *supra* note 87, 34.6.

<sup>99</sup> The degree to which this burden extends across §§ 26(2) and 27(2) is uncertain. See the analysis of Sandra Liebenberg, *Interpretation of Socio-Economic Rights*, in CONSTITUTIONAL LAW OF SOUTH AFRICA (2<sup>nd</sup> ed, OS, December 2003), 33-53 (suggesting that “the party claiming a constitutional violation would have to establish a *prima facie* case that the measures undertaken are unreasonable” but that “[i]f the state wishes to rely on a lack of available resources ... it should bear the burden of proving the alleged unavailability of resources”).

<sup>100</sup> *Treatment Action Campaign* 2002 (5) SA 721 (CC).

Although there is evidence of an effective operation of the minimum core and proportionality analysis in relation to economic and social rights in the Colombian context,<sup>101</sup> it is easy to theorize that the combination of approaches would both remove the inflationary effects of proportionality analysis at the expense of rights perhaps most in need of an inclusive, solidaristic expression, and deprive economic and social rights of operation in any but grave or catastrophic circumstances.<sup>102</sup>

### **B. The Approach to Deference**

Second, the approaches to proportionality and reasonableness differ in the approach to deference. Judges relying on proportionality analysis often provide a “margin of appreciation” to ensure appropriate deference; judges relying on reasonableness review rest their approach on context-based criteria for the same purpose. In each of these approaches, the underlying problematic is the separation of powers problem common to all positive obligations flowing from economic and social rights: too little deference causes the court to usurp the democratically elected branches; too much abdicates the responsibility undergirding judicial review.<sup>103</sup>

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<sup>101</sup> David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS*, 267, 284. Landau suggests that the Colombian Constitutional Court favors the vital minimum, or minimum core, as a concept in which to prioritize the interests of the poor, and proportionality analysis as a subsequent step in comparing the limitation with the government’s justification.

<sup>102</sup> *Cf.* Bernal, *supra* note 89. Using the Hartian vocabulary of cores and penumbras, Barak offers the view that proportionality should be applied to the full scope, but the core is a useful accompanying concept: BARAK, *supra* note 63, 20.

<sup>103</sup> For an apt description of this general problem, see Michelman, *supra* note 67.

Under reasonableness review, deference is bound up with the content inquiry, discussed above, where the right is given an interpretation generous to the government's (or other actor's) discretion.<sup>104</sup> Under proportionality analysis, on the other hand, deference is provided through the application of a margin of appreciation or discretion, particularly in order to deal with the threat of judicial usurpation represented by a “less restrictive means” analysis, as applied to positive obligations. For example, the cost savings of a measure restrictive of a right to health care, or housing, for example, may be viewed, without deference, as trivial by a court (and therefore not necessary) or as capable of being shifted or offset by other aspects of the budget (and therefore not the least restrictive means).<sup>105</sup> Other cases susceptible to a “dollars versus rights” frame may push too closely on both epistemic and democracy based limitations.<sup>106</sup> Hence, the “self-restraining reaction”<sup>107</sup> of deference is triggered on the part of the court. And like other “containment” doctrines,<sup>108</sup> the general posture of deference, or a margin of appreciation, immediately defeats the rigor (and consistency) of the inquiry in the first place.

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<sup>104</sup> E.g., *Mazibuko* 2010 (3) BCLR 239 (CC); and attendant criticisms, LIEBENBERG, *supra* note 32. Reasonableness review integrates discretion to lower courts, in, e.g., horizontal application inquiries, or even the epistemic discretion required for science: see, e.g., *Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>105</sup> See, e.g., the Canadian cases of *Eldridge v. British Columbia (A-G)* [1997] 3 SCR 624 and *Gosselin v. Quebec (A.G.)* [2002] 4 SCR 429 (dissent). For a recent acknowledgement that budgets will be within the purview of reasonableness analysis, see *Blue Moonlight* 2012 (2) SA 104 (CC) para 74 (Sth. Afr.)

<sup>106</sup> E.g., *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 SCR 381. (Canadian Supreme Court passing through every stage of proportionality before finding that a burden on pay equity was justifiable in the context of a fiscal crisis).

<sup>107</sup> Contiades & Fotiadou, *supra* note 21.

<sup>108</sup> For a broader outline of “containment” doctrines, see Colm O’Cinneide, *The Constitutionalization of Social and Economic Rights*, in SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE 261 (Helena Alviar García et al. eds., 2015) (as designed to limit the “spillover” of civil and political rights protection and administrative law controls into the social and economic realm).

This dynamic is not surprising. For proportionality proponents, for example, positive obligations are the quintessential area for affording deference, and the belief that the legislature’s own balancing is worthy of respect.<sup>109</sup> But this is, of course, based on the assumption that the legislature has accorded due respect to economic and social rights, to which it is held democratically accountable – assumptions that may hold in the traditional welfare states, in so-called “normal” circumstances of stability and solidarity, but are far less tenable in conditions of fiscal disruption and crisis, ideological disagreement, legislative dysfunction, and internationally controlled fiscal policy – conditions which are far more likely to hold, in most places.<sup>110</sup>

Given the inevitability of this dynamic, it is curious that proponents of proportionality have not reached a more developed position on where, when, and how, deference should be applied.<sup>111</sup> The correct level can depend, according to Mattias Kumm, on such broad factors as the political, social and cultural context; the complexity of the policy questions involved, the structure of the processes and institutions that have generated the decision that is under review, and the structure of the judicial institution.<sup>112</sup> Most of these factors would be weighted towards the adoption of deference in economic and social rights review. Even the negative obligations that flow from economic and social rights – such as

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<sup>109</sup> ALEXY, *supra* note 7.

<sup>110</sup> *See, e.g.*, how these assumptions are treated by so-called “activist” tribunals in South Africa, Colombia, and India: CONSTITUTIONALISM OF THE GLOBAL SOUTH (Daniel Bonilla Maldonado ed., 2013).

<sup>111</sup> For a call for “a clear principled basis for deference” in relation to the necessity enquiry, *see* David Bilchitz, *Necessity and Proportionality: Towards A Balanced Approach?* in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 41, 48 (Liora Lazarus et al. eds., 2014). *But see* Matthias Klatt & Johannes Schmidt, *Epistemic Discretion in Constitutional Law*, 10 Int’l J. Const’l L. 69, 71 (2012) (seeking to outline an approach to discipline what they term as “the discretion of classification”).

<sup>112</sup> Kumm, *supra* note 51, at 163.

obligations to desist from unlawful evictions, when homelessness may result – can raise issues of complexity, such as how, and in what form, alternative accommodation should be provided.

For Julian Rivers, the intensity of review can be shifted, between stronger and weaker, and more or less deferential forms of proportionality analysis, according to the “seriousness of the infringement” at issue.<sup>113</sup> But how is this seriousness to be determined by a court? Here, proportionality analysis runs out. For if courts do take economic and social rights seriously – and inquire into the dignity, equality, or freedom harms caused by the failure to secure basic needs or capabilities – then deference would immediately be put to one side, forcing the courts into a rigorous and searching proportionality analysis. More likely, as current evidence suggests, courts will revert to recognizing “property-based” or “equality” based assessments of seriousness, which are more cognizable to them, rather than attempt to accord due weight to the inevitable dignity harms that are experienced by those living in poverty or other forms of vulnerability.<sup>114</sup>

We might well accept judicial deference, via the margin of appreciation or other containment doctrines, or via the standard of reasonableness, under traditional separation

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<sup>113</sup> Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L. J. 174 (2006).

<sup>114</sup> An interesting outcome of this tendency to judge seriousness through available categories is the middle class bias that flows from according less deference in such cases. Compare, for example, the South African Constitutional Court’s refusal to recognize a right to water for Soweto residents who were unable to pay, with its recognition of a right to electricity for those who had paid but were disconnected: *Mazibuko*, *supra* note 96, with *Joseph v. City of Johannesburg* 2010 (4) SA 55 (CC). Others too have suggested that such rights can “degenerate into consumer rights that are hijacked by the middle and upper classes”: e.g., Daniel M. Brinks & Varun Gauri, *Human Rights as Demands for Communicative Action*, 20 J. POL. PHIL. 407, 409 (2012).

of powers principles. There is much at stake in courts involving themselves in a highly charged balancing exercise, involving the complex weighting of principles of distributive justice, while maintaining a pragmatic grasp on their own legitimacy. Yet this dynamic does question the justification for proportionality analysis based on its purported disciplining effect. This is because if nothing within proportionality analysis dictates whether the court inquires more or less searchingly to the questions it asks at each stage, or how it should provide a margin of appreciation, then its claims to discipline and coherence are weakened.<sup>115</sup> The approach is then, in this respect, on par with the less explicit deference applied in reasonableness review.<sup>116</sup>

### C. The Structure of Limitations

Finally, the approaches to proportionality and reasonableness differ in their structuring of the limitation inquiry. As described above, proportionality analysis offers a disciplined, regimented, structured inquiry into the aims, necessity, (sometimes suitability) and proportionality of a limitation of a right. In this respect, it calls for the least (or sometimes merely less<sup>117</sup>) restrictive alternative. Even if these tests are not strictly observed in South Africa, the sequence represents a higher order of justification. Reasonableness, on the

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<sup>115</sup> While a full engagement with these arguments is beyond the scope of this chapter, one does not need to adopt the wholesale legal realism of Mark Tushnet, *Easy Cases Make Hard Law*, in this volume, to question the guarantee of certainty in the proposal of Klatt & Schmidt, *supra* note 111.

<sup>116</sup> For the suggestion that South African judges are averse to deference, due to the apartheid legacy, see Hugh Corder, *From Despair to Deference: Same Difference?*, in *INSIDE AND OUTSIDE CANADIAN ADMINISTRATIVE LAW: ESSAYS IN HONOUR OF DAVID MULLAN* (Huscroft & Taggart eds., 2006) 327, 328.

<sup>117</sup> Sth. Afr. § 36 (1)(e) (a reasonable and justifiable limitation is measured against a number of factors, including the availability of any “less restrictive means to achieve the purpose”).

other hand, provides a holistic, general question, incorporating notions of necessity, suitability and proportionality in an ad hoc method, which is arguably less restraining of the adjudicator's own views.

Again, the example of *Mazibuko* demonstrates the destructuring of the proportionality step within reasonableness review: in finding Johannesburg's water reforms to be reasonable, the court did not consider whether the City's objectives – "to reduce unaccounted for water, to rehabilitate the water network, to reduce water demand and to improve the rate of payment"<sup>118</sup> could have been pursued through other, less restrictive alternatives. For example, the Constitutional Court did not consider whether the City's objectives might have been achieved through installation of conventional credit meters (which would not result in automatic shutoffs); or whether a more generous quota applied overall would be more cost-effective than keeping an indigent person's register, given that the City's representative had indicated that the universalist system would be cheaper to administer.<sup>119</sup> In this respect, the structure of proportionality analysis might force the adjudicator to engage more explicitly with the more rights-respecting alternatives. So too may a more explicit adoption of the proportionality principle, without the requirement of deference.

#### **IV. PROPORTIONALITY-INFLECTED REASONABLENESS?**

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<sup>118</sup> *Mazibuko* 2010 (3) BCLR 239 at para. 13.

<sup>119</sup> See, e.g., Anashri Pillay & Murray Wesson, *Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS*, *supra* note 101, at 352.

In celebrating proportionality analysis, commentators have suggested that it can provide a “flexible, but generally more substantive interpretation of positive rights, avoiding both the Scylla of a minimum core approach and the Charybdis of a mere reasonableness test”.<sup>120</sup> Yet South African commentary suggests a different operation of proportionality: “proportionality-inflected reasonableness”, as a compromise position. This approach addresses the concerns of weakness within reasonableness review, while avoiding the self-defeating containment doctrines that limit the reach of proportionality analysis in economic and social rights cases, especially those involving positive obligations. A greater attention to the excessive impacts on rights experienced by the most vulnerable allows for a more robust integration of the principle of proportionality into economic and social rights review.

Nonetheless, the question remains as to whether a proportionality-inflected reasonableness travels well, beyond our setting of South African constitutional law. Just as one comparative lesson of economic and social rights adjudication is that standards-based, apparently weak-form adjudicatory postures can (perversely) produce more rights-protective results than strong form, muscular or managerial adjudication;<sup>121</sup> another comparative lesson is the contingency of this insight. The ability of weak-form review to deliver positive outcomes can depend on a series of contextual factors, including legal or constitutional culture; function or dysfunction on the part of the executive and legislature (and public perceptions of the same); vitality and clout of rights-claiming social

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<sup>120</sup> KLATT & MEISTER, *supra* note 74, 108.

<sup>121</sup> Tushnet, *supra* note 93.

movements and civil society;<sup>122</sup> and even timing of jurisprudential development.<sup>123</sup> In the setting of economic and social rights, it is difference, rather than uniformity, that marks the comparative setting.<sup>124</sup>

Yet proportionality-inflected reasonableness has already been a successful transplant in economic and social rights review. The success of *Grootboom* influenced the drafting of the new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.<sup>125</sup> In the face of heated contestation of alternatives – such as setting out a standard of “unreasonableness”, or providing for a “margin of appreciation” or “margin of discretion”, the new OP-ICESCR requires the Committee on Economic, Social and Cultural Rights to consider “the reasonableness of the steps taken by the State Party”, bearing in mind “that the State Party may adopt a range of possible policy measures” for

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<sup>122</sup> YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS, *supra* note 7; CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH (2015).

<sup>123</sup> Sandra Fredman has called for proportionality to be applied in UK positive rights cases, partly for fear that reasonableness review will devolve into *Wednesbury* analysis in that setting: Fredman, *New Horizons: Incorporating Socio-economic rights in a British Bill of Rights*, [2010] PUBLIC LAW 297, 317.

<sup>124</sup> Colm O’Cinneide, *The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 299 (Liora Lazarus et al. eds., 2014); Brinks et al, *supra* note 1.

<sup>125</sup> Brian Griffey, *The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 275 (2011); *see also* Note prepared by the Secretariat, ‘The Use of the “Reasonableness” Test in Assessing Compliance with International Human Rights Obligations’, U.N. Doc. A/HRC/8/WG.4/CRP.1 (Feb. 1, 2008) (use of “reasonableness” in nine core human rights treaties); Bruce Porter, *Reasonableness and Art. 8(4)*, in THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY (Malcolm Langford et al, eds., forthcoming).

implementing its obligations.<sup>126</sup> Perhaps the Anglo-common law heritage of the standard helped to assuage the hostility of the main opponents of a complaints mechanism.<sup>127</sup>

In outlining the scope of “reasonableness”, the Committee has largely adopted the South African approach, including whether the steps have “taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk”.<sup>128</sup> It has also made an explicit reference to proportionality, noting that it will consider to which extent, “where several policy options are available, the state party has adopted the option that least restricts Covenant rights”.<sup>129</sup> The likely consolidation of national jurisprudence within the complaints mechanism will give greater migratory flight to the reasonableness standard for diverse constitutional systems.<sup>130</sup>

While the constraints on an international treaty body are different from a constitutional court, there are cross-fertilizations back and forth in the standards and forms of review. In

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<sup>126</sup> OP-ICESCR, *supra* note 20 at art. 8(4).

<sup>127</sup> Catarina de Albuquerque. *Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights-The Missing Piece of the International Bill of Human Rights* 31.1 HUMAN RIGHTS QUARTERLY 144, 161 (2010) (opponents including Australia, Canada, and the United States.)

<sup>128</sup> CESCR, Statement, An Evaluation Of The Obligation To Take Steps To The “Maximum Of Available Resources” Under An Optional Protocol To The Covenant para. 8(d), UN Doc. E/C.12/2007/1 (Sept. 21 2007) .

<sup>129</sup> *Id.* para 8(f); *see also* Eibe Riedel et al., *The Development of Economic, Social and Cultural Rights in International Law*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 31 (Eibe Riedel et al., eds., 2014).

<sup>130</sup> While 164 states have ratified the International Covenant on Economic, Social and Cultural Rights, it should be noted that only 21 have to date ratified the OP-ICESCR: *see* U.N. Human Rights Office of the High Commissioner, International Covenant on Economic, Social and Cultural Rights, Status of Ratification, (Mar. 30, 2016), <http://indicators.ohchr.org/> [<https://perma.cc/CR5E-VUHJ>]. On local diversity, *see* Brinks et al, *supra* note 1.

the European setting, the links between reasonableness and integrated proportionality will no doubt continue. For example, in a letter to Member States addressing the global financial crisis, the Committee confirmed the “requirement” of proportionality, by calling for all policies confronting the crisis to “be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights.”<sup>131</sup> A proportionality-inflected standard of reasonableness may draw from the relevant examples from Europe, which include the Latvian Court’s rejection of social security reforms made in the absence of “objective and well-weighted analysis” of the economic and social consequences of the reforms, and of other less restrictive means.<sup>132</sup> Similarly, in Hungary, among the Constitutional Court’s earliest cases was a holding that the citizen’s legitimate expectations and confidence in the legal system required a serious consideration of different means to social security reform, and not merely application of reforms “practically overnight”.<sup>133</sup> A recent addition to this line of examples is the well-known rejection, by the German Constitutional Court, of cuts to social security reached by a random, rather than evidence-based, inquiry.<sup>134</sup>

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<sup>131</sup> Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (May 16, 2012), <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>.

<sup>132</sup> Contiades & Fotiadou, *supra* note 21, 697, discussing Judgment of the Constitutional Court of the Republic of Latvia, on 21 December 2009, in the case No. 2009-43-01.

<sup>133</sup> *Id.*, at 677, see also BEATTY, *supra* note 64, 143; On Social Security Benefits (1995).

<sup>134</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (Hartz IV), 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (—), 1 BVL 1/09, para. 1–220, 2010 (Ger.), available in English at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209\\_1bvl000109en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html) (last visited June 2, 2016).

In other contexts, too, the requirement to give “reasonable consideration” to constitutional requirements may be more or less open to the principle of proportionality. For example, there is evidence that the pressure for a reasonable formulation of budgets has contributed to public debate about the appropriate level of educational spending in Indonesia.<sup>135</sup> Pressure to accommodate state education rights in the United States has informed the public discourse about taxing and spending in the United States, allowing a democratic conversation about short-term fiscal efficiency to be broadened by considering rights-based constitutional commitments.<sup>136</sup>

Nonetheless, many of the constitutional systems protective of justiciable economic and social rights do not share the South African tradition of an evolving reasonableness review; and those common law systems that do, have often failed to incorporate economic and social rights. Civil law systems are more than five times as likely to have incorporated justiciable constitutional rights than common law systems, including the non-English language jurisdictions within Latin America and Eastern Europe.<sup>137</sup> It may be likely that proportionality analysis, alongside the margin of appreciation, has taken, or will take, greater hold in such systems; and that innovations in its application will follow.<sup>138</sup>

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<sup>135</sup> Brinks & Gauri., *supra* note 114, at 422 (focusing on remedies).

<sup>136</sup> Helen Hershkoff & Stephen Loffredo, *Tough Times and Weak Review: the 2008 Economic Meltdown and Enforcement of Socio-Economic Rights in U.S. State Courts*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS*, *supra* note 101, at 234.

<sup>137</sup> Jung et al., *supra* note 14.

<sup>138</sup> Such comparative analysis is very timely: see, e.g., Landau, *supra* note 99.

## Conclusion

The operation of proportionality is an asymmetrical one in the so-called “global model” of constitutional rights – it is a test that has not been invoked in the prominent economic and social rights cases usually associated with this model. Partly, this is because the “margin of appreciation” that attends a proportionality inquiry is more likely to be triggered under present conceptions of economic and social rights. Nonetheless, the proportionality principle – that “the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required” – inflects the standard of reasonableness that has been developed for economic and social rights adjudication. This paper suggests that the reasonableness standard, which follows a methodology of contextualized rights-evaluation, rather than the separate rights-identification and justification-of-limits associated with the proportionality test, can nevertheless be both protective, and constraining, of justiciable rights. By avoiding the “containment” doctrines that can effectively remove all strength from a purportedly stronger intensity of review, the use of a proportionality-inflected reasonableness may yet deliver greater rights protection.