

# CHAPTER 6

## JUSTICE O'REGAN: FINDING THE ARISTOTELIAN GOLDEN 'MIDDLE WAY'

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicekateoregan/index1.html>

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### 1 Introduction

Arising from her interpretation of the South African Constitution's framework for the separation of powers, Justice Kate O'Regan has faced considerable criticism for her position on judicial deference (or 'modesty' and 'restraint') in the realm of public law and its impact on socioeconomic rights. In partial justification of this position, and in the early days of the Constitutional Court, she argued that the precedent-setting nature of the Court's decisions should serve as a constraint on undue judicial interference in 'the field of social and economic policy where governments [particularly the new South African democratic government] often need to act expeditiously and even experimentally to seek to identify solutions to the pressing problems faced by the country.'<sup>551</sup>

551 K O'Regan 'A forum for reason: Reflections on the role and work of the constitutional court', Helen Suzman Memorial Lecture, 22 November 2011 (2012) 28 *South African Journal on Human Rights* 133.

By contrast, her judicial record suggests that she is not averse to a degree of judicial activism in pursuit of the constitutional value of equality, for example. Recognising the dangers of both activism and restraint, her University of Cape Town (UCT) colleague Professor Pierre de Vos has suggested that there is an imperative for judges to find a morally justifiable path 'between judicial activism and judicial restraint'.<sup>552</sup> De Vos's injunction references the philosophical ideal posited perhaps most famously by Aristotle of equilibrium, balance and moderation – essentially, finding the perfect path by avoidance of equally unvirtuous, unhealthy, unwise or antisocial extremes of excess or inadequacy.<sup>553</sup> In the Aristotelian view, there is an ethically desirable middle way between two extremes, one of excess and the other of deficiency. For example, courage is a virtue, but if taken to excess would manifest as recklessness, while a deficiency of courage results in cowardice.

Justice O'Regan has described the role of the Constitutional Court as a forum for 'public reasoning'.<sup>554</sup> The rudder of reason and rationality can be identified as a strong guiding principle in her body of work, along with the principle of legality. Her commitment to 'cold-eyed' rationality might perhaps be contrasted with the rather warmer poetic nature of much of the writing by her colleagues Sachs and Yacoob. Elsewhere, however, she has also been quoted as saying that the Constitution's transformation project requires all of us to engage with empathy as we try to imagine life from the perspective of the other.<sup>555</sup> In her recognition of the judicial and human duty to understand and share the feelings of another, she shares a great deal with the adjudicative orientation of her colleagues on the Court – not only that of her sole female colleague, Justice Yvonne Mokgoro.

This chapter explores whether it is possible to establish from Justice O'Regan's judicial, academic and public record whether she has succeeded in navigating a justifiable middle way through the tensions arising between the imperatives of legality and experimentation, between rationality and imagination, and between deference and empathy.

552 P de Vos 'Between judicial activism and judicial restraint' *Constitutionally Speaking* 20 January 2009 <http://constitutionallyspeaking.co.za/between-judicial-activism-and-judicial-restraint/> (accessed 18 December 2013).

553 *Wikipedia* 'Golden mean (philosophy)' [https://en.wikipedia.org/wiki/Golden\\_mean\\_\(philosophy\)](https://en.wikipedia.org/wiki/Golden_mean_(philosophy)) (accessed 25 November 2017). See also *New World Encyclopedia* 'Golden mean (philosophy)' [http://www.newworldencyclopedia.org/entry/Golden\\_mean\\_\(philosophy\)](http://www.newworldencyclopedia.org/entry/Golden_mean_(philosophy)) (accessed 25 November 2017).

554 K O'Regan *The role of the Constitutional Court: Fostering a democracy based on public reason* Part II 'The Challenge of change: Thirteen years of constitutional democracy in South Africa' Unrevised text of John Foster and Miriam Rothschild Memorial Lecture, London, 23 October 2007 [http://www.constitutionalcourt.org.za/site/judges/justice\\_kateoregan/index1.html](http://www.constitutionalcourt.org.za/site/judges/justice_kateoregan/index1.html) (accessed 12 March 2017).

555 'Have empathy, that's what you can do for constitutional democracy – Kate O'Regan' *City Press* 8 September 2015 <http://www.news24.com/SouthAfrica/News/Have-empathy-thats-what-you-can-do-for-constitutional-democracy-Kate-ORegan-20150908> (accessed 12 March 2017).

## 2 A select biography<sup>556</sup>

O'Regan received a BA from the University of Cape Town (UCT) in 1978, an LLB (cum laude) from UCT in 1980, an LLM from the University of Sydney (first class honours) in 1981, and a PhD from the University of London (London School of Economics) in 1988. She practised as an attorney in Johannesburg during the 1980s, specialising in labour law and land rights law, representing a wide range of trade unions, anti-apartheid organisations, and communities facing evictions under apartheid land policy. On the academic front, she was a researcher in UCT's Labour Law Unit in 1988 and a senior lecturer in UCT's Faculty of Law in 1990.

Over the next five years, her anti-apartheid activism became prominent. She was: a founder member of UCT's Law, Race and Gender Research project and of UCT's Institute for Development Law; an advisor to the African National Congress on land claims legislation and to the National Manpower Commission on gender equality law; a trustee of the Legal Resources Trust; a co-editor (with Christina Murray) of a book on forced removals and the law – *No place to rest*<sup>557</sup> – as well as the Independent Mediation Services of South Africa (IMSSA) Arbitration Digest, a digest of labour arbitration decisions; and a contributor to *A charter for social justice: A contribution to the South African Bill of Rights debate*.<sup>558</sup>

O'Regan was a Justice of the Constitutional Court of South Africa from 1994 to 2009. Since the end of her fifteen-year term of office in 2009, she has served as an *ad hoc* judge of the Supreme Court of Namibia (since 2010), she chaired the 'Commission of inquiry into allegations of police inefficiency and a breakdown in relations between SAPS and the community in Khayelitsha' in 2012,<sup>559</sup> was an academic at UCT,<sup>560</sup> was a Director of the Bonavero Institute of Human Rights at Oxford University<sup>561</sup> and has served on the Board of Trustees of the Bingham

556 Constitutional Court of South Africa 'JUDGES | Judges: Justice Kate O'Regan: Personal details' <http://www.constitutionalcourt.org.za/site/judges/justicekateoregan/index1.html> (accessed 12 March 2017).

557 O'Regan, K (1990). *No place to rest: Forced removals and the law in South Africa*. Oxford University Press in association with the Labour Law Unit, University of Cape Town, 20 Dec 1990. See [https://books.google.co.za/books/about/No\\_place\\_to\\_rest.html?id=fOToAAAAIAAJ&redir\\_esc=y](https://books.google.co.za/books/about/No_place_to_rest.html?id=fOToAAAAIAAJ&redir_esc=y) (last accessed 27 November 2017).

558 Corder, H (ed) (X). *A charter for social justice: A contribution to the South African Bill of Rights debate*. Department of Public Law, University of Cape Town, 1992. See [https://books.google.co.za/books/about/A\\_Charter\\_for\\_Social\\_Justice.html?id=ZygvAAAAYAAJ&redir\\_esc=y](https://books.google.co.za/books/about/A_Charter_for_Social_Justice.html?id=ZygvAAAAYAAJ&redir_esc=y) (last accessed 27 November 2017).

559 See Khayelitsha Commission 'Kate O'Regan' <http://www.khayelitsha.commission.org.za/about/79-about/78-kate-o-regan.html> (accessed 12 March 2017).

560 See Who's Who Southern Africa 'Catherine O'Regan' <http://whoswho.co.za/catherine-oregan-4876> (accessed 12 March 2017).

561 See University of Oxford, Faculty of Law 'Kate O'Regan' <https://www.law.ox.ac.uk/people/kate-oregan> (accessed 12 March 2017).

Institute of International and Comparative Law.<sup>562</sup> She is an honorary member of the Advisory Council of the Council for the Advancement of the South African Constitution (CASAC),<sup>563</sup> a board member of Corruption Watch,<sup>564</sup> and was until August 2015 a board member of the Open Society Foundation for South Africa.<sup>565</sup>

### 3 The 3Rs of the Constitution

#### 3.1 Respect, responsibility and rights

Justice Catherine 'Kate' O'Regan is wary of viewing rights as a one-way street. Rights, too, must be weighed in the balance. She wrote her article on the 'three Rs of the Constitution'<sup>566</sup> in response to '[m]any commentators' who had criticised 'the South African Constitution and our emerging constitutional jurisprudence on the basis that they are all about rights, and not responsibility.' In her view, this criticism was 'misplaced' because 'respect, responsibility and rights' *together* 'are the building blocks of the Constitution'.<sup>567</sup> From her perspective, the '3Rs of our Constitution, the basic tools of our social ordering, are equal respect for human beings, a normative commitment to asserting and promoting the moral responsibility of human beings, and the entrenchment of fundamental rights to protect and enhance democracy, dignity, equality and freedom'.<sup>568</sup>

She has offered a proposition based on 'constitutional principle' that consists of two components. First, the Constitution 'asserts that human beings are morally responsible agents'; and second, this then 'imposes obligations upon the State to foster the conditions of moral agency'. This, she argued, is 'the starting point upon which the commitment to democracy and to the Bill of Rights is built' and 'goes to the very root of the Constitution'. It is precisely '[b]ecause the [constitutional] vision is of human beings who should have the capacity for moral responsibility, [that] we assert the value of human dignity – that human beings are worthy of equal respect and concern'. It is for this same reason – equal human dignity – that the Constitution 'assert[s] also the centrality of democracy to ensure

562 See Bingham Institute of International and Comparative Law, Governance, Board of Trustees <https://www.biicl.org/governance> (accessed 25 November 2017).

563 See CASAC 'Executive committee and advisory council' <http://www.casac.org.za/executive-and-advisory-council/> (accessed 12 March 2017).

564 See Corruption Watch 'Board members' <http://www.corruptionwatch.org.za/about-us/people/board-members/> (accessed 12 March 2017).

565 See Open Society for South Africa 'Board' <http://www.osf.org.za/the-osf-sa-board-1/> (accessed 12 March 2017).

566 C O'Regan 'The three Rs of the constitution: Responsibility, respect and rights' (2004) 86 *Acta Juridica* 86.

567 As above, 86.

568 As above, 95.

that the exercise of public power is open, accountable, responsive and based upon the will of the people’.

For O’Regan, the Constitution has two primary ‘related purposes: it establishes the institutions and procedures of democracy, on the one hand; and on the other, it entrenches fundamental human rights. Underlying both of these,’ she suggests, ‘lies the assertion of the moral agency of human beings and the important role the state can play in enhancing moral agency’.<sup>569</sup> This emphasis on personal responsibility, and the recognition of its necessary enabling factors, may reflect O’Regan’s particular sense of responsibility as a relatively privileged white woman on the Bench of the highest court in a country emerging from centuries of racism, sexism and patriarchy. Her academic and professional background in labour law and land rights, and the fact that she was a founder member of both the Law, Race and Gender Research project and of the Institute for Development Law at UCT, are indicative of her concern with the power imbalances prevalent in South African society under colonialism and *apartheid*.<sup>570</sup>

O’Regan clarifies that her proposition is ‘not based on the descriptive proposition that human behaviour is determined entirely by human choice and not [also] caused in some way by a range of factors beyond human choice’. Rather, hers is ‘a normative proposition that human beings can exercise choice in a morally responsible fashion and that the broader society should seek to enhance the ability to exercise such choices’.<sup>571</sup> She is therefore ‘not arguing for a strong view of free will’, as there ‘can be no doubt that both circumstance and structure impact on human agency. Who we are, where we have come from, and where we are now, including what we have – all affect our decisions and choices’.

She clarifies, further, that her proposition also ‘exclude[s] [the opposite extreme of] a hard determinist position, in terms of which all human conduct is determined by factors other than the exercise of genuine choice by individuals,’ as this interpretation would leave ‘no room for any meaningful moral responsibility’. While it may be possible to establish ‘a constitutional order’ on this extreme view, it would not be ‘the best understanding of our [particular] constitutional endeavour’. She concludes that if her proposition is correct that the Constitution ‘asserts moral agency ... then the Constitution should be interpreted in a way which empowers and enhances moral responsibility’.<sup>572</sup>

O’Regan founds her proposition on several constitutional provisions, including section 3, which asserts the obligations of citizens in the following terms:

569 As above, 88.

570 Constitutional Court of South Africa (n 556 above).

571 O’Regan (n 566 above) 88.

572 As above, 89.

- (2) All citizens are –
  - (a) equally entitled to the rights, privileges and benefits of citizenship; and
  - (b) equally subject to the duties and responsibilities of citizenship.

It is clear from these provisions that the Constitution affords rights to citizens while also requiring of them that they fulfill their duties and responsibilities. O'Regan argues that it is 'implicit in the notions of duty and responsibility' that citizens have a choice, and that 'in exercising that choice citizens must act in a morally responsible' manner.<sup>573</sup>

Further, section 1 of the Constitution, containing the founding provisions, provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) *Human dignity, the achievement of equality and the advancement of human rights and freedoms* (emphasis added).

It is worth noting that the values are mostly phrased as achievements to be pursued – 'achievement' and 'advancement'. They have not been achieved by the stroke of a pen and adoption of the Constitution. The Constitution is infused with these values of democracy, human dignity, equality, and freedom, which are repeatedly asserted. Thus, section 7(1) provides that the Bill of Rights 'is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Similarly, section 36 states that rights may be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Moreover, section 39 instructs courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

O'Regan asserts that these provisions make it absolutely clear that the Constitution 'is premised on a vision of an open and democratic society based on human dignity, equality and freedom'. As a result,

the emphasis on an accountable democratic government, human dignity, equality and freedom seem to [her] to be compatible only with a conception of human conduct that affirms the possibility and desirability of human agency and the important role of government in fostering such agency. [The Constitution's democratic vision is based on citizens' participation in elections and in governance, and] demands a form of government which is not only open, but accountable to the people, and responsive to their needs. [This] emphasis on the value of human dignity, on open and accountable

<sup>573</sup> As above, 90.

democracy, and on freedom and equality [thereby] impose[s] obligations upon government to foster human agency.<sup>574</sup>

### 3.2 Capacity and capabilities

If one were to accept O'Regan's proposition, two questions then arise. Firstly, without placing complete responsibility on the shoulders of the individual, how does the state act in such a way as to empower and enhance personal moral responsibility? Secondly, how do the courts evaluate and adjudicate the conduct of the state and its efforts in this regard?

Her argument is based on more than the text of the Constitution. Thus, '[a]lthough text is important and in this case indicative of the proper interpretation of the Constitution,' she submits that 'the overall *context* of the Constitutional project as a whole also provides important interpretive guides' (emphasis added).<sup>575</sup> As we shall see, this has significance for her interpretation of rights, particularly socio-economic rights (SERs).

Significantly, O'Regan argues that the 'important role of government in fostering agency and the equal worth of all South Africans' is 'particularly evident' in the Constitution's 'recognition' of SERs. If civil and political rights alone were entrenched, despite the context of 'our deeply unequal society', that 'might well have suggested that government's role in fostering autonomy was a minimal or even negative one'. However, there can be no question of such a limited role for the state when the Constitution 'imposes positive obligations upon government' to take reasonable steps to achieve the progressive realisation of rights to housing, health care, food, water, social security, and education. She thus concludes that 'it is clear that the Constitution asserts the moral agency of human beings and imposes obligations upon the State to foster the conditions in which moral agency may flourish.'<sup>576</sup> O'Regan emphasises that '... our Constitution contains within it an express set of values about the ordering of human relations which is not neutral'. However, 'nor [is it] without competitors'. Clearly, despite their express nature and the active public obligations to which they give rise, these values and the rights that flow from them are contested. They need therefore to be protected and upheld by the judiciary. Thus, she concludes that 'the task of constitutional adjudication lies in *giving voice and effect* to those values' (emphasis added).<sup>577</sup>

This assertion then begs the question whether the current approach by the courts to the adjudication of SERs successfully gives adequate 'voice

<sup>574</sup> As above, 91-92.

<sup>575</sup> As above, 91.

<sup>576</sup> As above, 92.

<sup>577</sup> As above, 94-95.

and effect' to constitutional values. Do the courts in practice astutely ensure that government is 'diligently and promptly',<sup>578</sup> fulfilling its constitutional responsibilities to fulfil all rights, thereby fostering the necessary 'capacity for autonomy',<sup>579</sup> which in turn enables dignity, equality and freedom – and thereby democracy – to flourish?

The Constitution 'imposes obligations upon government to foster our capacity for autonomy' in order to enable us to meet our responsibilities as citizens. For, through the enhancement of 'citizens' ability to be morally responsible agents,' human dignity and freedom are enhanced. In performing the positive obligations imposed upon it, the government 'will seek to ensure that all South Africans have the equal capacity' to act morally and responsibly. 'Democracy will *then* be founded on the morally-responsible exercise of rights' (emphasis added).<sup>580</sup> In other words, the democratic government must be proactive, including by creating certain material conditions, before citizens will be able to exercise rights responsibly.

The similarities between O'Regan's philosophical approach and Amartya Sen's developmental theory based on a 'capabilities' approach are not coincidental. Among others, Sen acknowledges O'Regan's influence on his thinking on the role of law.<sup>581</sup>

In an interview with Justice O'Regan for the Constitutional Justice Project (CJP),<sup>582</sup> she provided an additional example of how the state should act proactively to empower and enable citizens to act morally and responsibly. She expressed strong endorsement of the idea of state financial support for civil society advocacy for SERs, including litigation where necessary. It should be recognised, she said, that everyone is fallible and that, even with the best will in the world, mistakes are made that have significantly undermined citizens' dignity, equality and freedom. The state is required to be responsive to people's needs, and this form of support would be a significant way to signal that it is willing to listen and to be responsive.

In this respect, O'Regan finds support from Jackie Dugard, who has argued vigorously for the right to legal representation at state expense in civil matters. Dugard has argued that the judiciary has failed the poor because of the Constitutional Court's 'weak socio-economic rights record', which has further diminished the capacity of the judiciary to act as an

578 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of constitutional Laws Act 5 of 2005) sec 237.

579 O'Regan (n 566 above) 95.

580 As above.

581 A Sen *The idea of justice* (2011) xxv.

582 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice Kate O'Regan (2014) 22.



'institutional voice for the poor'.<sup>583</sup> In addition to critiquing the Constitutional Court's under-utilisation of the adjudication techniques and remedial instruments available to it, she suggests that state financial support for legal representation in these cases is one important way in which access to justice can be enhanced.

### 3.3 Responsibility, reasonableness and deference

Dugard's critique of the Court's record includes trenchant criticism of O'Regan's decision in the 2010 *Mazibuko*<sup>584</sup> matter, which for the first time required the Court to consider the right of access to water, and her separate concurring judgment in the 2010 *Joe Slovo*<sup>585</sup> matter, which dealt with the right to housing. In the wider context of ruling party politicians' criticism of the courts for undue and excessive interference in the policy-making responsibilities of the executive branch of the state, Wilson and Dugard decry the Court's undue deference to the executive and legislative branches.

In *Mazibuko*, where there was evidence suggesting a range of possibilities concerning the content of the right to 'sufficient water', O'Regan quoted with approval the following passage from the Court's decision in *Treatment Action Campaign No.2*:<sup>586</sup>

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a *restrained* and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness *may in fact have budgetary implications, but are not in themselves directed at rearranging budgets*. In this way, the judicial, legislative and executive functions achieve *appropriate constitutional balance* (emphasis added).

In her separate concurring judgment in *Joe Slovo*, O'Regan cautioned that:

In considering this and similar cases, courts need *on the one hand* to be aware of the enormity of the task that government must perform in seeking to '(i) improve the quality of life of all citizens' and be astute not to impair government's ability to perform this task. *On the other hand*, courts must not

583 J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214. See also J Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965.

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

585 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

586 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 38. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 32, to similar effect.

permit government to treat citizens in a manner that is not consistent with *human dignity* while pursuing laudable programmes. The difficulty lies in seeking an *appropriate balance* between these two constitutional imperatives (emphasis added).<sup>587</sup>

While signaling the significance of dignity in the Court's jurisprudence, she continued to hold that the test of reasonableness 'does not require us to be satisfied that' government's rehousing plan for Joe Slovo residents 'is perfect, or that there is no better plan'; and that courts 'should be slow to interfere in the legitimate policy choices made by government in determining the plan'.<sup>588</sup>

### 3.4 Responsibility and pragmatism

Wilson and Dugard<sup>589</sup> argue that the Court, including in these two cases, has not achieved an appropriate balance. On the contrary, they believe that the Court is unduly deferential to its conceptualisation of the separation of powers doctrine, to the detriment of its responsibility to afford due weight to a contextual analysis of the lived experiences of structural poverty. In other words, the Court had failed to exercise the empathy that its members acknowledge is required of them.

Despite O'Regan's apparent firm adherence to a principled approach to the Court's interpretation of the separation of powers, in the CJP interview O'Regan identified a further example of her openness to pragmatic solutions to large-scale problems affecting the realisation and enjoyment of rights. She indicated support for the idea of administrative tribunals, using inquisitorial procedures, to provide individuals with accessible, cheap and speedy redress, for example, in instances of multiple social grant errors.<sup>590</sup>

O'Regan explained during the CJP interview that the Constitutional Court's 2004 decision in *Khosa*,<sup>591</sup> contrary to any perception that the Court had overreached and strayed into executive territory, should be attributed to appropriate weight being afforded to the fundamental constitutional right and value of equality. The decision did not signal an exception to the Court's approach to the progressive realisation of SERs. Although the Court's decision had budgetary implications – a matter ordinarily reserved for the legislative and executive branches of the state – the decision was basely largely on considerations of equality. This imperative allowed the Court to order the inclusion of an additional group

587 *Joe Slovo* (n 585 above) paras 265-266.

588 As above, para 295.

589 S Wilson & J Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 3 *Stellenbosch Law Review* 664.

590 Pienaar (n 582 above) 24-25.

591 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

of beneficiaries in the social security safety net provided for in terms of section 27 of the Bill of Rights.<sup>592</sup>

## 4 A 'progressive jurisprudence' of SERs and their 'progressive realisation'

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.'

*Franklin D Roosevelt, State of the Union address 11 January 1941*

### 4.1 Deprivation disables democracy

Justice O'Regan opens her Foreword to McLean's book *Constitutional deference, courts and socio-economic rights in South Africa*<sup>593</sup> with the above quotation, reiterating her moral responsibilities-capabilities approach to understanding rights. Rights are indivisible and mutually reinforcing; deprivation disables democracy. Nevertheless, fifteen years into the democratic era, thirteen years after adoption of the final Constitution, and near the end of her term on the Court, O'Regan appeared to remain awed by the novelty, scale and complexity of the challenge of developing an appropriate jurisprudence of SERs in South Africa.

She wrote perhaps just as the urgency of the need to realise SERs, to ensure widespread lived experience of enjoyment of SERs, began to dawn on South Africa's elites. Realisation was just awakening of the necessity of taking bold steps to help define the substantive content of SERs within the framework of the Constitution's promise of social justice. Against a background of growing dissatisfaction and discontent with democracy's failure to deliver greater equality, President Jacob Zuma's ANC was elected in 2009 on a platform promising more rapid socio-economic progress. Zuma was seen at the time as a candidate of 'the left', more open to collaboration with alliance partner the South African Communist Party, and offering tangible hope to workers, labourers and the poor more generally.<sup>594</sup>

O'Regan described the novelty of the task before the courts, including 'her' Court, in the following terms:

592 It is perhaps noteworthy that the judgment by Justice Yvonne Mokgoro, who authored the Court's majority decision in *Khosa*, appeared – on one measure – to found her reasoning more on the constitutional value of dignity (mentioned 19 times) than of equality (mentioned 12 times).

593 K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009).

594 R Calland *The Zuma Years* (2015) 170-173.

The South African Constitution is one of the first Commonwealth constitutions to entrench both civil and political rights and social and economic rights and to render both justiciable before the courts. The task of interpreting and applying the social and economic rights in the Constitution is arguably the most challenging task facing lawyers and courts in South Africa.<sup>595</sup>

Acknowledging the pertinence of South Africa's socio-economic context, she described the scale of the constitutional enterprise as follows:

That task is rendered all the more difficult by the deep inequality in South African society. In its Preamble, the Constitution states that the Constitution is adopted in order to build a society in which, to paraphrase, the quality of life of all South Africans is improved and the potential of each person is freed. Fifteen years into our new democratic order, we are still far from realising these goals.<sup>596</sup>

In her interview for the CJP, O'Regan expressed in plain terms the difficulty facing the state, and therefore the courts too, when adjudicating the positive obligation to progressively realise SERs. The area of positive obligations is 'so much tougher terrain for courts ... particularly ... for courts in a country which don't have enough money for everything'.<sup>597</sup> Prioritising state interventions is a delicate task. While recognising that rights are based on fundamental human needs, she felt the burden of the 'inescapable reality' that 'South Africa is a middle-income country with a high rate of unemployment and government is simply not able immediately to provide the basic necessities of life to all citizens'.<sup>598</sup> This sentiment echoes her position in *Mazibuko*, for example, where she held that:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the *first* place, for the *legislature and executive*, the institutions of government best placed to *investigate social conditions in the light of available budgets and to determine what targets are achievable* in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to *democratic popular choice* (emphasis added).<sup>599</sup>

595 K. O'Regan 'Foreword' in K. McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) vii.

596 As above, vii.

597 Pienaar (n 582 above) 4.

598 O'Regan (n 566 above) vii.

599 *Mazibuko* (n 584 above) para 160.

## 4.2 Principle, prudence, patience and pragmatism

In the midst of this resource dilemma, she remained alive to the very practical task at hand, as well as to the pragmatic and principled constraints imposed by the need for judicial deference to the newly democratic legitimacy of the other branches of the state. Thus, there is a need to develop a jurisprudence ‘which gives concrete meaning and effect to social and economic rights. This jurisprudence must foster the constitutional values of human dignity, equality and freedom, on the one hand, *without unduly trammelling the executive and legislative arms of government*, on the other’ (emphasis added).<sup>600</sup>

O’Regan believed that patience was necessary, and was sustainable – the government and the courts were ‘[o]nly just over a decade in, [and] we should accept that we are only beginning the long process of establishing that jurisprudence.’<sup>601</sup> She believed that she was writing in what were still only the very early years of the Constitution’s life, and that time was needed, and available, to undertake a cautious, thoughtful and prudent journey, anticipating deep-rooted disagreement and disputation, which should be overcome by shared principles that would be ultimately identified:

*As we set out on the journey to develop a progressive jurisprudence of social and economic rights, it seems to me that we should accept that it is unlikely that we will achieve consensus on the proper role for courts in this field. Like other areas of constitutional adjudication, our understanding of the proper role of courts will depend on deep and contested questions of political and moral philosophy. The contestation that will inevitably persist, therefore, makes it all the more important that contributions to the debate are clear and principled* (emphasis added).<sup>602</sup>

She re-emphasised that she and her fellow lawyers were only beginning what she signalled would be an inevitably tumultuous and perilous journey – ‘As lawyers *who are embarking* on this journey, I would warn of two countervailing dangers’ (emphasis added).<sup>603</sup> While highlighting prudence, and recognising that each of us has a limited worldview, she therefore affirmed the value of principled and purposive imagination. The first danger ‘is that we stop challenging our preconceptions, and fail to let our jurisprudential imagination roam. By so doing, we may fail to give real content to the social and economic rights in our Constitution (emphasis added).’<sup>604</sup>

600 O’Regan (n 566 above) vii.

601 As above.

602 As above, viii.

603 As above.

604 As above.

Writers such as Wilson and Dugard as well as Liebenberg<sup>605</sup> suggest that caution has been excessive and that imagination (and empathy) has been lacking in the Court's approach to adjudicating SER matters thus far. As the crisis arising from persistent inequality grows, there is an urgent need to give substantive meaning and content to SERs, rather than a continued emphasis on a largely 'procedural' approach to determining reasonableness.<sup>606</sup> Wilson and Dugard in particular suggest that this task will require the judicial exercise of imagination, which entails an understanding of the realities of the structural context within which lived experiences of poverty rights claims arise.<sup>607</sup> Thus, the Court needs to 'develop a theory of these needs [of litigants] and [constitutional] purposes [and values], by listening more closely to what poor litigants say in their papers about how the social context of poverty affects their access to socio-economic goods.'

In her book, McLean notes pertinently that the principled approach to the doctrine of deference (in the context of the separation of powers) has been less evident and less clearly defined in SER matters:

[T]he post-1994 South African courts have quickly developed the beginnings of a jurisprudence on the doctrine of deference which mirrors that in Canada and the United Kingdom. Yet, this development is uneven: while the application of the doctrine is principled in the interpretation and enforcement of civil and political rights (such as in the *Pillay* decision),<sup>608</sup> this has yet to be mirrored in its application to socio-economic rights. It is this latter point which is developed in the remainder of this book.<sup>609</sup>

Indeed, recent litigation in the Constitutional Court involving the South African Social Security Agency's (SASSA's) administration of social grants payments<sup>610</sup> represents an example of why the patience of the most vulnerable is justifiably wearing thin. The Court's decision is a clear indication that, at least in this respect, the time has passed for the poor to be patient with a weak, careless or even culpably remiss public administration that should be energetically focused on the diligent performance of constitutional responsibilities.<sup>611</sup> Government must ensure service delivery in realisation of rights. The Court made it abundantly clear that '[t]he sole reason for the litigation leading to this judgment is the failure of SASSA and the Minister [of Social

605 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010). Wilson & Dugard (n 589 above) fn 7.

606 As above, 667ff.

607 As above, 665.

608 *MEC for Education, KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC).

609 McLean (n 593 above) 87.

610 *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 5 BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017).

611 Section 237 of the Constitution provides that 'All constitutional obligations must be performed diligently and without delay.'

Development] to keep their promise to this Court and the people of South Africa.<sup>612</sup>

### 4.3 Power and principles

The second danger O'Regan cautioned against arises from the temptations of power. She recognised that lawyers are among society's elites, and admonished that they should remind themselves that they are in service of but one branch of the state, and are not themselves above the law and the Constitution. Lawyers must therefore 'be cautious, given our own craft and the power that it affords us, not to seek a jurisprudence that will empower lawyers and clients but in the end undermine democracy and the democratic arms of government.'

O'Regan advocates use of a roadmap signposted by principles that help us avoid pitfalls and quagmires that might divert us from our national objective. Endorsing Kirsty McLean's book, O'Regan warranted that it 'is alive to both these dangers' and welcomed it as 'a principled basis for the development of our jurisprudence which will constitute a valuable and lasting contribution to the debate.'<sup>613</sup> However, as suggested elsewhere in this chapter, steering a route strictly in the middle of the sea passage between Scylla and Charybdis risks blunting the transformative impact of the Constitution, thus perpetuating and compounding the marginalisation of litigants and the multitudes who together with them suffer complex deprivations.

## 5 Text and context

Discussing the significance of the constitutional text and its contextual origins and continued realities, O'Regan draws a sharp distinction between South Africa's Constitution and older Constitutions 'whose original constitutional purpose may be less pertinent today than at the time of their inception' and which may be 'short on normative and purposive guidance'. Highlighting the necessity for the courts to give due attention to citizens' lived experiences, she notes 'the sense of immediacy and purpose [and] the detailed texture of the South African Constitution'. For these reasons, 'the trivialisation of text has no place in contemporary South African constitutional jurisprudence.'<sup>614</sup>

Having said this, however, O'Regan cautions that she is 'not suggesting that in every case, the constitutional text is determinative of the outcome' of that case. When there are cases where there is room for

612 *Black Sash* (n 610 above) para 14.

613 O'Regan (n 566 above) viii.

614 K O'Regan 'Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa' (2012) 75 *The Modern Law Review* 11.

reasonable disagreement, 'the text *and context* of the Constitution still serve as significant constraints on the ambit and nature of that disagreement' (emphasis added). In terms redolent of progress and the creative task, she argues that while judges 'may well be giving shape and form to the bones of constitutional provisions ... the constitutional text is an important determinant of that shape and form.'<sup>615</sup>

Reflecting on the jurisprudence of the Constitution's first seventeen years, she argues that 'it is clear that the task of delineating the scope and content of the rights has been more complex than predicted.' For her,

the hardest part of constitutional judging is giving contours and content to these open-ended guarantees. From early on, the Court accepted that the interpretation of the rights should be both 'generous' and 'purposive' though the Court also acknowledged that, at times, a purposive analysis might require a narrower interpretation of a right.<sup>616</sup>

It might be suggested, however, that this complexity could be simplified should the Court call on litigants to provide evidence in support of the minimum core content of SERs.<sup>617</sup> Her discussion of the internal qualifiers in SERs clauses appears to give them a virtual right of veto, whereas it might be argued that those same internal qualifiers, i.e., 'reasonable' and 'available', also provide logical and essentially pragmatic exits from the 'internal definition of the content of the right'. This might be especially so because they do so precisely by making available a reference to history, experience and context. Reflection on lessons and inferences that could be drawn from our history and experience might suggest that if government does not have a transparent, rational objective (such as some generally agreed approximation of the minimum core that constitutes progress towards the constitutional vision of social justice) and a transparent, reasonable and well-administered plan to achieve it, the chances of attaining that objective are significantly, and unreasonably, reduced.

## 6 Separation of powers

In her Helen Suzman memorial address,<sup>618</sup> O'Regan again referenced the uniqueness of the South African Constitution and emphasised that the separation of powers doctrine does not have a single global definition. Instead,

615 As above, 11.

616 As above, 23.

617 Indeed, in *Mazibuko* (n 584 above), at para 54, while rejecting a minimum core approach, the Court quoted Yacoob J in *Treatment Action Campaign No 2* (para 34) as recognising that 'that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable'.

618 O'Regan (n 551 above) 118.



each constitutional framework has its own understanding of the relationship between the arms of government. The particular conception of the separation of powers in any particular constitutional democracy requires a careful analysis of its constitutional text as well as its constitutional practice. Moreover, the precise contours of the doctrine of the separation of powers are, arguably everywhere, somewhat uncertain.<sup>619</sup>

In regard to this contentious debate, O'Regan indicated during the CJP interview that the term *separation of powers* itself is 'unfortunate' in that it sends an incomplete and misleading message about the relationship that ought to characterise the complementary and collaborative working relationship between the three branches of the state. She therefore suggested the value of also taking note of the constitutional imperative of cooperative governance and its application in this context. 'Courts have a responsibility to respect what the other arms of government have done,' she said.

O'Regan's call to a necessarily careful and thorough analytical approach found inspiration in the diligence and preparation that characterised Helen Suzman MP's exemplary single-handed parliamentary opposition to the *apartheid* government over many years. Suzman was one of a very few women at the forefront of political life during *apartheid*, not entirely dissimilar to O'Regan's tenure on the Constitutional Court bench when her only female contemporary was Justice Yvonne Mokgoro.<sup>620</sup> O'Regan expressed particular admiration for Suzman's 'mastery of detail and attention to principle' and for her 'serious-minded and painstaking approach to the exercise of public power'.<sup>621</sup> For O'Regan as much as for Suzman, although in quite different political contexts, playing the game within the rules is an absolute requirement; principles are not mere options that can be taken from a shelf when convenient.

Wishful thinking and nice-to-haves are included neither in O'Regan's toolbox nor in Suzman's. Hence, when considering the appropriate extent and limits of the doctrine of separation of powers, the need to pay close attention to 'constitutional text as well as its constitutional practice'. In that context, O'Regan recognises that the relationship between the branches of the state in a democracy is ordinarily 'tense';<sup>622</sup> it is precisely the purpose of the separation of powers to enable restraint on the exercise of public power, which will inevitably give rise to a degree of frustration and irritation.

619 As above.

620 Mokgoro J served during the same 15-year term as O'Regan – 1994-2009. See Constitutional Court of South Africa 'JUDGES | Justice Yvonne Mokgoro: Narrative' <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.html> (accessed 12 March 2017).

621 O'Regan (n 551 above) 116-117.

622 As above, 118.

O'Regan cautions that in many instances, 'there is reasonable disagreement in our society as to what policies will best achieve the destruction of the *apartheid* legacy. Courts should take care not to limit unduly government's ability to make the decisions as to which policies it chooses. Given the great challenges we face, and the lack of clear and agreed answers as to how they should best be tackled, courts should not tie government's hands more than the Constitution requires.'<sup>623</sup> Courts must accordingly avoid what a respected Indian commentator has termed the 'jurisprudence of exasperation':<sup>624</sup> the tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country, rather than on the basis of 'carefully thought out arguments based on the law's possibilities and limits.' She is concerned that, in South Africa, a jurisprudence of exasperation might result in the requirements of rationality being unduly tightened or in courts being too slow to accept that government's policies in achieving social and economic rights are reasonable, or in courts insisting that government adopt their views as to what is appropriate government policy.

O'Regan correctly identifies that the Constitution confers a particular role on the courts and that they have not illicitly assumed it themselves; that their role and responsibilities include reviewing 'policy'; and that citizens have the right 'to use the courts to protect the Constitution', rather than merely to protect rights. In addition to constitutional supremacy, the corollary of which is a 'strong power of review',<sup>625</sup> O'Regan describes the Bill of Rights in the global context as 'particularly broad'<sup>626</sup> because it includes not only civil and political rights, but also a 'wide range' of 'additional' rights, such as environmental rights, and rights to just administrative action and to access to information, as well as SERs. In addition, it binds the judiciary, as well as the executive and legislative branches, and also, to varying extents, private individuals and private corporations.

Emphasising the magnitude of the task entrusted to the courts, she enumerates in some detail the remainder of the Constitution which must be interpreted, applied and protected by the judiciary, and notes that the Constitutional Court is given the significant and invasive power to make an order of constitutional invalidity. Given these broad powers, O'Regan argues strongly that they should be exercised with deference, modesty and restraint. This chapter, however, endeavours to identify legitimate scope for nuance while respectful of a contextually appropriate understanding of separation of powers.

623 As above.

624 PB Mehta 'With due respect, Lordships' *Indian Express* 11 March 2007 <http://www.indianexpress.com/news/with-due-respect-lordships/25375/2> – cited in O'Regan (n 551 above) 133.

625 O'Regan (n 551 above) 121.

626 As above, 120.

In the Suzman memorial address, O'Regan responded to President Zuma's and the ruling party's expressed concern that opposition parties were using the courts to 'co-govern' and that, in so doing, the courts were curtailing the power of the executive and the legislature 'to make what is referred to as "policy"',<sup>627</sup> These concerns arose from perceptions that the courts were disrespecting the constitutional separation of powers. O'Regan provided a detailed account of the Court's record, noting that, 'of the 90 declarations of legislative invalidity made by the Court, the largest number, 22, have been in the field of criminal law and procedure,'<sup>628</sup> while the 'second most common ground for declarations of constitutional invalidity has been inequality,' based on section 9 of the Constitution. By 2011, very few declarations of constitutional invalidity were controversial in the sense that they affected what President Zuma and the ruling party might call 'policy'. There had been seven challenges to the actions or conduct of the President, and four had involved President Nelson Mandela, two of which were not upheld by the Court. Two challenges concerned President Thabo Mbeki, again with a 50 per cent 'success' rate. The single challenge by that time involving President Zuma related to the purported extension of the term of Chief Justice Ngcobo, which was successful.<sup>629</sup>

'The principles that inform the determination of such challenges are relatively straightforward,' noted O'Regan: 'The President must act lawfully, rationally and consistently with the Bill of Rights.'<sup>630</sup> The first two principles are discussed briefly before the third is explored in greater detail.

## **6.1 The first constraint: Legality and the rule of law**

The first constraint on policy implementation is that all government conduct must have a legal foundation, whether in the Constitution or in legislation. In an early case, the Constitutional Court formulated this principle to mean that 'it is central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'

This principle of legality is based on the rule of law, a founding principle in our constitutional order. The rule of law simply means that

<sup>627</sup> As above, 118.

<sup>628</sup> As above, 123.

<sup>629</sup> There have been several more challenges subsequently, some of which involved 'policy', while others involved executive discretion (for example, appointments), and many have been successful.

<sup>630</sup> O'Regan (n 551 above) 125.

power must be exercised in accordance with the Constitution and the law.<sup>631</sup>

## 6.2 The second constraint: Rationality or the 'some rhyme or reason' rule

O'Regan emphasised that this second requirement 'is not onerous, for it requires only that there be some nexus or link between the purpose sought to be achieved by the relevant action or legislation and the terms of the legislation or character of the conduct. It perhaps might be called the "some rhyme or reason" rule. As long there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.'<sup>632</sup>

The Court described the requirement of rationality as 'a minimum threshold requirement applicable to [the] exercise of all public power by members of the executive and other functionaries', but emphasised that the standard of rationality does not permit courts to substitute their opinions as to what would be appropriate for that of the government. Given the requirement that any link between the decision or legislation and the underlying purpose would suffice, the Court noted that '[a] decision that is objectively irrational is likely to be made only rarely.'

O'Regan emphasised that this 'no rhyme or reason' test 'does not significantly impair the ability of the government to perform its necessary tasks .... [T]he Court has on several occasions emphasised that it "should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively ... *As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly*"' (emphasis added). She cautioned that '[s]etting a tighter test for rationality might well constitute an unwarranted intrusion into the legitimate constitutional space accorded to the legislature and the executive' (emphasis added).<sup>633</sup>

Compare these sentiments, however, with the words of an attorney working at a university law clinic interviewed for the CJP. He expressed the view of many when he pleaded for greater urgency from the Constitutional Court to 'map out our democracy, and clearly define rights without delay' without 'wasting' more time. Rather than give the executive and legislative branches of the state more space, his words indicate an increasingly widely shared view that government has failed to make adequate progress towards substantive equality, urging an appreciation

631 As above, 126.

632 As above, 127.

633 As above, 127-8.

that ‘we are no longer a young democracy’. For him, as for many others, empathy with the demands of dignity and equality, together with an appreciation of the requirements of reason and rationality, demand that the courts must step in where government policies are proving to be inadequate to the transformative task.

### 6.3 The third constraint: The Bill of Rights

No government policy, whether implemented through legislation, executive or presidential action or administrative law, may infringe the rights entrenched in the Bill of Rights. The legislature, executive and judiciary all bear obligations under the Bill of Rights to respect, protect, promote and fulfil those rights. In a very real sense, therefore, ‘it is the provisions of the Bill of Rights that most sharply constrain the conduct of government, including the making of policy.’<sup>634</sup>

Nevertheless, these rights ‘are not absolute constraints’ or ‘trump cards’ that always take precedence over other concerns. The Constitution ‘recognises that there will be times when one right in the Bill of Rights will be in tension with another, or where important public interests may require the limitation of rights and it accordingly permits the limitation of rights,’ provided this is supported by “‘special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity”’.<sup>635</sup> Rights must be balanced against one another, rather than limited or ‘rationed’ based on limited available resources. Thus, when deciding whether an infringement is nevertheless justifiable, the Court ‘considers whether the reason given by the government for limiting the right is sufficiently important to outweigh the impact it causes in limiting the right. This is essentially a proportionality analysis.’<sup>636</sup>

‘The role of the Constitutional Court is thus not to thwart or frustrate the democratic arms of government,’ but is rather to call on them to account, that is, to explain and justify the manner in which they exercise public power. O’Regan cites Etienne Mureinik’s ‘celebrated formulation’ in which ‘our new constitutional order establishes a “culture of justification”’ and through which government leadership ‘rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command’ and builds a community based ‘on persuasion, not coercion.’<sup>637</sup>

634 As above, 128.

635 As above, 128 – citing Dieter Grimm. See D Grimm ‘Proportionality in Canadian and German constitutional jurisprudence’ (2007) 57 *University of Toronto LJ* 383, 391.

636 O’Regan (n 551 above) 129.

637 E Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 32.

In understanding the meaning of a right, the key question is the scope of the obligations imposed by that right, explains O'Regan. Thus, if an individual has a right of access to health care, against whom does she have that right and, most significantly, what must that person do in relation to her right? Again, O'Regan signals caution, describing the 'most difficult' jurisprudential aspect of social and economic rights as 'determining the extent of the positive obligation they impose upon government to act to achieve the realisation of the right.'<sup>638</sup>

Essentially, the approach of the Court has been to require government to explain why its policies in the field of social and economic rights are reasonable. Government must disclose to the Court 'what it has done to formulate the policy, its investigation and research, the alternatives considered and the reasons why the option underlying the policy was selected'. O'Regan is satisfied that this approach permits citizens to hold the democratic branches of government to account through litigation, but does not require government 'to be held to an impossible standard of perfection.'<sup>639</sup> The effect of this deferential approach and the reasonableness test, for O'Regan, is that the courts 'do not take over the task of making policy, but they do require government to account to citizens for its policy decisions in the field of social and economic rights. The process of accounting for decisions in the field should improve the quality of decision-making without improperly restricting the choices available to government.'<sup>640</sup>

### 6.3.1 *Deference, democracy, and just and equitable remedies*

A consideration of the leading cases in which the courts have sought to define the contours and the limits of the application of deference shows that O'Regan has by no means been alone in undertaking this enterprise, and neither has the Constitutional Court's or the Supreme Court of Appeal's approach lacked nuance.<sup>641</sup> In *Ferreira v Levin*<sup>642</sup> Ackermann J found that 'where a right is expressly and narrowly protected in the Constitution, the Court would be less deferent to the legislature than would be the case where the interest was protected generally or through a residual right.'<sup>643</sup> In the *National Coalition*<sup>644</sup> decision, the Constitutional Court 'again used the language of deference, finding that the deference

638 O'Regan (n 551 above) 130.

639 See *Mazibuko* (n 584 above) para 160.

640 O'Regan (n 551 above) 131.

641 Reference is made here to McLean's text as it neatly traces the development of the law regarding deference and the role that O'Regan, and many others, have played in that trajectory.

642 *Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO & Others* 1996 (1) SA 984 (CC).

643 McLean (n 593 above) 82.

644 *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC).

owed to the legislature in deciding what constitutes appropriate relief will depend on the individual circumstances of each case.<sup>645</sup> Here, it is important to note the significance of ‘... the Court’s awareness of the *context-sensitive* nature of the choice of remedies, and the role that deference to the legislature plays in that assessment’ (emphasis added).

In *Minister of Health v TAC*,<sup>646</sup> the Constitutional Court expressly considered the question of how deference and the doctrine of separation of powers relate to how it should adjudicate SERs, raising two concerns in this regard. The first concerned the deference the Court was to show the executive regarding policy formulation, while the second related to the appropriate remedy which the Court should provide. In deciding on the former, ‘the Court emphasised its institutional limitations as the most important consideration’, which it again emphasised in the decision in *Bel Porto School Governing Body*,<sup>647</sup> while also noting that ‘an appreciation of these limitations should not undermine the court’s role in interpreting and protecting rights.’ The Constitutional Court found that, while courts should, ‘as a general principle, be deferent to the “practical difficulties” faced by the administration, this does not mean that decision makers should not be held to account for infringement of constitutional rights: “It is the remedy that must adapt itself to the right, not the right to the remedy.”’

Reviewing administrative action which involved polycentric decision making, Cameron JA, in the Supreme Court of Appeal decision of *Logbro Properties*,<sup>648</sup> developed that court’s understanding of institutional competence, holding that a ‘measure of judicial deference’ is appropriate to the administration. The decision linked ‘institutional competence concerns with democratic competence issues.’ Deference is important, Cameron JA held, to maintain the distinction between review and appeal, to ensure that the judiciary ‘appreciate[s] the legitimate and constitutionally-ordained province of administrative agencies,’ recognising their expertise in such matters, and to ensure that they are ‘sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.’<sup>649</sup>

645 McLean (n 593 above) 83.

646 *Treatment Action Campaign* (n 586 above).

647 *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002 (3) SA 265 (CC).

648 *Logbro Properties Constitutional Court v Bedderson NO & Others* 2003 (2) SA 460 (SCA) para 21.

649 McLean (n 593 above) 84.

*Logbro Properties* was then applied in the SCA's later decision in *Phambili Fisheries*,<sup>650</sup> where the Court held that deference in the judicial review of government economic policies was appropriate for the same institutional and democratic competence reasons.<sup>651</sup> The court stated that '[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.'

This is particularly important, the SCA held, 'where the subject matter under review is "very technical or of a kind in which a Court has no particular proficiency."' <sup>652</sup> Likewise in *Foodcorp*<sup>653</sup> the Cape High Court, 'following both *Logbro Properties* and *Phambili Fisheries*, acknowledged the importance of "due judicial deference" to "policy-laden and polycentric" administrative action which "entails a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have."' <sup>654</sup>

In *Bato Star Fishing*<sup>655</sup> (the appeal to the Constitutional Court against the SCA decision in *Phambili Fisheries*), O'Regan J repeated the passages cited by the SCA on the deference to be adopted in the judicial review of administrative agencies. With reference to the *ProLife Alliance*<sup>656</sup> decision, she added that 'the need for courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'<sup>657</sup> By contrast, the High Court in *South African Jewish Board of Deputies*,<sup>658</sup> also referring to the SCA's judgment in *Phambili Fisheries*, held that where a judicial review matter was not one which was 'very technical or of a kind in which a court has no particular proficiency', judicial deference was not appropriate at all (emphasis added).<sup>659</sup>

The Constitutional Court's decision in *Bato Star* has since become possibly the leading decision on the topic, followed in many subsequent decisions. However, the decision in *Pillay*<sup>660</sup> is a significant refinement by the Constitutional Court. It concerned the right of a schoolgirl to wear a

650 *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 SCA.

651 *Phambili* (as above) para 47.

652 As above, para 53.

653 *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (CC) para 68.

654 McLean (n 593 above) 84-85.

655 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC).

656 *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 paras 75-76.

657 *Bato Star Fishing* (n 655 above) para 46.

658 *South African Jewish Board of Deputies v Sutherland NO & Others* 2004 (4) SA 368 (W).

659 McLean (n 593 above) at 85.

660 *Pillay* (n 608 above).



nose stud in school as part of her right not to be discriminated against on the basis of religious and cultural practices. The school authorities argued that the Court should show a measure of deference to school 'governing bodies that are statutorily required to run schools and have the necessary expertise to do so.' Consistent with O'Regan's reference<sup>661</sup> to the constitutional value of equality as the distinguishing consideration in *Khosa*, the Court here held that, while judicial deference is appropriate in the review of administrative action where the decision-maker is 'especially well qualified to decide a particular matter, no institutional deference is necessary or desirable where a court is to determine whether the right to equality has been infringed.' More specifically, the Court held that:

The question before this Court ... is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the school bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the school's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the school to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.<sup>662</sup>

McLean notes further that in other judgments, the 'courts have recognised the role of the legislature in the South African democracy, and held that deference is due to the legislature by the other branches of government, and that a court should only interfere where it is "*absolutely necessary* to avoid *likely irreparable* harm and *then only in the least intrusive manner possible* with due regard to the interests of others who might be affected by the impugned legislation"' (emphasis added).<sup>663</sup> With this caveat in mind, it is notable that O'Regan was party to the unanimous decision of the Constitutional Court in *TAC (No.2)*, in which the Court intervened in an unparalleled manner to instruct the executive to dispense a particular medication, with significant budgetary impact in the longer term.

In contrast to O'Regan's apparent contentment with the doctrine as currently applied, it has been argued that, while the courts have quickly developed the 'beginnings of a jurisprudence on the doctrine of deference which mirrors that in Canada and the United Kingdom,' this development is 'uneven'. Thus, while the application of the doctrine is 'principled in the interpretation and enforcement of civil and political rights (such as in the

661 Pienaar (n 582 above).

662 Pillay (n 608 above) para 81.

663 *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amicus Curiae)* 2003 (1) SA 472 (CC) para 31. This passage was quoted with approval in *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC) para 69.

*Pillay decision*), ... *this has yet to be mirrored in its application to socio-economic rights*' (emphasis added).<sup>664</sup>

Without doubt, there is no single correct model for deference or single appropriate deferential position; the courts' approach to deference will depend on a number of contextual factors, as well as pre-existing attitudes of the judges and judicial culture. This understanding is not inconsistent with 'a principled approach to deference within a particular context, or that normative claims cannot be made in this regard.' On the contrary, in terms supportive of Wilson and Dugard's emphasis on a contextual approach to understanding SERs adjudication, it is reasonable to argue that 'normative evaluations' *should* be made regarding an "appropriate" level of deference *in our current context and circumstances*' (emphasis added).<sup>665</sup>

## 7 Conclusion

It is apparent from this analysis that it is necessary to encourage a continuation of the journey towards an appropriately contextualised understanding and application of the doctrine of deference. An appropriate understanding of the doctrine is essential in the context of increasing demands for the fundamental transformation of South Africa's unequal socioeconomic environment. O'Regan does not disagree, observing that we are making a path as we try 'to give real content to the social and economic rights in our Constitution', but reminding us of the need to be guided by clear principles lest we miss our mark.<sup>666</sup>

O'Regan expressed openness to the idea of some form of a purposeful 'constitutional dialogue' in keeping with the Constitution's transformative vision: 'The more we debate and consider the proper approach to social and economic rights in our Constitution, the more likely it will be that we will develop a progressive and democratic jurisprudence.'<sup>667</sup>

O'Regan believes that we are yet in the early days of our journey towards the transformed society envisioned by the Constitution. While she prizes principle and accordingly urges caution and patience, she is under no illusion that we have yet arrived at our destination. While prioritising 'balance' and respectful deference, she does not understand this to mean stubborn or self-satisfied rigidity. As such, the way is yet open to making a path that makes rights real, especially for those who have little else to cling to as a source of hope. An essential initial step along this path is the state's responsibility to enable citizens to develop the capacity to exercise moral

664 McLean (n 593 above) 87.

665 As above, 88.

666 O'Regan (n 566 above) viii.

667 As above, vii.

responsibility. In O'Regan's conceptualisation of the constitutional framework, rights and responsibilities adhere to everyone within the polity; they are interlocking and mutually reinforcing paving stones on the pathway to the goal of a just society. In her imagery, the South African Constitution is a fruit tree requiring ongoing cultivation. While it 'is bold and generous in spirit ... its vision is still far from the daily experience of most South Africans. As the Constitution takes root and grows, the challenge is to bring its bold and generous vision to fruition in our daily lives.'<sup>668</sup>

It is not beyond the realms of this framework and this vision – and it does not divert us from our road – to assert that the pressing needs of our current context and circumstances require us to identify other ways to bring to fruition the Constitution's 'bold and generous spirit' and to find a different equilibrium between the branches of the state. The courts recognise that deference has its limits, particularly as regards policy implementation, but also as regards policy formulation, with particular reference to context and circumstance. For O'Regan, everyone bears some responsibility for where we are and the progress we are making along our road. If, for instance, application of the reasonableness test indicates that maladministration and poor governance are substantially undermining the ability of some branches of the state to fulfil their responsibilities, it is within the parameters of this test for the courts to identify a different route to, or a different vehicle with which to reach, the transformed destination promised and required by our Constitution. Scope for this lies, for example, in the courts' powers to identify a 'just and equitable remedy' in terms of the provisions of section 172(1)(b) of the Constitution.<sup>669</sup>

In our current situation of profound disequilibrium, a different set of measures may be necessary in order to balance the scales, and a different delineation of the separation of powers may be required. As a first step, the courts are able to call upon litigating parties to provide more detailed evidence about the choices that inform policy and programmes, to more closely interrogate the sets of governance actions that underpin or undermine those programmes, and to inquire about their reasonableness in all the relevant circumstances. A second instrument could be the conscious factoring into the reasonableness test of considerations of urgency and

668 K O'Regan 'Cultivating a constitution: Challenges facing the Constitutional Court in South Africa' (2000) 2 *Dublin University Law Journal* 1-18, 18.

669 A case in point is the Constitutional Court's ongoing supervision of the various parties involved in finding an optimal alternative to current arrangements for the payment of social grants. Following the CC's decision in *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8; 2017 5 BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017), it continues to oversee the process of identifying an appropriate vehicle and associated institutional arrangements for grants payments. See, for example, 'Court wants details on mooted grant payment methods' *SA News* 30 November 2017 <https://www.sanews.gov.za/south-africa/court-wants-details-mooted-grant-payment-methods> (accessed 30 November 2017).

maladministration – under the mantle of the diligent performance of constitutional responsibilities. Mureinik's 'culture of justification' may provide the necessary counterweight to revisit the current parameters of the reasonableness test. Likewise, the constitutional rights of equality and dignity seem able to provide the necessary principled pillars to guide closer scrutiny of the policy implications of our current context and circumstances.

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