

RATIONALITY, REASONABLENESS, PROPORTIONALITY: TESTING THE USE OF STANDARDS OF SCRUTINY IN THE CONSTITUTIONAL REVIEW OF LEGISLATION

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At least three cases decided by the South African Constitutional Court in the 2010 term deal with constitutional challenges to legislation. In this brief overview, I discuss the Court's choice regarding the standard of scrutiny, and the way in which the selected standard is applied in each concrete case critically. Issues to be explored include: what is the justification for choosing a particular test? What are the practical consequences of applying different standards of scrutiny? Does it really make a difference? To which degree does the Court actually employ the sets of questions or prongs that it uses to characterise each test? How intense is the scrutiny made under the chosen test?

1 Background: rationality, reasonableness and proportionality as standards in the previous case law of the Constitutional Court

The development and adoption of stock formulas for these different standards and their respective tests are, of course, not new in the jurisprudence of the Constitutional Court of South Africa. The first precedent where the Court makes use of the rationality standard dates from the interim Constitution period. The Court has gradually defined its approach to their use in a series of cases which I summarise here. The list has no pretension of being exhaustive.¹

In *Makwanyane* (1995),² decided under the Interim Constitution, the Court considered a constitutional challenge against the death

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¹ For a comprehensive analysis, see A Price 'The content and justification of rationality review' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 36.

² *S v Makwanyane* 1995 3 SA 391 (CC) para 156.

penalty, without any explicit mention in the interim Constitution about it being forbidden. Justice Ackerman, in a concurring opinion, introduced the rationality standard as follows:³

In reaction to our past, the concept and values of the constitutional state, of the “regstaat”, and the constitutional right to equality before the law are deeply foundational to the creation of the “new order” referred to in the preamble. The detailed enumeration and description in section 33(1) of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the Constitution emphasises the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.

Segments of this quote have been referred to by the Court in later cases. However, the scope of the rationality standard proposed by Justice Ackerman in this case was considerably more substantive than the standard retained by the Court in its later jurisprudence. In fact, it is unlikely that a very thin conception of rationality, as the mere connection of a legitimate State purpose with the means chosen, could have been of any use in a case where the challenge to the death penalty was fundamentally based on variations of the substantive due process notion.

In *New National Party of South Africa* (1999),⁴ the Court dealt with a challenge to electoral rules that imposed the requirement of specific identification documents to exercise the right to vote, striking out some other valid IDs from the list. The majority of the Court, following the opinion of Justice Yacoob, invoked a narrow notion of ‘rationality’, as mere connection between a legitimate State purpose and the means chosen, and found the legislative scheme to be rational and thus constitutional. In a dissenting opinion,

³ As above.

⁴ *New National Party of South Africa v Government of the RSA* 1999 3 SA 191 (CC), particularly paras 19 & 24.

Justice O'Regan criticised the approach of the majority and called for a more contextual analysis that took into consideration the potential discouraging effect of a restrictive regulation on the exercise of the right to vote, particularly in that nascent stage of the South African democracy. Justice O'Regan proposed a more substantive standard of review, a 'reasonableness' standard, which in her view would have enabled the Court to discuss the appropriateness of the regulation in promoting the right to vote.

In *United Democratic Movement (2000)*⁵ the Constitutional Court reviewed the constitutionality of a statute allowing members of Parliament to change their political party under circumstances specified by the law. The Court again made use of a thin rationality test, finding that the statute passed constitutional muster as there was a connection between a legitimate State purpose and the means chosen to achieve that purpose.

In *Pharmaceutical Manufacturers Association (2000)*⁶ the Constitutional Court found that State action – in the case, a presidential decision to bring an Act of Parliament into force – did not pass the thin version of the rationality test. In that instance, the Parliament had adopted a new legislative scheme modifying the Medicines and Related Substances Act. The new scheme made obsolete the existing schedules that were referred to in the previous scheme, and required, in order to be operative, the adoption of new regulations and schedules. However, the President, acting upon the powers granted by the legislative act, decided to bring it into force even before the necessary regulations and schedules were adopted. During the Constitutional Court proceedings, the Government itself acknowledged the technical mistake. The Court refined the definition of the rationality standard, adding that the determination of whether the decision was rationally related to the purpose for which the power was given called for an objective – rather than a subjective – enquiry: that is, no matter the good faith or mistaken belief of the public authority who took the decision. The Court considered that the presidential decision could not be found 'objectively rational on any basis whatsoever', that it was irrational and thus struck it down.

In *Bel Porto School Governing Body (2002)*,⁷ the Court had to face a constitutional challenge against a legislative scheme that confronted the difficult task of achieving racial desegregation in schools in a context of limitation of resources. The scheme privileged

⁵ *United Democratic Movement v President of the RSA (1)* 2000 11 BCLR 1179 (CC), particularly paras 55 - 76.

⁶ *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 2 SA 674 (CC), particularly paras 85 & 90.

⁷ *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC), particularly para 45.

the situation of permanent staff over that of personnel who were contracted by former only-white schools on a discretionary basis and were thus not considered public employees, despite long working periods. The majority of the Court was satisfied about the existence of a link between legitimate State purposes and the means chosen, and hence considered the legislative scheme constitutional. A joint partial dissent by Justices Sachs and Mokgoro, and separate partial dissents by Justice Ngcobo and Justice Madala did not agree on the solution regarding the status of the contracted personnel. However, their respective arguments were not based on the rationality of the scheme, but rather on other substantive and procedural standards and principles – fairness, administrative justice or lack of consultation.

In *Affordable Medicines Trust* (2005)⁸ the Court considered the rationality and proportionality of a licensing scheme introduced by the Government requiring a permit to dispense medication in specifically licensed premises. The Court upheld the licensing scheme, concluding that it was rationally related to the achievement of the legitimate government purpose to increase access to medicines that are safe for consumption by the public. In relation to the challenges based on alleged breaches of the rights to choose and practise a profession, dignity, freedom of movement and property, the Court found that the licensing scheme did not limit those rights, and thus did not even enter into the analysis of the justifiability of the limitations.

Furthermore, the Court developed criteria to assess the reasonableness of the measures taken by the State to achieve the realisation of the rights to housing and of the right to health, respectively,⁹ in two noted leading cases, *Grootboom* (2000)¹⁰ and *Treatment Action Campaign* (2002).¹¹ Similarly, the Court has also approached the reasonableness of administrative action.¹² Standards that involve rationality and proportionality-related assessment have also been developed by the Court in the context of arbitrary deprivation of property.¹³

⁸ *Affordable Medicines Trust v Minister of Health of RSA* 2006 3 SA 247 (CC), particularly paras 74 - 79.

⁹ For an enlightening discussion of this issue, see D Brand 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in F Coomans (ed) *The justiciability of economic, social and cultural rights* (2006) 207; S Liebenberg, 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in S Woolman & M Bishop (eds) *Constitutional conversations* (2011) 303.

¹⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹¹ *Minister of Health v Treatment Action Campaign* (No 1) 2002 5 SA 703 (CC).

¹² See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

¹³ For a comprehensive discussion of this issue, see T Roux 'The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*' in S Woolman & M Bishop (eds) (n 9 above) 265.

In summary, the approach adopted by the Constitutional Court has been the following:¹⁴

- The exercise of public power – including lawmaking¹⁵ – should be rational and not arbitrary. ‘Rationality’ is understood as a rational relationship between the measures adopted and a legitimate governmental purpose. ‘Rationality’ calls for an objective enquiry.
- When the challenge to general norms is based on the alleged infringement of any of the rights included in the Bill of Rights, the standard of review to be applied is in principle that of ‘proportionality’, according to section 36(1) of the South African Constitution. The ‘proportionality’ test requires the Court to assess if limitations to rights are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose; and the existence of less restrictive means to achieve the legitimate purpose.
- ‘Reasonableness’ is a standard specific to some constitutional rights – such as the right to health, or the right to housing – but it is also a criterion to be taken into account when assessing both the proportionality of the limitation of a constitutional right (as per section 36(1) of the Constitution), or the appropriateness of the action adopted by the political branches of the Government to comply with constitutional duties or achieve legitimate state purposes.¹⁶

In my view, two general conclusions can be drawn from the analysis of the previous Constitutional Court case law:

- The apparent adoption of an agreed set of criteria regarding the choice of the standard of review and the test entailed by each standard can be

¹⁴ This is, of course, an over-simplified summary. For a comprehensive overview, see the discussion between M Bishop ‘Rationality is dead! Long live rationality! Saving rational basis review’ and A Price ‘The content and justification of rationality review’ both in S Woolman & D Bilchitz (n 1 above) 1 and 36, respectively. The extent to which there is an overlap between ‘reasonableness’ and ‘proportionality’, and between ‘rationality’ and ‘proportionality’ deserves further exploration, but the issue exceeds the purpose of this section, as it is not particularly relevant for the cases that I will examine below.

¹⁵ Among other areas, rationality analysis has been employed by the Constitutional Court to assess the acceptability of differentiations made by the legislative branch under equality challenges (section 9(1) of the SA Constitution), when such differentiations are not based on prohibited discrimination grounds mentioned in Section 9(2). Bishop’s article focuses on this use. See Bishop (n 14 above). I did not include such cases in the previous overview, as none of the judgments discussed later deal with challenges based primarily on section 9(1) of the Constitution. Interestingly, in one of the cases (*Law Society of South Africa*) the need to remove arbitrary differentiations was mentioned by the Government as a purpose to justify the challenged provisions of the statute.

¹⁶ For example, whether the State has complied with its obligations to facilitate participation in the legislative process; whether the State has complied with sec 33 or whether the State has complied with its positive obligations under sec 7(2) to ‘protect, promote and fulfil’ constitutional rights.

misleading. The analysis of case law shows that the adoption of a seemingly accepted approach by the Court was not undisputed. A closer look at the case law shows that in different cases, the scope of the different formulas was not the same, and even when the tests referred to are the same, the intensity of the scrutiny varies considerably. Moreover, while the Court has in some cases tried to restrict the use of the 'reasonableness' standard to only those cases involving constitutional rights which explicitly include this standard in their wording, 'reasonableness' keeps coming back as a criterion in different ways.

- The use of the 'rationality' test has not been a particularly fruitful as a standard to review general norms. The Court concluded only in a small number of cases¹⁷ that the challenged norms or acts did not pass the 'rationality' test, and in fact in three of those cases the challenge was not directed against a law, but rather against the Executive's behaviour.

2 *Poverty Alleviation*: reasonableness of measures to ensure participation, rationality of a Constitutional amendment and subsequent legislation

In *Poverty Alleviation*,¹⁸ the applicants challenged the constitutional validity of a constitutional amendment and legislation adopted thereafter with the aim of changing the boundaries between two provinces and thus transferring municipalities from one province to the other. According to the claim, the authorities involved (National Assembly, National Council of Provinces, provincial legislature of KwaZulu-Natal) failed to facilitate public involvement in the decision-making process, and the constitutional amendment and legislation were allegedly irrational. Interestingly, none of the claims were based on the alleged violation of rights included in the Bill of Rights, but rather on rules and duties governing the adoption of legislation or the amendment of the Constitution (sections 74, 74(8), 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution). The Court considered the first challenge under a reasonableness scrutiny, and the second under a rationality scrutiny. In both cases, the Court upheld the constitutional validity of the amendments and legislation.

Regarding the claim on failure to comply with the duty to adequately facilitate public involvement in the different instances of the decision-making process, provided for in similar wording by

¹⁷ As of 2011, only five, according to Price's account, while it has dismissed far more. See Price (n 14 above) 64.

¹⁸ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC).

sections 59(1), 72(1) and 118(1)(a), the Constitutional Court, relying on precedent,¹⁹ decided to consider the issue under a reasonableness enquiry – even if reasonableness is not mentioned as a standard in any of those provisions. The Court stated that legislative bodies have ‘considerable discretion to determine how to fulfill’²⁰ this duty, and took into account in order to assess reasonableness the need to strike a balance between ‘the need to respect parliamentary autonomy’ and the ‘right of the public to participate in the legislative process’.²¹ Factors to be weighed to assess the reasonableness of the measures adopted by the legislative bodies to facilitate public participation are the nature, importance and urgency of the legislation, and the time and expense that public involvement may require.

On these bases, the Court examined the legislative history of the process of adoption of the Constitutional amendment and the ensuing legislation, and concluded that the involved authorities had indeed facilitated participation. The Court went on to examine three related issues: whether facilitation of participation requires only the consultation of the discrete group directly affected by the legislation, with the exclusion of others; whether facilitation of participation required the legislative bodies to receive oral submissions; and whether the legislative bodies involved had considered the representations made by the plaintiffs. Given the deference granted by the Court to the legislative bodies in the determination of the methods for facilitating public involvement, it is not surprising that the answers to these three issues were negative. The Court concluded that there is no requirement to consult solely with the discrete group directly affected by the legislation – the legislature should only afford them a reasonable opportunity to participate meaningfully. They also rejected the claim that oral submissions were required, leaving it to the legislature to decide whether oral submissions could provide more clarity to the already received written representations. Finally, the Court maintained that public involvement does not mean that the inputs offered should necessarily have an impact on the outcome legislation, but only that the opportunity to be heard is granted.

Regarding the alleged irrationality of the constitutional amendment and ensuing legislation, the plaintiffs made a number of different claims: that the outcome legislation ignored the inputs received from the public, that it was based on factual errors, that the decision was pre-determined and that the lawmakers were instructed

¹⁹ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 99.

²⁰ *Poverty Alleviation* (n 18 above) para 35, quoting *Doctors for Life* (n 19 above) para 99.

²¹ *Poverty Alleviation* (n 18 above) para 35.

to vote in a particular manner. The Court resorted to their standard formula on rationality – rational connection of the measure with a legitimate governmental purpose – and dismissed the claims made by the applicants without much hesitation. They had no doubt that the constitutional amendment and ensuing legislation were connected to a legitimate governmental purpose, and summarily dismissed the claims. The Court stated that the applicants’ argument muddled procedure with substance, and pointed out that rationality concerns itself with outcome, rather than with compliance with procedural requirements. They also rejected the claim that the legislative bodies erroneously considered the nature of the municipality at stake, granting deference to the views adopted by the legislative bodies and repeating that a court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way. A court could only interfere ‘if it can be shown that the objective is arbitrary, capricious or manifests naked preferences’.²² In turn, the court considered that it cannot investigate the motives of the legislative bodies, but should rather stick to the examination of the rationality of the legislation itself.

A number of points can be made on the Court’s decision in *Poverty Alleviation*. Regarding the choice of the standard of review, it is interesting to note that while the Constitutional Court usually rejects ‘reasonableness’ as a general standard to evaluate challenges against legislation not strictly based on the infringement of constitutional rights, it spontaneously resorts to ‘reasonableness’ as a standard to evaluate compliance with legislative procedural duties – such as the duty to facilitate public involvement in the lawmaking process – even if there is no mention of such a standard in the respective constitutional provisions that were the basis of the claim.²³

However, the scope of the ‘reasonableness’ test used in this case proves to be a thin standard to assess the legislative conduct, as the criteria offered to evaluate what is reasonable assumes from the inception a broad deference to the legislature. It is fair to say that the Court seems to devote more attention to considering – in a favourable light – the evidence offered by the legislative bodies to show that it complied with facilitating public involvement in the lawmaking process, than to dig in any form into the arguments justifying the legitimacy of the governmental purpose and responding to the other claims related to ‘rationality’. But the consequences of choosing

²² *Poverty Alleviation* (n 18 above) para 71.

²³ The argument can be made that the Court had done so in previous cases (eg *Doctors for Life* and *Matatiele*) and that, thus, in *Poverty Alleviation* it is just following its precedents. But this doesn’t affect the point made here – it might only transfer the same question to the justification of the decision made in those cases.

either ‘reasonableness’ or ‘rationality’ do not seem to make an enormous difference in the case. Both the intensity of the use of the ‘reasonableness’ test for assessing the adequacy of the facilitation of public involvement in lawmaking, and of the use of the ‘rationality’ test for assessing the outcome of the legislation appear to be mild. The Court is in both cases far from probing the legislative bodies: it appears to assume that the legislative record is *prima facie* valid, unless it sees strong evidence to the contrary – which was not the case in *Poverty Alleviation*.

3 *Law Society of South Africa: the cold and the hot in the same dish*

In *Law Society of South Africa*,²⁴ the applicants challenged the constitutional validity of a legislative amendment of the Road Accident Fund Act, a law regulating a public fund to provide compensation to victims of car accidents. Specifically, allegations of constitutional violations were made about the elimination in the new statutory scheme of a residual common law claim allowing accident victims to recover losses not compensable under the act from a wrongdoer which existed in the previous statutory scheme, and to the establishment of inadequate tariff levels to cover medical expenses incurred as a consequence of car accidents. The legal claims were two-fold. On the one hand, the applicants alleged that the new statutory scheme was irrational, but requested the Court to move away from a mere rationality test and to endorse a more substantive standard – the assessment of whether the new legislation *unfairly deprives people of their constitutional protection*. On the other hand, the applicants alleged that the new legislation unjustifiably limited several constitutional rights – the right to security of the person, the right to property, the right to health and the right to an adequate remedy.

In respect to the claim that the new statutory scheme was irrational, the Court rejected the request to engage in a more substantive test, and maintained its previous trend of adopting a narrow rationality test – that is, rational connection between means chosen and a legitimate governmental purpose, without considering whether legislation is fair or reasonable or appropriate, or whether there are other or even better means that could have been used. According to the Court, the adequate space for a more substantive test – such as the proportionality test – was the consideration of the justifiability of alleged breaches to a fundamental right provided for in the Bill of Rights under section 36 of the Constitution.

²⁴ *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC).

However, even adopting a narrow 'rationality' test, when confronted with the analysis of the rationality of the elimination of the residual civil law claim, the Court had to struggle to find a justification for the legislative amendments. According to the government, the purposes of the new statutory scheme were to tackle the increasing deficit of the fund, to remove arbitrary differentiations (passengers on the one hand, and drivers and pedestrians on the other) in the compensation of accident victims, and to integrate the compensation of road accident victims into a comprehensive social security scheme offering life, disability and health insurance cover for all accidents and diseases. The government argued that this legislative scheme is a gradual step towards the replacement of a common law system of compensation with a set of limited no-fault benefits of a broader social security net.

The applicants pointed out that the existence of a residual common law claim does not influence the financial viability of the scheme, as common law claims are not directed against the fund but against the wrongdoer. Thus, its abolition would not further the end of meeting the needs of every victim by making the scheme fully funded. So, according to the applicants, there is no proper relation between the means chosen and the alleged governmental purpose.

While the Court accepted that the elimination of the residual claim does not worsen or improve the financial standing of the fund, it went on to argue that the scheme must be seen as a whole and not only in the light of the common law claim. According to the Court, as the statutory scheme puts caps on the compensation to be paid by the Fund, with the continued existence of a residual claim the liability of wrongdoers would increase in proportion to the level of caps imposed, thus making liable motorists bear the risk of substantially increased residual claims from accident victims. The Court deems that the risk to which the new cap exposes all drivers is disproportionate in relation to the 'relatively small inattentiveness or oversight that could give rise to the risk'.²⁵ The Court makes an additional argument: that the retention of a common law claim does not sit well with a social security compensation system aiming to provide equitable compensation to all people regardless of their financial ability. To prove this, the Court asserts: a) that the common law claim would be actually recovered only from wrongdoers capable of paying the compensation or of affording insurance, and b) that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid.

²⁵ *Law Society of South Africa* (n 24 above) para 50.

What is remarkable in this justification is that these reasons were provided *by the Court itself*, and not by the Government. The Court hardly weighed impartially the arguments offered by the Government and the applicants as to whether there was a rational connection between the elimination of the residual common law claim and the purposes sought by the legislative scheme. Instead, it in fact furnished a justification that indeed focuses on the protection of the potential wrongdoers against the exposure to increased liabilities – an argument the Government had not articulated.

The Court also gave some weight to the Government's contention that the new statute needs to be seen as a transitional scheme, towards a no-fault compensation regime. The Court considered the abolition of the common law claim as a 'necessary and rational part'²⁶ of an interim scheme aimed at achieving financial viability and more effective and equitable access to social security services. But little explanation was offered to support this conclusion: no reason is given as to why it would be incompatible to have a capped no-fault compensation system paid by the Fund, and to maintain a common law claim against the wrongdoer, either fault or non-fault, requiring of the prospective plaintiff a higher procedural burden and subject to the risk of not recovering, but offering the possibility of a higher compensation – which would in turn be more appropriate to satisfy the health or disability-related needs ensuing from the accident.

In conclusion: not only did the Court choose the very narrow rationality test to consider the constitutional challenge of the legislative scheme, but the intensity of the application of the test was indeed notoriously weak – to the point that the main arguments used to assert that there was a rational connection between the impugned provisions and the legitimate governmental purpose were in fact provided by the same Court.

After dismissing the challenge on the basis of irrationality, the Court moved on to consider the alleged breaches of several fundamental rights. While the Court had previously stated that the standard of scrutiny would be stricter when the challenge at stake was the claim that a fundamental right was breached, it is not clear that the Court completely lived up to this statement. Three of the claims were dismissed, without digging much into the reasons offered by the government to justify the impugned provisions, and apparently without exhausting the steps of the analysis that – at least in theory – should be prompted by the proportionality test – or by any other scrutiny deemed to be more substantive.

²⁶ *Law Society of South Africa* (n 24 above) para 54.

According to the first challenge, the elimination of the residual common law right to claim breached the duty to adopt positive measures to ensure the right to security of the persons (section 12(1)(c) of the South African constitution, which enshrines a right ‘to be free from all forms of violence from either public or private sources’) and/or the right bodily and psychological integrity (section 12(2) of the South African constitution). The Court sticks to the analysis of the claim based on 12(1)(c), engaging in the evaluation of the challenge under a proportionality test. As to the first prong of the test – whether the fundamental right at stake is compromised by the impugned piece of legislation – the Court accepts that the protection granted to road accident victims falls within the thrust of the State’s positive obligations to respect, protect and promote the right to be free from violence either from public or private sources and, hence, that the State incurs section 12 obligations in relation to victims of road accidents.

The next issue considered by the Court was whether the abolition of the common law claim unjustifiably limited section 12(1)(c). In my view, the question was wrongly presented by the Court. The language of the justifiability of the limitation of rights, as stated in section 36 of the South African constitution, is mainly addressed to evaluate restrictions upon or regulations of the enjoyment or exercise of freedoms.²⁷ Here, the issue at stake was instead the appropriateness of the positive measures adopted by the State in order to protect the right to be free from violence – an analysis which resonates more closely with the issue of the reasonableness of the positive measures adopted to realise socio-economic rights than with the framework of the justifiability of the limitation of freedoms or negative rights.²⁸ To put it slightly differently: what the Court is assessing here is whether the positive measures adopted by the State to protect the right to be free from violence are adequate, and not if that right was unjustifiably restricted. The analysis of a ‘restriction’ presupposes that the content of the positive measures constitutionally due by the State is already known – but this is exactly what is at stake here.

Moreover, the claim made by the applicants seemed to require an inter-temporal evaluation from the Court: whether the new legislation had unduly reduced the level of protection previously granted by the existing legislative scheme – which allowed for a residual common law right to sue. This idea can be presented both in a ‘negative’ or ‘positive’ wording. In a ‘negative’ formulation – which

²⁷ For a comprehensive analysis of Section 36, see S Woolman & H Botha ‘Limitations’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2006) Chapter 34. See also S Woolman & H Botha ‘Limitations: Shared constitutional interpretation, an appropriate normative framework and hard choices’ in S Woolman & M Bishop (eds) (n 9 above) 149.

might superficially resemble the wording of the limitation of rights – the question would be whether the new legislative scheme unduly limited or restricted the existing level of protection of the right. This implies that restrictions of the already conceded level of legislative protection are unjustifiable: that is, that once the legislator recognised that a common law right to sue is part of the protection for victims of road accidents, removing that right is forbidden. In other contexts, this idea has been captured by the notions of ‘prohibition of retrogression’, ‘irreversibility’ or ‘standstill or ratchet effect’.²⁸ In a ‘positive’ formulation – which might rather resemble the context of evaluation of the reasonableness of positive measures – the question might rather be posed as whether reducing the level of protection already conceded does meet the positive obligation to protect the right. The Court seems to avoid any need to embark itself in inter-temporal comparisons, and thus considers both the old and the new schemes not as a chronological sequence, but rather as two alternative options in a *tabula rasa* scenario. This approach fails to capture the main point made by the plaintiffs, which was not that article 12(1)(c) of the South African constitution necessarily requires a common law action to protect the right, but that victims of road accidents will, in the future, see reduced the options for compensation that they had already enjoyed before the legislative change.

By dealing with the abolition of the common law right to sue as a mere limitation of rights, the Court finds that of course it diminishes the victims’ capacity to protect and to enforce the right to the

²⁸ By this I do not mean that rights other than socio-economic rights only impose negative obligations on the State. They also impose positive obligations, even if they do not usually carry the same qualifications (i.e. reasonableness, subjection to available resources) as it is the case with socio-economic rights. The Constitutional Court has discussed the scope of these positive obligations of rights other than socio-economic rights in a few cases. See, for example, *New National Party of South Africa* (n 4 above) paras 13 - 17, and O’Regan J’s dissenting opinion at paras 118 - 119 (obligation to enact legislation and take positive measures to ensure the enjoyment of the right to vote); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) paras 39 - 51 (positive obligations stemming from the right to access to courts). In any event, my contention here applies to the standards to evaluate positive obligations stemming from any constitutional right, regardless of whether it is or not classified as socio-economic. Even if the term used is the same (ie ‘reasonableness’), its meaning in the context of limitations of rights as stated in section 36 cannot be the same as when used as a standard to assess compliance with positive obligations. In the former case, the issue at stake whether a restriction to a freedom can be justified. In the latter, the issue at stake is whether the measures adopted to ensure the enjoyment of the right are adequate or appropriate, given certain circumstances.

²⁹ See, for example, UN Committee on Economic, Social and Cultural Rights, General Comment No 3 ‘The nature of States parties obligations (Art. 2, par.1)’ 12/14/1990 para 9: ‘any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.

security of the person, but finds little trouble in considering that the same justification given to uphold the rationality of the new legislative scheme also justifies the limitation. The following paragraph is graphic enough:³⁰

As I understand it, the real complaint of the applicants is that they have lost the common law right of recourse and have to contend with a new ceiling on their claim for general damages and to loss of income or support. They add that the common law right of recourse against wrongdoers comes at no cost to the Fund. It is the wrongdoer and not the fund that would be liable for the residual common law damage. The Minister and the Fund have advanced adequate justification for this limitation. They rehearse no fewer than eleven substantive grounds of justification, most of which are cogent. The over-arching grounds are the urgent need to make the Fund financially viable and sustainable, and to make its compensation regime more inclusive, transparent, predictable and equitable.

Interestingly, the arguments used by the Court to justify the limitation of the fundamental right under the proportionality test are exactly the same used before to assess the rationality of the scheme. While some overlap might be explained by the inclusion of the means-ends analysis as one of the criteria to assess proportionality, the question left by the Court's approach is whether it makes any difference to invoke a rationality or a proportionality standards – claiming indeed that the latter is a more substantive standard – when the exact same reasons said to meet one test are repeated to consider the second test passed. There is no trace in the proportionality analysis engaged by the Court of the use of other criteria that the proportionality test should have prompted according to section 36 of the Constitution and to the stock formula usually used by the Courts: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and the existence of less restrictive means to achieve the purpose. Moreover, according to section 36, these are only illustrative examples of 'all relevant factors' that should be taken into account. The individual consideration of each factor is poor, to say the least: the only factor considered is the relation between the limitation and its purpose, and this is done in the same narrow fashion as in the rationality test – that is, mere connection of the means with the purpose, rather than fulfilling the promise of a more substantive analysis. Little is said about the weight of the other factors – nature of the right, importance of the purpose of the limitation, nature and extent of the limitation, existence of less restrictive means to achieve the purpose – and there is no effort to identify the existence of other relevant

³⁰ *Law Society of South Africa* (n 24 above) para 78.

factors that should be taken into account. So instead of making use of the flexible formula of section 36 to perform a context-based evaluation of the reasons offered by both parties, the Court employs the proportionality test in a rather formalistic manner, which makes it difficult to distinguish any consequence of its use in comparison with the use of a narrow rationality test.

Two additional constitutional challenges – regarding the rights to property (section 25(1) of the Constitution) and the right to a remedy (section 38 of the Constitution) were also summarily dismissed by the Court. Regarding the right to property the claim is dismissed as the Court finds no ‘arbitrary deprivation of property’³¹ – so not even the first prong of the proportionality test bears fruit here.³² In relation to the right to a remedy, the Court points out that it has already found that the limitation placed by the new statutory scheme on this right is reasonable and justifiable in all circumstances.

The Court’s approach to the violation of the right to health was considerably different: the standard of scrutiny was notoriously stricter, and the deference shown to the reasons presented by the Government was very narrow. The plaintiffs’ contention was that the tariff level determined by the legislative scheme for claims to be paid by the Fund for hospital and other medical treatment was so low that road accidents victims will not be able to obtain treatment from private health care institutions. According to the applicants, the regulation was irrational, deprived the innocent victim of an effective remedy, and, in relation to the right to health recognised in section 27 of the Constitution, was retrogressive – as opposed to progressive – and unreasonable.

Upon consideration of the expert evidence, the Court finds that the tariff fixed by the regulation is ‘wholly inadequate and unsuited for paying compensation for medical treatment of road accident victims in the private health sector’,³³ thus meaning that victims that cannot afford private medical treatment by other means will have to submit to treatment in public health establishments. It is also established that public health institutions are not able to provide adequate services crucial to the rehabilitation of accident victims with permanent disabilities, including quadriplegic and paraplegic victims. The Court also considers that the savings that such a tariff would generate amount to 6% of the total compensation bill at the most. According to the Court, depriving quadriplegic and paraplegic

³¹ *Law Society of South Africa* (n 24 above) para 86.

³² Despite its easy rejection in this case, deprivation of property is another fruitful context to show the Court’s varying approach of rationality. Theunis Roux has shown that the ‘arbitrariness’ test has in some cases been used much more substantively than in others. See Roux (n 13 above) 265-281.

³³ *Law Society of South Africa* (n 24 above) para 91.

victims from adequate access to medical care to achieve such negligible financial saving is unreasonable.³⁴

Besides the finding, what is interesting here is the standard used by the Court to assess the constitutionality of the scheme. The Court asserts that the tariff fixed by the regulation

is incapable of achieving the purpose which the Minister was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require (...) It must follow that the means selected are not rationally related to the objectives sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents.³⁵

Additionally, the Court finds that the tariff is under-inclusive in relation to the healthcare needs of quadriplegic and paraplegic road accident victims, and hence 'unreasonable and thus in breach of section 27(1)(a) read together with section 27(2) of the Constitution'.³⁶

It seems that, inadvertently, the Court is using here a very demanding standard to assess the progressive realisation of the right to health – a much more substantive standard than the one used in leading socio-economic rights cases such as *Grootboom*, *Treatment Action Campaign* or *Mazibuko*.³⁷ Instead of relying mostly on procedural requirements, as it did in those cases,³⁸ the standard used here to assess the reasonableness of the measures adopted to progressively realise the right to health is squarely the *adequacy of the measures to allow victims to access the treatment they require*. Moreover, it seems to convey the idea that the right to health includes an opportunity to access treatment in private medical health care facilities – an idea that is hardly reflected in section 27 of the

³⁴ This reasoning can perhaps be compared to *Khosa*, where the Constitutional Court struck down legislation denying social assistance to non-citizens as discriminatory and unreasonable. The Court rejected similar 'savings' arguments. See *Khosa & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC) paras 60 - 62. But, as it was mentioned before, the Court considered, among others, 'savings' arguments as a proper justification for the elimination of the residual civil law claim.

³⁵ *Law Society of South Africa* (n 24 above) para 99.

³⁶ *Law Society of South Africa* (n 24 above) para 100. Section 27 of the South African Constitution, in the relevant parts, reads as follows:

'27.1) Everyone has the right to have access to health care services, including reproductive health care; (...)

27.2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

³⁷ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

³⁸ For a sharp overview and critique of this approach see D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or: "What are socio-economic rights for?" ' in H Botha, A van der Walt & J van der Walt (eds) *Rights and democracy in a transformative constitution* (2004) 33.

Constitution. One could wonder how the Court would react if prompted to employ the same standard to assess the quality of the general public health services offered by the Government to fulfil the right to health.

A second remark refers to the use of the means-end analysis made. Presenting the analysis as a means-end consideration seems to eschew, rather than to reveal, the same nature of the reasoning of the Court. Rather than a formal comparison of means and end, the Court is making here a substantive assessment: it is testing the adequacy or appropriateness of the level of tariffs fixed by the Government against the substantively defined content of the required treatment. Using the same name for this analysis and, say, the rationality analysis made before, or the one made in *Poverty Alleviation*, seems completely misleading.³⁹

In summary: the same case shows two opposed approaches to choose and apply the standard of scrutiny for deciding a constitutional challenge of a legislative statute. The elimination of the residual common law claim was dealt with through a very deferential approach: the Court provided itself reasons to justify the connection between the means chosen and the intended purpose, and hardly bothered to probe further criteria to consider the alleged breached of the rights to security of the person, property and adequate remedies. In that account, the difference between the Court's use of a 'rationality' and a 'proportionality' scrutiny seems to be negligible. On the other hand, things change a lot when it comes to the level of tariff fixed by the regulations to pay for health and other medical treatment. Here – again, regardless of the name of given by the Court to the type of scrutiny – the standard of review used is remarkably more substantive and less deferential to the Government. My suspicion is that the justice who wrote the decision first reached a conclusion about the merits of each challenge, and then accommodated the standard of scrutiny to his previously adopted conclusion, rather than employing methodically the stock formulas

³⁹ In an early review, Danie Brand pointed out the different levels of scrutiny employed under the same rubric (reasonableness) in the Court's socio-economic rights cases. See D Brand (n 9 above) 207-236. The point was particularly renewed after the Court's decision in *Mazibuko*, where reasonableness is used as mere formal due process review. See, in this respect, R E Kapindu, 'Reclaiming the frontier of constitutional deference: *Mazibuko v City of Johannesburg* - a jurisprudential setback', in S Woolman & D Bilchitz (eds) (n 1 above) 319; L Williams, 'The role of courts in the quantitative-implementation of social and economic rights: a comparative study' (2010) 3 *Constitutional Court Review* 141.

and prongs for each type of scrutiny to analyse the various constitutional challenges.⁴⁰

4 ***Malachi*: rationality postponed in favour of proportionality**

In *Malachi*,⁴¹ the Constitutional Court had the opportunity to consider the constitutional validity of the legislative provisions of the Magistrate's Court Act which granted courts the power to order, at the request of the creditor, the arrest of a debtor when it appears that he/she intends to leave the country – the so-called *tanquam suspectus de fuga*.

The applicant challenged the legislative provisions as contrary to the right to security and freedom of the person in terms of section 12(1) of the South African constitution, particularly paragraph (a), which refers to the right 'not to be deprived of freedom arbitrarily or without just cause'. The Court employed a proportionality scrutiny to consider the constitutional challenge, following the prongs of the stock formula: (a) does the arrest based on the impugned provision limit the applicant's right to freedom of the person arbitrarily or without a cause?; (b) if the right is limited, is the limitation justifiable?

Regarding the first prong of the test, the Court pointed out that by definition, an arrest or detention limits the freedom of a person – so that the relevant question is whether the limitation is without a just cause. According to the reasoning of the Court in the case, for a cause to be just, it requires a strict relation of necessity of the measure with a legitimate purpose sought. The object of the arrest is to ensure that the potential debtor remains within the jurisdiction of the court until the court has given judgment in the matter. The Court suggested that the arrest does not guarantee the satisfaction of the judgment debt – the debtor can leave the country as soon as the judgment is given, and the arrest does not render the judgment any more executable to the creditor than would have been the case had the debtor left the country. Moreover, the order for arrest is made in a moment when the civil liability has not yet been established. As prison for debt is forbidden, *a fortiori* there is no legal justification for depriving of the personal freedom of a person that has not even been proven to be civilly liable, and might never be. The Court found

⁴⁰ Lucy Williams makes a similar point about the Constitutional Court's use of 'separation of powers' arguments to avoid engaging with the evidence offered in the case and thus weakening the potential substantive bite of the reasonableness standards in *Mazibuko*. See Williams (n 37 above).

⁴¹ *Malachi v Cape Dance Academy International (Pty) Ltd* 2011 3 BCLR 276 (CC).

then that there is no just cause for the arrest in terms of the impugned provisions.

Sticking perhaps too literarily to the stock formula, the Court went on redundantly to analyse whether the limitation is justified – when the previous analysis raised exactly the same question: whether there was a just cause for the arrest, which was dealt with by the Court as whether there is a substantive – rather than formal – legal justification for the arrest. In any case, after engaging in a determination of the existence of a just cause in terms of section 12(1), the Court moved on to analyse the justifiability of the limitation in terms of section 36 of the Constitution. Here the same reasons are presented in a slightly different manner, according to the language of the factors described in section 36. Thus, while the Court recognised that there is a connection between the arrest and the objective to be achieved – facilitating debt collection – the impugned provisions are not strictly necessary, have not considered less restrictive options, and are over-inclusive, because even they might facilitate the payment of debtors that are in a position to pay but refuse to do so, they also strike debtors that have no means to pay their debt. The threshold of R40 to trigger the order of arrest was also seen as proof of the disproportion between means and purpose. Finally, the Court weighed the importance of the right to personal freedom. Taking all these factors into consideration, the Court held that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and declared the provision unconstitutional.

Here, the Court seemed to deny the existence of a lexicographical order of questions to address constitutional challenges to legislation – that is, first rationality, then proportionality – as seems to be suggested in other cases.⁴² Even if in previous cases the Court had said that rationality is the minimum muster that all acts of the public authorities should pass, here it simply avoids the question of the rationality of the legislative scheme and tests the impugned provisions with a proportionality analysis. Given the arguments used to declare the statute unconstitutional under the proportionality test – which include the lack of necessary connection between means and purpose – a stringent application of a rationality test would probably have led to the same result. The fact that the solution of the case looks relatively straightforward and surely elicits sympathy for the applicant might also have moved the judge to use a standard of scrutiny that allows for a more expansive deployment of arguments against the constitutional validity of the statutory provisions – rather than sticking to the minimum necessary.

⁴² See, for example, *Affordable Medicines Trust* (n 8 above) para 92.

The fondness to expand on arguments to strike down the statutory provisions at stake seems to offset the silent avoidance to comment on the seemingly dubious nature of the contract that linked the parties. Ms Malachi, of Moldovan origin, was brought to South Africa hired by Cape Dance Academy International and House of Rasputin Properties to perform the duties of an 'exotic dancer'. Upon arrival in South Africa, the employers order her to surrender her passport to them and refused to give it back unless she reimbursed them with the money they allegedly spent on her pursuant to the terms of the contract. After several months of work, instead of making a living, she appears to be indebted to her own employers for R100 000. The employers use the *tanquam suspectus de fuga* injunction to arrest her in order to avoid her from leaving the country and force her to pay her debt. Any *bona fide* reader of these facts can at least see hints of human trafficking or forced labour. The Court might have felt uncomfortable to frame the issue in those terms, and to distil any legal consequences from such a framing – for example, to develop the legal duty of Courts to eradicate and punish human trafficking or the ensure compliance with the constitutional and international prohibition of servitude and forced labour (section 13 of the South African Constitution).

5 Conclusion

As I tried to show in the discussion, the examination of the case law of the Court shows that rather than strict formulas that determine the outcome of the constitutional challenges examined, the standard of scrutiny chosen and the intensity of the scrutiny are just flexible departing points to address the issues at stake, but rarely determine the outcome of the case. The three cases commented on in this article seem to confirm this idea. The distinctions between rationality, proportionality and reasonableness as standards of scrutiny are artificially stressed in some circumstances, while it is rather the fluidness and the inter-linkages that are underscored in other. The Court rarely sticks in the actual analysis of each case to the apparently rigid stock formulas and prongs that it uses to define the required standards of scrutiny. These points may rather call for an enquiry into the reasons that might move the Court to grant either a more deferential or a more stringent review of the action or inaction of the political branches of government.