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Adjudicating socioeconomic rights: A lasting legacy

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1 Introduction

Justice Cameron and I first met in Oxford on the Bachelor of Civil Law's Comparative Human Rights course, over four decades ago. For me, it was a daunting experience, especially since I was one of only two women taking the subject. It was good to see a fellow South African at the first seminar, but astonishing to discover that Edwin, whose towering intelligence was immediately visible, was equally daunted. This was the beginning of a very long and warm friendship, which has continued unabated even though I stayed on in the United Kingdom and Edwin went back to South Africa, and despite the distance of miles and years.

The Comparative Human Rights course from which we both learnt so much was, in Oxford terms, a fringe course, with some of my tutors advising me against taking it if I had any thought for my future career. Nevertheless, despite its pioneering nature in the blackletter world of Oxford University in the 1980s, the course covered only civil and political rights, and the comparator jurisdictions were exclusively in the Global North, with a particular emphasis on the United States of America. Little did we know, at a time when apartheid was at the height of its repressiveness, that in the next decade, South Africa would transition into democracy with a transformative constitution which embraced the whole gamut of human rights, including socioeconomic rights, and with a developing jurisprudence which necessitated inclusion in any comparative human rights course. What was not a surprise to me, though, was that Edwin would be a judge in the new constitutional order and would rise to the pre-eminent position of Justice on the Constitutional Court. I therefore feel very honoured at having the

opportunity to discuss his contribution to socioeconomic rights and equality in this collection.

This chapter considers three cases concerned with socioeconomic rights in which Justice Cameron penned or co-authored a judgment: *Glenister II*,[1] *Dladla*,[2] and *Mwelase*.[3] I focus on the main challenge in all these cases, namely the role of courts in advancing human rights which require positive steps and resource allocation from government. The aim of the chapter is not to provide a critique of socioeconomic rights adjudication more generally,[4] but to find the thematic unity between these judgments and to reflect on the background judicial philosophy which appears to animate them. The cases discussed here demonstrate Cameron J's lasting contribution in relation to three key themes. First, how should courts achieve appropriate accountability for resource allocation without risking judicial overreach? This requires specific attention to the delineation of the separation of powers principles. Secondly, is there scope for developing the jurisprudence beyond assessing the reasonableness of the measures, to assessing the content of the right? For example, what should the courts' role be in assessing whether housing is 'adequate' for the purposes of section 26(1), the right to have access to adequate housing? Thirdly, how should courts use their remedial powers when faced with cases of executive incompetence, incapacity or intransigence, or a combination of these, impeding the delivery of socioeconomic rights? Part 2 of the paper briefly sketches the challenges and background context to the cases. Part 3 sets out a framework for

1 *Glenister v President of the Republic of South Africa* [2011] ZACC 6 (*Glenister II*). The prequel to this case (*Glenister v President of the Republic of South Africa* [2008] ZACC 19, known as *Glenister I*) is not relevant for the purposes of this chapter.

2 *Dladla v City of Johannesburg* [2017] ZACC 42.

3 *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30.

4 For critical perspectives on socioeconomic rights, see S Fredman *Human rights transformed: Positive rights and positive duties* (2008); S Liebenberg *Socioeconomic rights: Adjudication under a transformative Constitution* (2010); E Cameron 'A South African perspective on the judicial development of socioeconomic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014); D Davis, P Macklem & G Mundlak 'Social rights, social citizenship and transformative constitutionalism' in J Conaghan, RM Fischl & K Klare (eds) *Labour law in an era of globalization* (2002); K Young 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale Journal of International Law* 113; D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socioeconomic rights* (2007); M Langford & K Young (eds) *The Oxford handbook of economic and social rights* (2022).

appraisal of adjudication of positive duties. Part 4 examines Cameron J's contribution to the challenge of adjudication of resources. Part 5 considers the content of the rights and part 6 the remedial challenge.

2 Socioeconomic rights: Challenges and context

It is by now familiar to contest the traditional distinction between socioeconomic rights and civil and political rights, and the relegation of the former to the realm of the political aspirations rather than justiciable rights. Instead, it is recognised that all rights give rise to both negative and positive duties, and it is in relation to positive duties that particular challenges arise in relation to adjudication.[5] Adjudicating positive duties raises concerns both in relation to judicial competence and judicial legitimacy.[6] So far as competence is concerned, there might be several ways in which positive steps might be taken to fulfil a right, and each might have polycentric implications.[7] Because of the limited purview of courts within an adjudicative setting, judges are arguably not well placed to determine which of these routes should be chosen. In terms of legitimacy, the resource implications of positive duties might require difficult choices to be made in terms of balancing of priorities, a process which, arguably, should be taken by those who are directly accountable to the electorate rather than judges.[8]

The South African Constitution is transformative in recognising, in section 7(2), that all rights give rise to duties to respect, protect, promote and fulfil.[9] Even rights such as the right to vote have been acknowledged as having resource implications.[10] The Constitution is also transformative in incorporating socioeconomic rights. Nevertheless, socioeconomic

5 Fredman (n 4); Liebenberg (n 4); Cameron (n 4); Davis, Macklem & Mundlak (n 4); International Commission of Jurists *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997.

6 Negative duties can also raise concerns as to legitimacy and competence. This is not the subject of this chapter.

7 L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353; J King 'Institutional approaches to legal restraint' (2008) 28 *Oxford Journal of Legal Studies* 409.

8 J Waldron 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346.

9 Constitution of the Republic of South Africa, 1996.

10 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* [2004] ZACC 10; *Richter v Minister for Home Affairs* [2009] ZACC 3.

rights are largely placed within a different, more deferent framework of scrutiny than civil and political rights. The rights to access healthcare, food, water, social security,[11] and adequate housing,[12] need not be realised immediately: they can be fulfilled as long as the state takes 'reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.' Only the right to basic education[13] and children's rights to basic nutrition, shelter, basic healthcare services and social services are elevated to the status of immediate rights.[14] This means that both legitimacy and competence concerns are centre stage in claims for the progressively realised rights. In the early cases before the court, there was a strong sense that, given the challenges of transformation following apartheid, and given the crucial importance of hard-won democracy, courts should take a relatively deferent approach to socioeconomic rights.[15] Most importantly, there was a resistance to defining the substance of the right, or even the minimum core, and instead placing all the weight on whether the measures taken by the state were reasonable.[16] Even the notion of progressive realisation has been subsumed in a relatively static principle of reasonableness.[17]

After the great promise of the transformative constitution, few would question the fact that progress has been deeply disappointing. Questions might therefore be raised as to whether the concept of reasonableness used to assess positive duties, elastic as it is, can accommodate such a slow pace. Early on, sluggish progress was understandable in the light of the ravages of apartheid, rapid urbanisation and the huge demands on public services. But more recently, it can be seen to be at least in part caused by the combination of two factors: siphoning off of resources through

11 Section 27 of the Constitution.
12 Section 26 of the Constitution.
13 Section 29(1)(a) of the Constitution.
14 Section 28(1)(c) of the Constitution. See *Equal Education v Minister of Basic Education* [2020] ZAGPPHC 306 (*School Meals*) para 43; F Veriava & N Ally 'Legal mobilisation for education in the time of Covid-19' (2021) 37 *South African Journal on Human Rights* 230 at 239.
15 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.
16 D Bilchitz 'Towards a reasonable approach to the minimum core' (2003) 19 *South African Journal on Human Rights* 1; Young (n 4); K Lehmann 'In defense of the Constitutional Court: Litigating socioeconomic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 163.
17 *Mazibuko v City of Johannesburg* [2009] ZACC 28 paras 57-68.

rampant corruption,[18] and serious incompetence or lack of capacity[19] in government departments at national, provincial and municipal level.[20] The result has been a massive increase in inequality, leaving South Africa as the most unequal country in the world[21] and a huge backlog in delivery of basic social rights and commitments. These include housing, property, education, and health.[22]

It is with these complex and urgent issues that the cases discussed here are concerned and Cameron J's contribution is crucial and lasting: *Glenister II* on corruption, *Dladla* on the right to housing, and *Mwelase* on land tenants' rights. Through all of these run the threads of the three challenges for constitutional adjudication identified above: accountability for resource allocation; identifying the substance of socioeconomic rights; and ensuring effective delivery in the face of executive intransigence. Each of these is dealt with below. But first I briefly set out a frame of reference against which these contributions can be assessed.

3 Adjudicating human rights: Bounded deliberative democracy

The role of the judiciary in a democracy, always contested, has come under renewed scrutiny as the US Supreme Court, composed of a majority of justices appointed for their explicitly political views, has set about stamping those views on judgments ranging from removing women's right to an abortion,[23] to upholding the right to carry guns in public,[24] to preventing environmental regulation.[25] In South Africa, there are more safeguards. As a start, judges have fixed tenures, avoiding a fixed majority which can outlive governments of different political persuasions.[26] In addition, the text of the constitution frames and

18 See eg the six-volume 'Final Reports' of the Judicial Commission of Inquiry into State Capture (2022).
19 See eg W Gumede 'SA's entire infrastructure is on the verge of total collapse' *Sunday Times* (1 May 2022).
20 There are clearly other causes too.
21 EH Dyvik 'Gini index: Countries with the biggest inequality in income distribution 2023' *Statista* (12 April 2024).
22 See eg Parliament of South Africa 'Question NW535 to the Minister of Human Settlements' *Parliamentary Monitoring Group* (20 March 2023).
23 *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022).
24 *New York State Rifle & Pistol Association, Inc. v Bruen*, 597 US 1 (2022).
25 *West Virginia v Environmental Protection Agency*, 597 US 697 (2022).
26 Section 176 of the Constitution.

constrains judicial intervention. Nevertheless, it is more important than ever to find ways in which judges can steer their intervention so that they can simultaneously hold legislatures to account for their human rights commitments and remain within the bounds of competence and legitimacy. This is particularly challenging where resource-intensive positive duties are concerned.

An increasingly popular approach is the dialogic theory, originally developed by Peter Hogg and Allison Bushell,[27] who argued that the record of decisions under the Canadian Charter demonstrated that judges did not in fact have the last word on the matter. Instead, the legislature was generally able to respond to judicial invalidation of legislation in ways that preserved the basic legislative objective. This suggested that courts participate in a dialogue with governments so that human rights concerns can be addressed by legislatures while still achieving the original purposes the latter aimed to achieve. More recently, Rosalind Dixon has developed a theory of 'responsive judicial review', which casts the judicial role as primarily to counter three specific dysfunctional aspects of current democracy: political monopoly; blind spots in the adoption of democratic legislation, and inertia or unjustified delay in addressing democratic demands for change in the constitution.[28]

In extra-judicial writings engaging with the challenges of adjudicating socioeconomic rights, Cameron J has set his own criteria for adjudication, endorsing the appropriateness of adhering to the principle of separation of powers while holding the state to account. Responding to critics of the Constitutional Court as being too deferent to the executive, he has asserted that

> institutionally and politically this is surely the Court's proper place – continual review, close scrutiny of government programmes, insistence on attention to the poorest, but leaving a wide margin for democratic institutions to shape the content of the rights within the mandate the voters confer.[29]

In my own work, I have drawn on the insights of deliberative democracy to develop a theory of adjudication which, I argue, provides human

27 PW Hogg & AA Bushell 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75.

28 R Dixon *Responsive judicial review: Democracy and dysfunction in the modern age* (2023).

29 Cameron 'A South African perspective' (n 4) 330.

rights accountability both for courts and for legislatures and executives.[30] Deliberative democrats argue that not all political cooperation should be based on interest bargaining, where the outcome depends on relative economic, material, political or numerical strength. Habermas distinguishes between 'interest governed' and 'value-oriented' coordination.[31] Interest bargaining is communication for the purpose of forcing or inducing the opponent to accept one's claim. Success depends on factual power rather than on good reasons or the power of the better argument. Interest bargaining presupposes that each person's or group's interests are fixed and unchangeable; and the solution is either victory, surrender, or compromise. This contrasts with coordination based on values. Instead of factual power, such coordination is based on the ability to adduce reasons which can convince all the parties. The parties enter the process aiming to justify their position by appeal to reasons that all parties can accept, and willing to be persuaded by arguments put forward by other parties. In place of defeat or victory, therefore, coordination takes place through rationally motivated consensus.[32]

Drawing on these insights, I have argued for an approach to human rights adjudication called 'bounded deliberative democracy'.[33] While interest-based bargaining is an inevitable and often an appropriate component of democracy, the possibility of deliberation stands out as an alternative which can transcend inequalities in bargaining power. Most importantly, human rights should not be addressed on the basis of interest bargaining.[34] If they were, those with superior numerical, political or financial power might always trump the rights of those without power. The power of the principle must itself be the reason for adopting it, rather than the numbers of those who back it. It is here that courts can potentially fulfil a democratic role. When human rights are at issue, courts should augment democratic participation by steering

30 This section is based on S Fredman *Comparative human rights law* (2018) ch 4; S Fredman 'From dialogue to deliberation: Human rights adjudication and prisoners' right to vote' 2013 *Public Law* 292; S Fredman 'Adjudication as accountability: A deliberative approach' in N Bamforth & P Leyland (eds) *Accountability in the contemporary constitution* (2013), applied in *In re: Distribution of essential supplies and services during pandemic* Suo Motu Writ Petition (Civil) 3/2021 at para 3.

31 J Habermas *Between facts and norms* (1997).

32 Habermas (n 31) 139-140, 165.

33 Fredman 'Adjudication as accountability' (n 30).

34 Fredman 'From dialogue to deliberation' (n 30); *Human rights transformed* (n 4).

decision making away from interest bargaining towards value-oriented deliberation or by functioning as a forum for deliberation. While interest groups will always be unequal, deliberative democracy should foster equality of participation. But this too requires intervention. Not all participants will have the same level of articulacy, nor the same skills in expressing a perspective and convincing others. Not all will even find their way into the deliberative forum. Courts in human rights litigation can only play a legitimate role if they make it possible for even the weakest voice to be heard and give equal persuasive power to all. Thus, Frank Michelman has argued that a Constitutional Court should 'reach for the inclusion of hitherto excluded voices of emergently self-conscious social groups'.[35] A judicial decision should not necessarily give a veto power to a minority. But neither should it simply require the interests of a weaker group to be considered. Instead, the process of articulating the case amplifies the voice of the minority as part of the process of persuasion.

It could be argued, however, that a deliberative approach is incompatible with the very essence of human rights adjudication. Deliberative models assume an open-ended approach, allowing the process to produce a solution with no preconditions.[36] Human rights, by contrast, require a prior commitment to the observation of human rights. Moreover, human rights pose particularly difficult challenges because they are neither fully determined nor open to thoroughgoing deliberative solutions. If they were fully determined, then both courts and legislatures could simply apply formulaic responses. Both institutions would be bound by the same mandatory norms and neither would be superior. However, human rights are open to a range of interpretations in particular contexts. Similarly, the question of whether human rights have justifiably been limited inevitably requires a judgment. On the other hand, human rights are not simply open moral questions. They are based on a consensus that has developed over time and is universally accepted as to what the fundamentals of being human in a political society require. It is within the framework set by this prior deliberative consensus that current decision making must take place. Thus, human rights place real

35 F Michelman 'Law's republic' (1988) 97 *Yale Law Journal* 1493 at 1529.
36 J Cohen 'Deliberation and democratic legitimacy' in A Hamlin & P Pettit (eds) *The good polity* (1989) 23.

constraints on both judicial and legislative decision making, while at the same time being open to interpretation.

This means that courts are not entitled to impose their views on open-ended moral grounds. The role of the court is not to exercise a conclusive veto or to prescribe an authoritative interpretation, but nor is justification measured against an open-ended standard of rationality or reasonableness, as in administrative law. Decision makers must be in a position to persuade the court that they have fulfilled their human rights obligations, account being taken both of the pre-existing deliberative consensus and of the fact that there is room for reasonable disagreement. Crucially, such reasons must be value-oriented rather than interest based. This is particularly true for decisions taken that affect individuals and groups without the political power to influence the decision. That is why the model I propose is not one of pure deliberative democracy, but of bounded deliberation.[37] In its important intervention at the height of the Covid-19 pandemic, the Indian Supreme Court relied on this model to achieve a roll-out of oxygen to desperate patients in Delhi, and to facilitate the provision of free vaccinations rather than distribution of vaccines being based on market prices.[38]

With this framework in mind, I turn to evaluate the three cases of concern here.

4 Accountability and resources: *Glenister II*

Although *Glenister II* is not a socioeconomic rights case, it is important in connecting corruption with poverty, inequality and the failure to roll out socioeconomic rights. It therefore frames key issues in relation to the appropriate role of the judiciary faced with resource-based justifications for limiting rights, especially where positive duties are concerned. *Glenister II* was triggered by the government's dissolution of the specialised crime fighting unit (the Directorate of Special Operations, commonly known as the Scorpions), that had been located within the National Prosecuting Authority; and its replacement by a different body (the Directorate for Priority Crime Investigation, commonly known as the Hawks) located

37 See again Fredman 'Adjudication as accountability' (n 30).
38 *In re: Distribution of essential supplies and services during pandemic* (n 30) para 3.

within the South African Police Service (SAPS).[39] This was challenged on the grounds, inter alia, that it breached the constitutional obligation to establish an independent anti-corruption unit. The challenge was upheld by a narrow majority of five to four, with the majority judgment penned by Moseneke DCJ and Cameron J. Critical examination of the judgment usually focuses on its novel (and, for some, controversial) approach to incorporation of international conventions.[40] This paper is not, however, concerned with this aspect of the case. The interest of the judgment of Moseneke DCJ and Cameron J for this paper is rather for the extent to which the recognition of the link between corruption and breach of socioeconomic rights leads them to take seriously the ways in which a court should hold governments accountable for proper use of resources without being guilty of judicial overreach.

The first question concerns whether there is a duty under the South African Constitution to establish an independent anti-corruption unit, and what independence might mean for these purposes. Under the lens of bounded deliberative democracy, the court should determine which interpretation fulfils a deliberative standard, that is which interpretation is persuasive in a value-oriented sense, taking into account the values of equality, solidarity, and human dignity, rather than the power of the interests represented. Particularly important is the need to ensure that the voices of those without political power are heard. In this respect, both the majority and the minority judgements recognise that corruption disproportionately hurts the poor[41] and undermines the ability of government to combat poverty and discharge their obligations to deliver socioeconomic rights guaranteed in the Constitution.[42] 'Corruption in the polity,' state Moseneke DCJ and Cameron J, 'corrodes the rights to equality, human dignity, freedom, security of the person and various socioeconomic rights'.[43] Both the majority and minority judgments also interpret section 7(2) of the Constitution, which places an obligation on the state to respect, protect, promote and fulfil all the rights in the Bill

39 For an in-depth discussion of the background, see J Berning & M Montesh 'Countering corruption in South Africa: The rise and fall of the Scorpions and Hawks' (2012) 39 *South African Crime Quarterly* 3.

40 E Cameron 'Constitutionalism, rights, and international law: The *Glenister* decision' (2012) 23 *Duke Journal of Comparative and International Law* 389.

41 *Glenister II* (n 1) para 167.

42 *Glenister II* (n 1) paras 57, 83.

43 *Glenister II* (n 1) para 200.

of Rights, to include a duty to prevent and combat corruption.[44] For the majority, this is explicitly value-oriented. Moseneke DCJ and Cameron J find that, even without taking international law into account, section 7(2) is triggered because corruption corrodes the rights to equality, dignity, freedom, security of the person and various socioeconomic rights including healthcare, education and housing.[45]

The majority and the minority, however, go in different directions in relation to whether the state had discharged these duties. Under bounded deliberative democracy, the state should be able to convince the court, on the basis of values rather than pure interest, that the means chosen can lead to the fulfilment of the right. Consistently with its institutional position and capacities, it is not for the court to devise the appropriate means. Nevertheless, the guiding principle is not simply deference to the state. The court should hold the state to a high standard to show that the means chosen can convincingly achieve the right as defined by bounded deliberation. Where resources are at issue, this means that the standard is not simply one of proportionality. Specifically, the government must include its assessment of both the cost of complying and the cost of not complying, and who bears these various costs. Simply asserting a resource-based argument would not sufficiently demonstrate why the cost should fall on the rights-bearers. Any deference to the state on the means chosen to achieve these rights must be shown to convincingly lead to the fulfilment of this understanding of the right at issue. On this issue, Moseneke DCJ and Cameron J, keeping in view the seriousness of corruption for the rights to equality, dignity, freedom, health- care, education and housing, can be regarded as holding the state to this standard. In their judgment, 'to create an anti-corruption unit that is not adequately independent would not constitute a reasonable step'.[46] They therefore find, firstly, that the Constitution imposes an obligation on the state to 'establish and maintain an independent body to combat corruption and organised crime' and, secondly, that the requirement of independence had not been met.[47]

44 *Glenister II* (n 1) para 106 (Ngcobo J); para 197 (Moseneke DCJ and Cameron J).
45 *Glenister II* (n 1) para 198-200.
46 *Glenister II* (n 1) para 195.
47 *Glenister II* (n 1) para 163.

Ngcobo J's dissenting judgement is, however, far more deferent. Ngcobo J accepts that the state has a positive duty under section 7(2) to prevent and combat corruption.[48] However, he states that the 'Constitution leaves the choice of the means to the state'.[49] There is no requirement that the state should use 'the best method possible or the most effective methods to combat crime including corruption'.[50] All the Constitution requires is that the state should 'enable the police service to discharge its responsibilities effectively'.[51] In his view, the test for independence required by international law is not analogous with judicial independence, but rather asks whether there is a risk of undue political interference. Applying this test, he holds that the Hawks enjoyed sufficient autonomy through institutional and legal mechanisms aimed at preventing undue political interference. It therefore complied with the constitutional obligation that national legislation should enable the police service to discharge its responsibilities effectively. Given the finding that there were adequate safeguards to prevent undue political interference, he concluded that locating the anti-corruption service within the SAPS, which is not independent, rather than the National Prosecuting Authority, which is, did not detract from the state's duty under section 7(2) to respect, protect, promote and fulfil the rights in the Constitution.[52]

The majority judgment proved prescient. In its report on corruption issued in June 2022, the Commission of Inquiry into State Capture cited Moseneke CJ and Cameron J's dictum:

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.[53]

However, it can be argued that the link between corruption and breach of socioeconomic rights should have led the judges to exercise even greater

48 *Glenister II* (n 1) para 106.
49 *Glenister II* (n 1) para 107.
50 *Glenister II* (n 1) para 111.
51 Section 205(2) of the Constitution.
52 *Glenister II* (n 1) paras 156-157.
53 See the Commission of Inquiry into State Capture (n 18) pt I, vol 1, para 672, citing *Glenister II* (n 1) para 166.

scrutiny, exposing the narrow line between an approach based on self-interest and a genuinely deliberative approach driven by a commitment to the values of the Constitution. Instead, even the majority judgment was deferent as to the question of whether location of the Hawks in the SAPS was compatible with true independence.[54]

In the event, the judgment's five criteria for independence were only skimpily applied in amending legislation and the Hawks continued to be located in the SAPS. The subsequent challenge in 2014,[55] while striking down aspects of the amending legislation, did not make the express link with poverty and socioeconomic rights. The record speaks for itself. Between 2001 and 2009, the Scorpions appeared to be at the helm of almost every high-profile corruption and fraud case. By February 2004, the Scorpions were reported to have completed 380 prosecutions with 93.1% resulting in convictions,[56] and between 2005 and 2007, they reportedly completed 264 prosecutions, 85% of them leading to convictions.[57] Since the Scorpions were disbanded, there has been an almost complete absence of corruption prosecutions.[58] Meanwhile, much of the cost of the estimated R1.5 trillion lost to corruption fell on the poorest and most vulnerable, in funds meant for housing, sanitation, health and transport, as well as in potential lost jobs, energy and infrastructure.[59] The importance of judicial scrutiny of government justifications for limiting rights based on claims of resource scarcity is placed into stark relief.

54 It is beyond the scope of this chapter to assess whether the judgment in practice resulted in augmenting what Epp calls 'support structures', namely advocacy groups, financial and legal resources, strategic planning by grassroots organisations or governmental enforcement agencies: see C Epp *The rights revolution* (1998). Similarly, more research is needed to determine whether the judgment could be said to build state capacity: compare M Khosla & M Tushnet 'Courts, constitutionalism, and state capacity: A preliminary inquiry' (2022) 70 *American Journal of Comparative Law* 95. For a study of the impact of strategic litigation in South Africa, see J Brickhill 'Strategic litigation in south africa: Understanding and evaluating impact' PhD thesis, University of Oxford, 2021.

55 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32.

56 Berning & Montesh (n 39) at 5.

57 National Prosecuting Authority 'Annual report 2006/07' (September 2007) 11.

58 K Dlamini 'Scorpions' downfall due to political interference' *Corruption Watch* (10 October 2018); E James 'Zondo and the case for an independent anti-corruption agency in South Africa' *Pinsent Masons* (18 May 2022).

59 M Merten 'State Capture wipes out third of SA's R4.9-trillion GDP – never mind lost trust, confidence, opportunity' *Daily Maverick* (1 March 2019).

5 Reasonableness, adequacy, and the content of the right: *Dladla*

The *Dladla* case comes to the question of separation of powers and assessment of resource-based justifications from a different direction. The South African Constitutional Court has set itself firmly against embarking on the project of defining the content of socioeconomic rights, emphasising in a series of cases that the Constitution should not be interpreted as providing for a minimum core as part of a self-standing right conferred on everyone.[60] Instead, the weight of adjudication has fallen on whether the state has fulfilled its duty to take reasonable measures within available resources to achieve progressive realisation of the right. There were several reasons for this. One was the Court's concern that delineating the content of the right would entitle everyone to claim the minimum core immediately, which it regarded as too demanding on the state. In *Treatment Action Campaign*, the Court held:

> [I]t is impossible to give everyone access even to a 'core' service immediately. All that is possible and all that can be expected of the State, is that it act reasonably to provide access to the socioeconomic rights ... on a progressive basis.[61]

There was also a concern that the court might instigate 'queue-jumping' if it allowed the litigant before the court to claim the substance of the right immediately, whereas those who are not before the court are required to wait patiently in the queue.[62] Furthermore, the Court has indicated, the litigants before the Court are not the worst off, so granting them rights would create broader distributional injustice.

This refusal to define the substance of the right, with its corresponding deference to the state in relation to measures to be taken, were most emphatically in evidence in *Mazibuko*, where the Court rejected the claim that the content of the right to water, found in section 27(1), could be determined independently of the state's duty to realise the right in section 27(2). According to O'Regan J:

60 *Grootboom* (n 15) para 33; *Minister of Health v Treatment Action Campaign (No. 2)* [2002] ZACC 15 (*TAC*) paras 26-39; *Mazibuko* (n 17) paras 55-68.
61 *TAC* (n 60) para 35.
62 *Grootboom* (n 15) paras 71, 81. See K Young 'Rights and queues: On distributive contests in the modern state' (2023) 55 *Columbia Journal of Transnational Law* 65.

> [Sections] 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the state. That obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim 'sufficient water' from the state immediately.[63]

The depth of this deference is surprising, given that the World Health Organization has specified minimum levels of water per person per day to ensure that most basic needs are met.[64] Although there was a dispute between expert reports presented in *Mazibuko* as to the precise volume required as an existential minimum, there was no doubt that a minimum level could be determined.[65] Even more concerning was the fact that the Court did not require the state to demonstrate how it would fulfil its obligation progressively to realise the right to water. Instead, it held that the fact that some progress had been made during the course of the protracted proceedings were sufficient to fulfil the reasonableness criterion.[66]

While there might have been some basis to the Court's deference in the early years, as decades pass since the transition to democracy, the slow pace of change demands more from the Court in holding the state to its constitutional promises. In particular, as *Mazibuko* demonstrated, the concept of progressive realisation has been subsumed into a general principle of reasonableness, with little or no demands for a clear timetable, targets or benchmarks. To make progressive realisation genuine requires at least some appraisal by courts of the target to which the state should be working. Particularly pressing is the need to develop the concept of 'reasonableness'. This could be a vehicle for deliberative reasoning, but has also allowed judges to leave difficult decisions on resource allocation issues to the political arena, where interest-based reasoning is paramount. Defining reasonableness is all the more important, given, as we have seen, that the Constitutional Court has consistently declined to give socioeconomic rights a substantive content or a minimum core meaning.

63 *Mazibuko* (n 17) para 56.
64 United Nations Office of the High Commission for Human Rights 'The right to water: Fact sheet 35' (August 2010) 8.
65 *Mazibuko* (n 17) para 61.
66 *Mazibuko* (n 17) paras 93-97.

One way forward, which I have examined in previous work, is to move away from the assumption that social rights necessarily refer to a bundle of goods.[67] A right can also be a right to an act, such as the creation of institutions, enabling or facilitative powers, or programmes of further action. To determine whether the state is progressively realising the right does not require courts to specify the means, but rather to develop criteria to assess, from a deliberative standpoint, the state's definition of the requirements of the right, and the state's explanation of its chosen means to move towards that end. These criteria can be derived from the underlying principle behind incorporating rights giving rise to positive duties into a constitution. In the South African case, these values are explicit: the values of dignity, equality, and freedom.[68] The state's duties to fulfil the socioeconomic rights in the Constitution are not simply aspirational, but require evidence of steps taken and of an interpretation of the right which enhances these values.

Cameron J's judgment in *Dladla* suggests ways towards an appropriate judicial role along these lines. The case is a sequel to *Blue Moonlight*,[69] where the Court held that the City of Johannesburg was in breach of the right to access adequate housing in section 26 by failing to take responsibility for re-housing people evicted by private landlords.[70] It ordered the City to provide temporary accommodation to the occupants. In response, the City provided temporary accommodation at Ekuthuleni Shelter. The accommodation was deliberately temporary, to avoid the charge of 'queue-jumping' ahead of those on the long waiting list for permanent housing. Nevertheless, the occupants remained there for at least four years. The Shelter's rules were clearly not suitable for these residents. Two rules were particularly problematic. The first was the lockout rule, which required residents to leave the Shelter between 08h00 and 17h30 daily. This meant that residents who worked nightshifts or were ill could not rest during the day. Those who were unemployed had to remain outdoors all day, rendering them vulnerable to violence. Moreover, gates were locked at 20h00, meaning that occupants had to

67 Fredman *Human rights transformed* (n 4) 77ff.
68 Section 1 of the Constitution.
69 *City of Johannesburg v Blue Moonlight Properties* [2011] ZACC 33.
70 See further J Dugard 'Beyond *Blue Moonlight*: The implications of judicial avoidance in relation to the provision of alternative housing' (2014) 5 *Constitutional Court Review* 265.

find alternative accommodation, or sleep in the street, if they returned later. This bore very heavily on occupants whose work kept them away later than this hour. The second rule required men and women to sleep in separate dormitories, so that heterosexual couples could not stay together, and children had to stay with their mothers. Both rules were strictly enforced.[71]

In *Dladla*, the occupants challenged these rules. Their challenge was upheld by the High Court,[72] which found that these two rules were unjustifiable infringements on the applicants' constitutional rights to dignity, freedom and security of the person, and privacy.[73] The Supreme Court of Appeal (SCA), however, upheld the City's appeal, on the basis that the nature of the Shelter meant that its rules were not unreasonable.[74] For example, mixed dormitories might offend many people's sense of modesty and dignity. The SCA also accepted the City's argument that, because this was temporary accommodation and not a permanent home, the applicants did not have the same rights as they would have in their own homes.[75] The Constitutional Court reinstated the decision of the High Court. However, Cameron J differed from the majority judgment as to the nature of the constitutional breach. Mhlantla J, giving the majority decision, held that the Shelter's rules should be separated from the provision of accommodation. While the provision of temporary accommodation implicated section 26(2), the Shelter rules did not.[76] Instead, the rules breached the rights to dignity, freedom and security of the person and privacy.[77] If the rules were not in place, section 26(2) would be fulfilled. Moreover, because the Shelter rules did not constitute a 'law of general application' as required by the justification provision in section 36(1), there was no constitutional basis for arguing that these breaches were justifiable.[78] Jafta J held that section 26(2) was not even implicated, as the City was merely carrying out the *Blue Moonlight* court

71 *Dladla* (n 2) para 3.
72 *Dladla v City of Johannesburg Metropolitan Municipality* [2014] ZAGPJHC 211.
73 Sections 10, 12 and 14 of the Constitution.
74 *City of Johannesburg v Dladla* [2016] ZASCA 66 (*Dladla* SCA) para 23.
75 *Dladla* SCA (n 74) paras 19-20.
76 *Dladla* (n 2) para 41.
77 *Dladla* (n 2) para 47.
78 *Dladla* (n 2) para 52.

order. The rules breached the order because they were not explicitly authorised, but were instead add-on rules and conditions.[79]

Cameron J,[80] by contrast, while agreeing with the result, insisted that the right to adequate housing was necessarily at issue. He found the distinction between the provision of temporary accommodation and the Shelter's rules unpersuasive. Any rules the Shelter imposed to regulate residents' conduct necessarily informed the adequacy of housing; and the provision of temporary accommodation remained a measure to achieve the progressive realisation of that right. This meant that the standard of scrutiny to be applied by the court was whether the accommodation at issue constituted reasonable measures within available resources to fulfil the right, as required by section 26(2). Applying this standard, he found that the Shelter's rules were unreasonable and section 26(2) had been breached.[81]

Given that the judgment of Cameron J reached the same conclusion as the other judgments in the case, what is the importance of the different route chosen? There are four ways in which his judgment contributes to these challenges, all of which have the potential to make a major contribution to the development of socioeconomic rights jurisprudence in South Africa. Perhaps the most striking is the fact that he is prepared to develop a way to evaluate the substantive content of the meaning of adequacy for the purpose of the right to 'have access to adequate housing' in section 26(1), rather than focussing only on the reasonableness of the measures under section 26(2). Cameron J stated: 'Temporary accommodation of necessity entails more than just providing a roof and four walls; it must include all that is reasonably appurtenant to making the accommodation adequate.'[82] This was taken a step further by Majiedt J in his dissenting judgement in *Thubakgale*.[83] Building on the notion of adequacy in *Dladla* as well as under the International Covenant on Economic, Social and Cultural Rights of 1966, he held that, in the context of South Africa's highly segregated urban areas, with

79 *Dladla* (n 2) paras 120, 123.
80 With whom Froneman J and Khampepe J concurred, and Madlanga J concurred except for paras 93-100 (relating to the question of whether the rules constituted a law of general application).
81 *Dladla* (n 2) paras 64-92, 100.
82 *Dladla* (n 2) para 57.
83 *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45.

deeply uneven access to resources, spatial justice should be considered in determining what constitutes adequate housing.[84] Putting these judgments together, albeit neither is in the majority, gives a glimmer of how a more substantive notion of adequate housing might be developed in a deliberative sense. Such a substantive notion would not cross the line of separation of powers by defining, in bricks and mortar terms, what adequacy requires. Instead, it requires the state to show that it has fulfilled the criteria of equality, participation, solidarity, and dignity.

Although reasonableness is a convenient principle to frame this development, it would be helpful for the court to define the criteria more specifically, as has been done in relation to basic education.[85] In a series of cases relating to abysmal schooling environments, litigants have pressed the courts to establish that the right to education includes the conditions in which a child is educated. These cases have not reached the Constitutional Court, but in a development of potentially great importance, High Courts and the SCA have been willing to find that that the right includes basic conditions for learning, including proper buildings,[86] textbooks,[87] desks and chairs,[88] teachers,[89] scholar transport,[90] and, most recently, nutrition.[91] Thus in *Madzodzo*, Goosen J stated:

> The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.[92]

In a case concerning scholar transport, Plasket J was similarly unequivocal, and emphasised that the state is under a duty to fulfil these substantive components:

84 *Thubakgale* (n 83) paras 108-110.
85 This section draws on Fredman *Comparative human rights law* (n 30) ch 11.
86 *Equal Education v Minister of Basic Education* [2018] ZAECBHC 6 para 176.
87 *Section 27 v Minister of Education* [2012] ZAGPPHC 114 (*Texbooks I*) para 25; *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 (*Textbooks II*) para 46.
88 *Madzodzo v Minister of Basic Education* [2014] ZAECMHC 5 para 41.
89 *Linkside v Minister of Basic Education* [2015] ZAECGHC 36 para 25.
90 *Tripartite Steering Committee v Minister of Basic Education* [2015] ZAECGHC 67 para 72.
91 *School Meals* (n 14) para 43.
92 *Madzodzo* (n 88) para 20. See generally F Veriava *Realising the right to basic education: The role of the courts and civil society* (2019).

> [W]here scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.[93]

In *Textbooks II*, the SCA held the government to a duty, embodied in the latter's own policy documents, to provide a textbook for every learner in Limpopo province; the court rejected counsel's argument that this standard was impractical, or one that the government had set itself merely as an aspiration or ideal.[94]

The right to basic education stands out from the other socioeconomic rights in the Constitution in that it is immediately realisable. Arguably, it is for this reason, courts have been more open to defining the substance of the right than for progressively realisable rights. However, the approach to adequacy by Cameron J in *Dladla* and Majiedt J in *Thubakgale* suggests that the criteria for reasonableness in progressively realisable rights could be further specified in terms of values suggested above. In *Madzodzo*, for example, the court drew on the values of equality and dignity to specify adequacy in relation to the right to basic education. In particular, the Court held, the right to basic education includes the provision of adequate and age-appropriate furniture so that each child has a desk of her own with sufficient space:

> Learners ... are entitled to have immediate access to basic education. They are also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermines the right to basic education.[95]

Similar broad criteria could be specified, for example, in relation to adequate housing, sufficient food and water, healthcare services and social security.

Secondly, Cameron J dealt with the resources argument head-on. The City submitted that the Shelter's two rules saved money, which it urgently needed for others who were even worse off. As we have seen above, judges are often reluctant to engage with resource-based arguments because of their concerns as to their own legitimacy and competence. However,

93 *Tripartite Steering Committee* (n 90) para 19.
94 *Textbooks II* (n 87) para 42.
95 *Madzodzo* (n 88) para 36.

in *Dladla*, rather than simply accepting that calculation of available resources was a decision best suited to the political sphere, Cameron J required the state to justify this assessment by reference to the actual figures. Here he found that the argument was thin. Although abolishing the lockout rule would increase the monthly costs per resident by about R310, the ameliorating measure, a daily drop-in centre, more than offset this saving.[96] Cameron J continued:

> So, the City's argument that housing is a zero-sum game – where if you require better treatment of one group, another group necessarily suffers – is not borne out by the facts here ... The City's notional assertion that every rand spent on the residents counts against money for others who need shelter is undoubtedly correct – but it cannot prevail in the general terms in which the City propounded it here.[97]

This can be regarded as an example of bounded deliberative democracy. Instead of leaving the decision in relation to resource allocation to interest-bargaining in the political sphere, he required the state to justify its decision on the basis of the values in the Constitution.

The third issue, the comparative welfare argument, can similarly be regarded as having been addressed in deliberative terms. In a version of the familiar 'queue-jumping' argument,[98] the City submitted that the rules should be judged more leniently because there were hundreds of thousands of people in Johannesburg who were worse off than the residents, living without shelter, food or warmth. For Cameron J, however

> The reasonableness of public treatment of the vulnerable cannot depend only on the fact that what they are getting is better than that of others who are worse off. The question is not whether others are worse off, but whether these measures the City is taking here, now, with this vulnerable group, affords them sufficient care, respect and dignity ... If the comparative welfare of others, or their lack of it, could without more justify deprivation of benefits, this could imply a race to the bottom, where the hierarchy of the worse-off determines who is entitled to dignity. This could lead to infinite regressions of impoverishment and misery.[99]

Considered from the perspective of bounded deliberative democracy, his approach can be regarded as requiring the reasonableness argument to

96 *Dladla* (n 2) para 85.
97 *Dladla* (n 2) para 86.
98 Young 'Rights and queues' (n 62) 67.
99 *Dladla* (n 2) paras 89-90.

be bounded by the rights to concern, dignity and respect of the litigants before the Court. Cameron J acknowledged that this entailed a painful clash of principles. This acknowledgement can also be regarded as reflecting the deliberative approach, according to which it is preferable to be open about clashes of principles, and show how they are resolved.

The fourth key contribution of Cameron J's concurring opinion in *Dladla* concerns his interpretation of section 36(1) and in particular the meaning of 'in terms of law of general application', which appears to function as the only gateway to the justification of any limitation of a constitutional right. The majority decision found that, because the rules of the Shelter were not a law of general application, there was no need to embark on a limitations analysis. This meant that once a breach of the rights to dignity, personal security and privacy was established, no limitation could be justified.[100] Cameron J, by contrast, held that section 36 should apply. He gave two reasons. First, he rejected the majority view that the absence of a 'law of general application' precludes a limitation analysis.[101] Secondly, he rejected the majority's restriction of the 'law of general application' to a statutory measure. As well as undoubtedly including the common law, he held that it should also cover the order in *Blue Moonlight*, in which the Shelter's rules were sourced. Given that section 36 states that a rights infringement may be justified 'in terms of a law of general application' rather than being limited to 'by' such a law, it includes policies that are *sourced* in law.[102] Here the Shelter's rules were sourced in the order in *Blue Moonlight*. They therefore needed to be subjected to the scrutiny of section 36(2). Under this scrutiny, they should be struck down. This, he held, was a preferable route to sidestepping the issue by holding that section 36(2) did not apply. This too can be regarded as reflecting a deliberative approach. Proper deliberation cannot take place unless there is an opportunity for the state to advance its reasons for limiting a right, but this must occur within the bounds of the Constitution. Section 36(2) is a preferable arena, because it places

100 *Dladla* (n 2) para 52.

101 *Dladla* (n 2) para 92, where Cameron J says: 'I do not agree ... that "law of general application" is a threshold consideration that can preclude limitations analysis. It is possible – must be possible – to enquire into the reasonableness of a measure intended to fulfil section 26 without first hunting down a "law of general application" enabling that measure.'

102 *Dladla* (n 2) paras 94-100.

strict boundaries on the kind of justifications that can be offered, as well as requiring a high level of scrutiny under the proportionality doctrine. This is further borne out by Cameron J's assessment of the role of section 26(2), the internal reasonableness standard.

Most importantly, he held, reasonableness in section 26(2) should 'mean the same, or at least entail the same interpretive process'[103] as the Constitution's limitation clause.[104] This meant, in turn, that the reasonableness inquiry in section 26(2) should 'thoroughly scrutinise any rights-limitations it may inflict'.[105] Context matters, as well as the nature of the right and the obligation. Reasonableness might vary in intensity depending on the right infringed and the context. Where a measure that affects the right to life is designed progressively to realise the right of access to healthcare, the level of scrutiny will differ from cases in which it is justified 'merely by a lack of resources.'[106] Resource scarcity which can be demonstrated may mean that the measure is more easily proved reasonable, but the scrutiny will remain intense because of the right at issue. Again, this could be regarded as reflecting a bounded deliberative democracy approach, requiring reasoning which is not based on interest-bargaining within a political process, but instead relies on its coherence and plausibility, bounded by the obligations to respect, protect, and fulfil the rights expressed in the Constitution.

6 Delivering socioeconomic rights: *Mwelase*

The final judgment discussed here, which was also Cameron J's last judgment from the bench, constitutes a crucial contribution to the genuine realisation of socioeconomic rights, and a refusal to accept that separation of powers can condone bureaucratic obstacles to their achievement, whether through intransigence, incapability, lack of resources or corruption, or a noxious combination of all of these.[107] As Cameron J, delivering the majority judgment, stated:

103 *Dladla* (n 2) para 75.
104 Section 36 of the Constitution.
105 *Dladla* (n 2) para 76.
106 *Dladla* (n 2) para 77.
107 G Budlender & K Roach 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325; J Braithwaite *Restorative justice and responsive regulation* (2002); C Hansen

> At issue are not only the lives and wellbeing of those claiming the betterment of their lives as labour tenants. At issue is the entire project of land reform and restitution that our country promised to fulfil when first the interim Constitution came into effect, in 1994, and after it the Constitution, in 1997.[108]

The term 'labour tenants' refers to people who work on a farm in exchange for the right to live there and to work on a portion of the farm for their own benefit. In Cameron J's words: 'Labour tenancy has deep roots in our land's pernicious racial past ... It is a precarious state, subject to the will of the landowner.'[109] The Labour Tenants Act[110] was intended to remedy this, promising security of tenure to labour tenants. Rather than being subject to the will of the farmer, labour tenants were given the express right to occupy and use the part of the farm on which they lived. Landowners' powers to evict without reason or notice were curbed, and tenants were given protection against eviction. More significantly still, chapter 3 of the Act gave labour tenants the right to acquire actual ownership of the land they had used and occupied. However, this last right required a detailed bureaucratic procedure, including an application and the opportunity for the landowner to oppose the claim, which needed to be processed. Although thousands of labour tenants timeously lodged applications with the Department of Rural Development and Land Reform before 31 March 2001, the majority of applications were not processed. Among these were the applicants in *Mwelase,* who turned to the Land Claims Court for assistance, after 13 years of attempting to progress their claims through an obdurate Department. The case revealed that the Department's records were 'non-existent or shambolic'[111] and a report from 2016 indicated that a staggering figure of 11 000 applications remained unprocessed.[112] After three years of Departmental failure to respond to various remedial solutions, including agreements, court orders and direct court supervision, the Land Claims Court ordered the appointment of a special master to prepare and execute an implementation plan. Given a backlog of applications which might take

'Inattentive, intransigent and incompetent' in S Humm (ed) *Child, parent and state* (1994).

108 *Mwelase* (n 3) para 2.
109 *Mwelase* (n 3) para 5.
110 Act 3 of 1996.
111 *Mwelase* (n 3) para 21.
112 *Mwelase* (n 3) para 16.

at least 24 years to process,[113] the special master would be in a position to assist the Department to develop a strategy for the efficient processing and referral of claims.

The appointment of the special master was overturned by the SCA.[114] The SCA held that the special master was an inappropriate foreign import, an outsider who would in effect usurp the functions of the Department, taking over the role of implementing legislation which had been entrusted to the Department. The Land Claims Court order was censured as a 'gross intrusion by a court into the domain of the executive' and thus 'a textbook case of judicial overreach'.[115] The order was, however, reinstated by the Constitutional Court. Acknowledging that this was a novel remedy in the South African context, Cameron J held that it was nevertheless appropriate in the context of 'sustained, large-scale, systemic dysfunctionality and obduracy'.[116] The failure to discharge its statutory duties did not only jeopardise the right of land claimants but threatened the constitutional security of all South Africans, 'profoundly exacerbat[ing] the intensity and bitterness of our national debate about land reform'.[117]

The judgment is important for its contribution to three challenging issues: separation of powers and the allegation of judicial overreach, the role of 'foreign imports' or comparative law; and the court's role in devising systemic remedies for systemic wrongs. On the first question, he held, separation of powers do not imply

> a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.[118]

He reiterated the Court's consistent recognition of its own specific and constrained role within the constitutional allocation of power, and particularly, the lack of any desire to supplant government in its

113 *Mwelase* (n 3) para 27.
114 *Director-General for the Department of Rural Development and Land Reform v Mwelase* [2018] ZASCA 105 (*Mwelase SCA*).
115 *Mwelase SCA* (n 114) para 51 (per Schippers JA).
116 *Mwelase* (n 3) para 39.
117 *Mwelase* (n 3) para 41.
118 *Mwelase* (n 3) para 46. See also para 47, citing Liebenberg (n 4) 70.

task of implementing legislative and other programmes. However, in a statement which clearly resonates with bounded deliberative democracy, he held that the constitutionally mandated function of the court includes stepping in when persuaded by 'argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programmes'.[119] Crucially, this includes, not only when the executive or the legislature 'has done wrong' but also when it 'has not done enough'.[120]

The second question concerned the use of comparative resources. Here Cameron J had no doubt that it was a mistake to regard a special master as an inappropriate importation, as the SCA did. As a start, he held, the Land Claims Court's main warrant for the appointment was not foreign practice, but its own statutory powers.[121] In any event, he held that there was much benefit in considering whether remedial mechanisms that work elsewhere might also work in South Africa. Crucially, this did not mean that the South African court was bound by foreign courts' approaches. In this case, the master would be closely supervised by the court, thereby sidestepping the risk of usurping executive powers.[122]

The third and particularly important contribution of Cameron J's judgment is its recognition of systemic nature of the wrong and his preparedness to accept a systemic remedy. The facts in *Mwelase* are just one demonstration of the numerous occasions in which the obstacle to realisation of rights has not been the lack of a policy, but bureaucratic failures. How to address regulatory failure has been the subject of several important studies.[123] In his study, Chris Hansen characterised the reasons of for non-compliance as based in 'incompetence, inattentiveness and intransigence',[124] each of which calls for different kinds of remedies. However, as Helen Taylor points out, it may be necessary to look beyond individual inattentiveness, incompetence or intransigence

119 *Mwelase* (n 3) para 51.
120 *Mwelase* (n 3) para 53.
121 *Mwelase* (n 3) para 61.
122 *Mwelase* (n 3) paras 56-61.
123 G Teubner 'Substantive and reflexive elements in modern law' (1983) 17 *Law and Society Review* 239; Braithwaite (n 107); Fredman *Human rights transformed* (n 4) ch 6; S Fredman 'Breaking the mold: Equality as a proactive duty' (2012) 60 *American Journal of Comparative Law* 265.
124 Hansen (n 107) 232.

to the underlying 'institutional dynamic' in order to frame remedies, such as court appointed agents, which aim to address 'the institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials'.[125] In response to such systemic blockages, courts across South Africa have been developing innovative remedies,[126] such as the court appointed auditor to supervise the delivery of furniture in the mud school cases in *Madzodzo,*[127] the claims administrator to oversee the disbursement of teachers' salaries in *Linkside*,[128] and the panel of experts appointed to evaluate the implementation of the payment of social grants by the South African Social Security Agency in *Black Sash*.[129]

More empirical work is needed to evaluate the effectiveness of these remedies. In my own work, I have drawn on the insights of systems theory into the limitations of a 'command-and-control' approach to legal remedies and the possibilities of 'reflexive law', which aims to locate the trigger for change within an organisation.[130] System theorists posit that organisations are likely to have their own internal logic, interpreting messages from law or other external stimuli according to their own 'language' or organisational system.[131] They therefore stress the importance of understanding the internal workings of organisations in order to find the triggers for change as well as to avoid obstacles and misunderstandings. Otherwise, attempting to impose change through simple 'command-and-control' remedies might have contradictory consequences. Gunther Teubner characterises this process as giving rise to a 'regulatory trilemma'.[132] First, prescriptive legal remedies might encounter token compliance without real change. Second, command-and-control remedies may be openly flouted, damaging the credibility of the legal system. Third, prescriptive legal solutions might be accepted,

125 H Taylor 'Forcing the Court's remedial hand: Non-compliance as a catalyst for remedial innovation' (2019) 9 *Constitutional Court Review* 247 at 252; see also G Mukherjee & J Tuovinen 'Designing remedies for a recalcitrant administration' (2020) 36 *South African Journal on Human Rights* 386.
126 Fredman *Comparative human rights law* (n 30) ch 11; Taylor (n 125).
127 *Madzodzo* (n 88) para 25.
128 *Linkside* (n 89) paras 20-21.
129 *Black Sash Trust v Minister of Social Development* [2017] ZACC 8 paras 68-69.
130 Fredman *Human rights transformed* (n 4) ch 6.
131 Teubner (n 123).
132 G Teubner 'Juridification – concepts, aspects, limits, solutions' in G Teubner (ed) *Juridification of social spheres* (1987) 3 at 19-22.

but at the cost of damaging the capacity of the organisation to function properly. All three of these possibilities are visible from the facts of *Mwelase*. Token compliance without real change (the first horn of the trilemma) is apparent from the Department's consistent claims that labour tenants have been dealt with through other land reform projects.[133] The second horn of the trilemma, namely openly flouting statutory duties, can be seen in the continuing non-response and evasion by the Department of Rural Development and Land Reform to the tenant farmers' rights. In Cameron J's words, 'the Department in effect conceded its statutory duties under the statute – but suggested that it knew better than the Legislature'.[134] The third horn of the dilemma, namely an attempt to comply leading to damage to the regulated body, could occur if the Court simply ordered the Department to clear the backlog, given that, as the Land Claims court found, it would take 24 years for the Department to do so, including work at weekends, and 40 years without weekend work.[135]

This powerful description of the interaction between the internal dynamics of an organisation and legal mandates requires an equally powerful remedy. Reflexive law aims to trigger change in an organisation without falling foul of the regulatory dilemma. Certainly, this was the aim of appointing a special master. Whether it will go far enough remains to be seen. An implementation plan was approved by the Land Claims Court, but by 13 May 2021 the Deputy Minister for Agriculture, Land Reform and Rural Development could only point to a total of 200 labour tenants' applications having been finalised during the financial year 2020, with 9 333 claims still outstanding.[136] This is scarcely auspicious progress. The Association for Rural Advancement, which initiated the case in the first place, is calling for effective budget allocations to the office of the special master, and more use of under-utilised alternative dispute resolution mechanisms, to speed up the process of change while building positive relationships.[137] Arguably, there is a limit to the remedial powers of the

133 *Mwelase* (n 3) para 19 and fn 44.
134 *Mwelase* (n 3) para 20.
135 *Mwelase* (n 3) para 27.
136 M Skwatsha 'Agriculture, land reform and rural development budget speech, vote 29' *Department of Agriculture, Forestry and Fisheries* (13 May 2021).
137 L Oettle 'Presentation to the joint committee meeting of the Portfolio Committee on Agriculture, Land Reform and Rural Development and that of Employment and Labour – Coordinated oversight on the living and working conditions on

court alone. But the recognition of systemic failings and the ongoing development of corresponding systemic remedies, some of which, like court-appointed agents, might be able to detect internal obstacles and find collaborative and innovative ways forward, are important steps.[138]

7 Conclusion

One of the central transformative contributions of the South African Constitution was its commitment to socioeconomic rights. At the same time, drafters shared some of the caution surrounding justiciable socioeconomic rights, with only the right to education and children's rights having the status of an immediate right. The rights to healthcare, housing, social security, food and water are caveated by provisions allowing them to be realised progressively and subject to available resources. Reflecting these concerns, the Constitutional Court has eschewed any attempt to define a minimum content of these rights. Equally important, although less often explicitly noted, the Court has not paid attention to the requirements of progressive realisation and has generally taken a deferent approach to decisions as to available resources. While this was appropriate in the early years of South Africa's democracy, the combination of corruption and incompetence prompts a different perspective on the judicial approach. This chapter has considered three important decisions in which Justice Cameron took a leading role in pointing the way towards reinvigorating these rights. Importantly, this is not done by transgressing the boundaries between the judicial, executive and legislative functions. It is by shaping the judicial role to ensure that the other branches of state are fully accountable, in a deliberative sense, for fulfilling the constitutional mandate to realise socioeconomic rights. It is to be hoped that this opens the way to giving more meaningful content to the principle of progressive realisation, and to greater judicial scrutiny of the state's resource-based justifications.

South African farms: Diagnostic report 1' *Parliamentary Monitoring Group* (25 March 2022).

138 Mukherjee & Tuovinen (n 125) 408-409; K Roach 'Polycentricity and queue jumping in public law remedies: A two track response' (2016) 66 *University of Toronto Law Journal* 3 at 50-52.