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Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court

THEUNIS ROUX

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Introduction

Some degree of judicial intervention in politics is an inevitable consequence of the adoption of a supreme-law Bill of Rights. The political branches' power to allocate resources, however, is conventionally thought to be beyond 'the limits of adjudication'.[1] Judges, the standard argument runs, are neither mandated nor institutionally equipped to undertake the complex economic and interest-balancing inquiries that inform the allocation of public resources. It is therefore unwise to give them the power to review decisions taken by the political branches in this area, and foolish for judges to assume this power when they are not compelled to do so.

If these propositions are true for judges in mature democracies, one would expect that they would apply with even greater force in new democracies, where the judicial branch is by definition still in the process of building the legitimacy required to play a meaningful role in politics. It is therefore surprising that some of the most far-reaching decisions in this area have been handed down by courts in Hungary and South Africa – both countries that democratized within the last 15 years. It is even more surprising that, in the case of South Africa, judicial review of political resource allocation has not as yet triggered any significant protest from the executive.[2] Why has this happened? And what does the South African experience tell us about the capacity of courts to check the power of the political branches in new democracies?

This study attempts to throw some light on these questions by examining four recent decisions of the South African Constitutional Court in which it was required to review the allocation of resources by the political branches. The first case took the form of a socio-economic rights claim, that is a claim based on a right to a particular resource or distribution of public benefits. And, indeed, it is in this context that the judicial review of political resource allocation is most obviously implicated. But the issue has arisen in other contexts as well, most notably in relation to constitutional challenges to

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legislation or policies allocating resources *away* from the claimant. The other cases discussed here are all of this type.

The discussion of each case begins with a summary of the formal reasons given by the court for its decision. Thereafter, the purpose is to identify the discretionary gaps exploited by the court in its manipulation of the applicable legal rules. By 'discretionary gaps' is meant fissures in the normative structure governing the decision that enabled the court to fashion an outcome in accordance with its sense of the degree of intrusion into politics appropriate to the case concerned. The aim is thus not to engage in a full doctrinal analysis of each case, but to focus on the way the court has used the opportunities presented to it in these cases to define its institutional role in the South African political system.

This way of proceeding brings together two bodies of literature on the role of constitutional courts in new democracies that seem to depart from different premises. On the one hand, political science discussions of this issue tend to assume that courts have a fairly wide discretion to tailor the outcome of controversial cases to the exigencies of the political moment.[3] On the other hand, legal academics writing about such cases, certainly in South Africa,[4] are reluctant to admit that extraneous political factors exert any kind of influence at all on the way judges make their decisions. The approach taken here lies somewhere in between. Legal rules *do* constrain the exercise of judicial discretion in controversial cases. However, by exploiting ambiguities in the normative structure governing their decisions, courts are able to manage their relationship with the political branches to a considerable degree.

The South African Constitutional Court has shown itself to be particularly adept at this kind of strategic behaviour, using the space provided by the new constitutional order to good effect. In particular, the four cases discussed in this article suggest that the court is scripting a role for itself as *legitimator* of the post-apartheid social transformation project. The advantage of this role is that it has allowed the court to build its legitimacy by endorsing the political branches' social transformation efforts. At the same time, the court has been able to give meaningful effect to the Bill of Rights, whilst remaining respectful of the political branches' residual prerogative to determine public policy.

Before discussing the cases, it may be helpful to readers unfamiliar with the South African constitution, and who wish to compare South Africa to other democracies discussed in this collection, to make some introductory remarks about the composition, method of selection and workload of the Constitutional Court. Although the South African case is undoubtedly significant, it may not be completely generalizable to other new democracies because of these peculiar institutional factors.

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The Composition, Method of Selection and Workload of the South African Constitutional Court

The Constitutional Court was established in 1994 under the so-called interim constitution,[5] an expressly transitional constitution that facilitated South Africa's passage from white minority rule to non-racial democracy. One of the more unusual aspects of the interim constitution was the role it gave to the court in certifying the final constitution[6] against a set of negotiated principles. This device, a clear pragmatic compromise between the desire for democracy and the need to keep the transition on track, necessarily thrust the court into the centre of politics. Its decision on this issue,[7] approving the bulk of the final constitution but remitting several important questions for reconsideration by the Constitutional Assembly, provided an early indication of the court's astute approach to controversial cases.

If one were to isolate a single non-contingent factor to explain the court's success in building its legitimacy, it would be that the court is composed of a remarkably talented group of people, all of whom possess impeccable human rights credentials.[8] Of the original eleven judges appointed, eight were still sitting at the beginning of 2003. When one considers that two of the vacancies were created by ill health, this statistic reflects a high degree of stability in the composition of the court. This has allowed it to build its relationship with the political branches through a series of cases in which it has largely spoken with one voice.[9]

The judges of the court are appointed by a Judicial Services Commission, which is effectively controlled by the majority party in the national government.[10] Given that South Africa is a one-party dominant state,[11] this might appear to be a reason for doubting the independence of the court. However, even in mature democracies, the national executive typically has the power to appoint a majority of the highest court on constitutional matters.[12] Few constitutional courts in the world are independent in the strict sense – composed of people with political views opposed to that of the governing political elite. Indeed, constitutional courts of this type, if they existed at all, would be at a distinct disadvantage when checking the power of the executive, since their decisions would be open to the charge of political bias. Conversely, as the South African case illustrates, the fact that a court's members have political views broadly sympathetic to those of the governing elite may be a necessary condition for them to assert their independence in the narrow sense: the capacity on occasion to say 'no' to the executive and 'make it stick'.

The other peculiar feature of the South African Constitutional Court worth mentioning is that it decides a comparatively small number of cases per year – never more than 30, and in some years as few as 20.[13] This is both

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an advantage and a disadvantage. The advantage of a low workload is that the court is able to pay close attention to the wording of its decisions, using them as the main means by which to manage its relationship to the political branches. The disadvantage, on the other hand, is that the court has concomitantly less control over its docket. This is compounded by the final constitution's very broadly framed jurisdictional provisions,[14] which have thus far precluded the development of a political question doctrine on the American model.[15] Deprived of this device, the court has very little option but to accept jurisdiction over controversial cases,[16] and then to use all its considerable rhetorical skills, both to *avoid* deciding issues that might bring it into conflict with the political branches,[17] and to *take on* politically useful issues that might not present themselves for decision again.

Discussion of the Cases

Government of the Republic of South Africa v. Grootboom

In the first major socio-economic rights case to come before the Constitutional Court – *Government of the Republic of South Africa and Others v. Grootboom and Others*[18] – a homeless community challenged their local municipality's refusal to provide them with temporary shelter. In a decision that has already attracted some international interest,[19] the court held that the state's failure to make proper provision for people in desperate need violated its obligation under section 26(1) and (2) of the final constitution to 'take reasonable and other measures within its available resources' to provide access to adequate housing. It accordingly declared the state's housing programme as applied in the municipal area in question unconstitutional to this extent.[20]

At first blush, this decision appears to be a remarkable slap in the face of a government that has made great strides in a short time to redress the apartheid housing-backlog. Closer examination of the reasons for the decision, however, reveals a diplomatically worded and respectful message to the political branches, generally endorsing their efforts, even as the court finds fault with aspects of the national housing programme.

The key discretionary gap exploited by the court in *Grootboom* was the ambiguity surrounding the application of international law, in particular, General Comment 3 of 1990 issued by the United Nations Committee on Economic, Social and Cultural Rights. Paragraph 10 of this Comment interprets articles 2.1 and 11.1 of the International Covenant on Economic, Social and Cultural Rights as meaning that States Parties have to devote *all* the resources at their disposal *first* to satisfy the 'minimum core content' of the right to adequate housing. Counsel for the *amici curiae* in *Grootboom*

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had argued strongly that this was the governing norm, and therefore that the court should order the state to redirect its spending so as to devote all available resources to meeting the needs of people in the position of the claimant community.

Clearly, the adoption of such an approach at the domestic level would have brought the Constitutional Court into direct confrontation with the political branches, since it would have required the court to substitute its own view of the needs that ought to be prioritized in the national housing programme for that of the legislature and the executive. Fortunately for the court, however, South Africa has not as yet ratified the International Covenant on Economic, Social and Cultural Rights.[21] And, although section 39(2) of the final constitution obliges the Court to 'consider international law', it clearly does not oblige it to apply non-incorporated legal norms.[22]

Taking full advantage of this discretionary gap, the court in *Grootboom* found that the textual differences between section 26(1) and (2) of the final constitution and Articles 2.1 and 11.1 of the International Covenant suggested that 'the real question ... is whether the measures taken by the State to realise the right afforded by s 26 are reasonable'.[23] The minimum core content of the right to have access to adequate housing, the court held, was only one indicator in respect of this larger inquiry.[24] In any event, there was insufficient evidence before the court to allow it to determine the minimum core content of the right, given regional variations in housing requirements and the rural/urban divide.[25]

Having opened out the normative structure governing its decision in this way, the court was able to develop the reasonableness review standard implied by the text of section 26(1) and (2) unconstrained by international law, or indeed by foreign law or past precedent. The court simply asserted, without relying on any authority, that the state's duty under section 26(2) to adopt 'reasonable and other legislative measures' implied that the national housing programme must be 'comprehensive',[26] 'balanced and flexible',[27] and targeted at those who were unable to access adequate housing through the market.[28] The precise holding in the *Grootboom* case, negatively expressed, was that it was unreasonable for the state to 'exclude' a 'significant segment of society' from the national housing programme,[29] especially where such a group was poor or otherwise vulnerable.[30]

The court must have been all too well aware, as it handed down this decision, that the standard of review set in this, its first major socio-economic rights case, would be a crucial determinant of the degree to which it would be required in future cases to involve itself in controversial policy issues, and in the allocation of resources in particular. It is therefore instructive to compare the standard of review adopted in *Grootboom* to the rational basis and proportionality standards in South African constitutional

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law, which mark respectively the low and high ends of the continuum of review standards from which the court might have chosen.

To lawyers familiar with the court's jurisprudence, the reasonableness review standard in *Grootboom* is clearly stricter than the rational basis standard applied under section 9(1) of the final constitution.[31] Although it insists on means-end rationality as a minimum,[32] the requirement that a social programme be comprehensive, balanced and flexible means that the court must do more than inquire into whether the legislation or policy at issue is rationally related to a legitimate government purpose. Rather, the court has to assess whether the social programme unreasonably excludes the segment of society to which the claimant group belongs. This assessment is closer to the one the court makes when applying the unfair discrimination standard it has developed under section 9(3) of the final constitution.[33] As such, it undoubtedly requires the court to substitute its view of what the constitution requires – the inclusion of the excluded group – for that of the political branches. It stops short, however, of a full-blown proportionality test.[34] The court's assessment is thus not directed at such issues as whether the state might have adopted less restrictive measures in pursuing the programme in question, but at whether the claimant group has *an equal or better claim* to inclusion relative to other groups that *have* been catered to.

It is now possible to see just how crucial the court's rejection of the direct application of General Comment 3 was. As noted above, the application of the standard set by the UN Committee on Economic, Social and Cultural Rights would have required the court to substitute its view of the needs that ought to be prioritized in the national housing programme for that of the political branches. By exploiting the discretionary gap in relation to the application of international law, the court was able to develop a subtly, but crucially different review standard, one that is less invasive of the political branches' resource-allocation powers in two respects.[35] First, the court was careful not to prescribe to the political branches the *temporal* order in which competing needs were to be met through the national housing programme. By rejecting the minimum core content argument, the court left the political branches free to meet a number of different needs in parallel, without prioritizing the needs of the most vulnerable over those who at least have somewhere to live where they are not in immediate danger of eviction or exposure to the elements.

The second important difference between the review standard developed in *Grootboom* and the standard set by the UN Committee on Economic, Social and Cultural Rights is that the former standard does not involve the court in prescribing to the political branches the precise amount of resources that have to be re-allocated in order to cure the constitutional defect it identifies. The court in *Grootboom* simply held that 'it is essential that a

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reasonable part of the national housing budget be devoted to [providing relief for those in desperate need], but the precise allocation is for national government to decide in the first instance'.[36] If the political branches were to attempt to give effect to this ruling, they would have to redistribute resources within the national housing programme, at the expense of people who might have benefited sooner from that programme but for the court-sanctioned diversion of resources to people in desperate need. But the political branches would not have to ensure that the shelter requirements of people in desperate need were met first, before going on to meet the needs of people whose situation was less desperate. Nor would they be required to allocate more resources to the housing programme, either by taking resources away from other programmes or by increasing the overall size of the national budget. To this extent, the *Grootboom* judgement remains respectful of the political branches' primary budget-setting and policy-making powers.

The impact of the reasonableness review standard developed in *Grootboom* on the political branches' power to allocate resources was directly addressed in the court's second major decision on socio-economic rights, *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)*.[37] In this decision, the court described the effect of its standard in the following terms: 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.[38] The distinction the court draws in this passage between, on the one hand, the deliberate usurpation of the political branches' resource allocation powers and, on the other, the inevitable budgetary consequences of a determination of reasonableness, is very revealing about how it sees its institutional role. The former conception, the court implies, would amount to an unacceptable intrusion into politics, whereas the latter is just an inevitable consequence of the function given to the court by the constitution. Judicial motives, in other words, are important. If the motive for 'rearranging budgets' is to substitute the court's view on how resources should be allocated for that of the political branches, the intrusion into politics cannot be justified. However, if the primary motive is rights-enforcement, the political branches should (as a matter of constitutional law) and will (as a matter of practical politics) accept the resource-allocation effects of the court's decision as a necessary part of the constitutional compact.

Pretoria City Council v. Walker

Socio-economic rights claims, as illustrated by the *Grootboom* case, generally have to do with challenges to the way resources have been

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allocated in existing programmes, and a concomitant claim that resources be diverted to the claimant. The remaining cases discussed here all concerned challenges to legislative or executive action that had the effect of allocating resources *away* from the claimant. The first such case, *Pretoria City Council v. Walker*,[39] provides a good illustration of the role that the Constitutional Court is beginning to define for itself in relation to challenges of this type. The respondent had been sued in the Magistrate's Court for outstanding electricity and water charges owed to the applicant, the Pretoria City Council. In defence to this suit, the respondent argued that the council's policy of charging a consumption-based tariff in formerly white suburbs and a lower, flat rate in formerly black townships amounted to cross-subsidization of the latter group by the former. As such, the policy violated section 8 of the interim constitution (the right to equality).[40] The respondent further alleged that the council's practice of taking legal action to recover debt owed by residents of the formerly white suburbs whilst declining to sue residents of the formerly black suburbs similarly violated this section.

Section 8 of the interim constitution, which is substantially the same as section 9 of the final constitution, has been interpreted as entailing two separate, but related standards of review: a rational basis standard linked to section 8(1), and an unfair discrimination standard linked to section 8(2). The first standard amounts to the familiar, means-end rationality test applied in other jurisdictions. In terms of this test, the court's inquiry is limited to deciding whether the provision or conduct complained of serves a legitimate government purpose and, if so, whether the differentiation at issue is rationally connected to that purpose. In *Walker* the application of this standard took up just two sentences of what is otherwise a fairly lengthy judgement, the court finding that the measures complained of were temporary in nature, and were rationally connected to the legitimate purpose of achieving parity in municipal service provision.[41]

The second, unfair discrimination standard, applied under section 8(2) of the interim constitution and section 9(3) of the final constitution, is more complicated. It is most concisely expressed in the court's decision in *Harksen v. Lane N.O. and Others*,[42] where the two-stage enquiry into whether an impugned differentiation amounts to unfair discrimination is explained as follows:[43]

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental

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human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

Applying this standard in *Walker*, the majority of the court held that the council's policy of charging different tariffs to residents of formerly white and formerly black areas, and of selectively suing residents of formerly white areas for the recovery of arrears, amounted to indirect discrimination on the basis of race.[44] Since race was one of the grounds expressly listed in section 8(2), this finding triggered the presumption in section 8(4) that the discrimination was unfair.[45] The major portion of the court's judgement is accordingly directed at assessing whether the council had successfully rebutted this presumption, namely whether it had proved that, even though its policy of charging differential tariffs and its practice of suing only residents of the formerly white suburbs indirectly discriminated on the basis of race, they were nevertheless fair.[46]

The unfair discrimination standard developed in its previous decisions required the court in *Walker* to focus on the *impact* of the discrimination on the complainant, taking into account three factors: (1) his or her position in society; (2) 'the nature of the provision or power and the purpose sought to be achieved by it'; and (3) 'the extent to which the discrimination has affected the [complainant's] rights or interests … and whether it has led to an impairment of [his or her] fundamental human dignity or constitutes an impairment of a comparably serious nature'.[47] In *Walker*, the court added for the first time that the complainant need not prove that the state intended to discriminate,[48] although the absence of an intention to discriminate was relevant to the court's assessment of the second factor.[49]

Assessing these factors, the court found that the council's differential tariff policy did not amount to unfair discrimination. The issues that the court considered relevant were: (1) that the complainant was a member of a previously advantaged, though minority group;[50] (2) 'the adoption of a flat rate [in formerly black townships] as an interim arrangement while meters were being installed … was the only practical solution to the problem';[51] (3) the inevitability of cross-subsidization;[52] and (4) the fact that the policy 'did not impact adversely on the respondent in any material way'.[53] The practice of selectively proceeding against residents of the formerly white suburbs, on the other hand, was not based on a 'rational and coherent plan',[54] but was

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rather a pragmatic way of dealing with the culture of non-payment in formerly black suburbs.[55] Official Council policy was in fact to enforce the payment of arrears by way of legal action against all ratepayers.[56] When coupled with the fact that, 'objectively', this practice affected the complainant and 'other persons similarly placed' in a manner 'comparably serious to the invasion of their dignity',[57] the presumption that this practice was unfairly discriminatory could not be said to have been rebutted.

What is significant about the majority judgement in *Walker* for our purposes is that the court was able to enter the politically charged terrain of municipal service provision and partially strike down a policy that favoured the previously disadvantaged majority over a still privileged minority. How did the court achieve this result without antagonizing the political branches?

First, it was perhaps not coincidental that *Walker* was the case in which the court chose to decide the question whether proof of an intention to discriminate on the part of the state is a necessary element of a successful unfair discrimination challenge. Although courts in the mature democracies cited by the court have taken different views on this question,[58] in a new democracy it is clearly preferable for judges not to have to rule on the motives underlying impugned executive conduct.

The second possible explanation for the apparent ease with which the court was able to hand down a judgement in *Walker* partially striking down a policy that favoured the previously disadvantaged majority, lies in the fortuitous fact that the case split into two parts. This allowed the court to uphold the differential tariff policy whilst sanctioning the practice of selective enforcement. In this way the court was able to balance its role as guardian of the constitution against the need to build its institutional legitimacy. It is also significant that the practice of selective enforcement did not enjoy the status of official policy, which meant that the court could attack it as irrational and incoherent without directly criticizing the political branches.

The third discretionary gap exploited by the court in *Walker* concerned the application of the unfair discrimination test. As noted above, where the ground of discrimination is listed in section 8(2) of the interim constitution, as it was in this case,[59] the formalistic enquiry prescribed by the *Harksen* case leaves very little room for manoeuvre until the final stage, in which the court assesses whether the state has rebutted the presumption of unfair discrimination thus arising.[60] At this point, however, the inquiry becomes quite open-ended. As the majority judgement in *Walker* shows, the third factor in the determination of fairness – the assessment of whether the impact of the conduct complained of is as serious as an invasion of the complainant's dignity – still leaves quite a bit of space for the court to exercise its political discretion.

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To understand this point it is necessary to return to the facts of the case. On the court's own version, it is apparent that the constitutional claimant (Walker) was not indebted to the council because of his inability to pay. Rather he was part of a concerned taxpayers' association that was attempting to highlight the way in which the council charged for services by refusing to pay any more for services than the flat rate charged to black residents.[61] Indeed, it is fair to say that Walker deliberately exposed himself to the possibility of being sued so that he could draw attention to the alleged violation of his constitutional rights. Against this background, the majority's conclusion that the impact of the council's practice of selectively suing white residents must have 'affected them in a manner which [was] at least comparably serious to an invasion of their dignity'[62] seems a little strained. There was no principled basis for distinguishing the council's differential tariff policy from the practice of selective enforcement according to this factor. If anything, the impact of the tariff policy was outside Walker's control, whereas he might have avoided the impact of the selective enforcement practice by settling his arrears, something that he was financially capable of doing.

The real reason for the court's willingness to find for Walker on the latter issue, it is suggested, was its desire to sanction the haphazard way in which the council went about recovering arrear charges.[63] This comes closer to a finding of irrationality than one of unfair discrimination. Indeed, it is at first glance strange that the court did not use the opportunity provided by the section 8(1) rational basis challenge to strike down the practice of selective enforcement, and in that way avoid the more controversial finding of unfair (reverse) discrimination under section 8(2).[64] As the two cases discussed below illustrate, the court is far more comfortable in the role of enforcing good governance standards than it is in second-guessing the wisdom of policies self-evidently required to redress the legacy of apartheid.

The only plausible explanation for the court's becoming more embroiled in the politically fraught terrain of municipal service provision than was doctrinally necessary is that it deliberately *chose* to enter this terrain in order to endorse the political branches' social reform efforts. Had the court decided the case merely on the basis of section 8(1), it would have had far less scope to affirm the constitutionality of such crucial transformational strategies as cross-subsidization, and far less opportunity to show its appreciation for the difficulties faced by the council in trying to achieve parity in municipal service provision. On balance, the checking effect of the court's decision to strike down the practice of selective enforcement is outweighed by the ringing endorsement it gives to the post-apartheid social transformation project. In this way the court was able to legitimate that project even as it affirmed the minority-protection function of the Bill of Rights.

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Premier, Mpumalanga v. Executive Committee, Association of State-aided Schools, Eastern Transvaal

Consequent on the inclusion of rights to administrative justice in both the interim and final constitutions, the Constitutional Court has on several occasions been required to review the constitutionality of administrative action in cases that in other jurisdictions would have been decided by the ordinary courts. The fact that a constitutional court should review administrative action does not, of course, render this widely accepted institution problematic. However, two further features of the South African situation warrant the inclusion of some of these cases in this analysis. The first feature involves the Constitutional Court's approach to the definition of administrative action, which, as in some other jurisdictions, has focused not on the 'arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising'.[65] As a result, the constitutional right to just administrative action has on several occasions been used to challenge decisions taken by ministers in the national and provincial governments, including decisions on the allocation of resources. The second feature of the South African situation is the enormity of the social transformation challenge facing the country, and the steadfastly legal framework within which the political branches have pursued the social transformation project. In combination, these two features mean that judicial review of political resource allocation under the right to just administrative action may pose as great a risk to the court's reputation and standing as that posed by judicial review in respect of socio-economic or equality rights. Even as apparently routine a review standard as procedural fairness may, if over-zealously applied, be perceived by the executive as undermining the achievement of the constitutional vision of a just and substantively equal society. By the same token, however, the judicious use of the court's power to review political resource allocation for procedural fairness may serve to legitimate the redistribution of resources by the political branches, which is a necessary part of the post-apartheid social transformation project.

The Constitutional Court indicated its awareness of this tension in the following extract from its decision in *Premier, Mpumalanga, and Another v. Executive Committee, Association of State-aided Schools, Eastern Transvaal.*[66]

> In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries.) As a young democracy facing immense challenges of

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> transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.

The *Premier, Mpumalanga* case concerned a challenge to a decision by a provincial education minister terminating bursaries paid to needy students in state-aided schools. The policy change was motivated by a well-founded desire to eliminate racial discrimination in the system. However, in his budget speech for the year in question, the minister had failed to indicate that existing, racially-based bursaries would be withdrawn in that year.[67] Thereafter, at a public meeting, he announced the termination of all existing bursaries with retroactive effect.[68]

The respondent, an association of formerly white schools, some of whose pupils were adversely affected by this decision, challenged it as a violation of section 24(b) of the interim constitution (right to procedurally fair administrative action). The trial court set aside the decision and substituted it with a decision that existing bursaries should be paid until the end of the school year. On appeal to the Constitutional Court, the decision to terminate the bursaries was assumed to constitute administrative action, notwithstanding a clear acceptance later on in the judgement (in relation to an allegation of bias) that it was 'a political decision ... taken in the light of a range of considerations' by 'a duly elected politician'.[69] Finding that the respondent had a legitimate expectation that bursaries would be paid until the end of the school year, the court held that the decision to terminate the bursaries with retroactive effect without affording the respondent's members a hearing was unconstitutional against section 24(b).

The first part of the court's interpretation of the procedural fairness standard is contained in the passage quoted above. The emphasis in that passage falls squarely on the need to permit the executive to act 'efficiently and promptly'. The emphasis shifts as the court continues:

> On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness ... Citizens are entitled to expect that government policy will not ordinarily be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.[70]

The balance that the court strikes in these two extracts between the need to promote 'prompt', 'efficient' and 'effective' government, and the need to ensure respect for due process is a familiar refrain in many countries, including mature democracies. What is remarkable about this passage,

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however, is that the court assigns to itself both a passive and an active role in the striking of this balance. Note, for example, the subtle shift in the first extract from the need not to '*inhibit* [the executive's] ability to make and implement policy effectively' to 'the need to *ensure* the ability of the Executive to act efficiently and promptly' (emphasis added). Similarly, in the second extract, the court's reluctance 'to permit the implementation of retroactive decisions' is justified by the need to enforce procedural rights. As it did in the *Walker* decision, the court is here defining a role for itself as legitimator of the social transformation project. According to this conception of its role, the function performed by the court is neither that of passive watchdog nor that of active champion of citizens' rights against the state. Rather, the political context in which it is operating requires the court to work alongside the democratically elected government to consolidate the transition from apartheid to democracy.

Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v. Ed-U-College (PE) (Section 21) Inc.

The court's self-understanding as legitimator of the political branches' social transformation project is also evident in another case in which it was required to apply the procedural fairness standard to political resource allocation. The facts in *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v. Ed-U-College (PE) (Section 21) Inc*[71] were almost identical to those in *Premier, Mpumalanga*. As in that case, the claimant challenged a provincial education department policy reducing the subsidies paid to schools, in this instance, independent schools.[72] The crucial difference between the *Premier, Mpumalanga* and *Ed-U-College* cases, however, was that the reduction in benefits in the latter instance had not been effected retroactively. Rather, it had followed by necessary implication from a reduced allocation to independent schools in the provincial education budget. This allocation had in turn been approved by the provincial legislature in its annual Appropriation Act. In all, three allocations were at issue in *Ed-U-College*: (1) the share of the provincial budget allocated to education; (2) the percentage allocation to independent schools; and (3) the allocation made to each independent school in terms of a subsidy formula determined by the minister.

The trial court had held that the first two allocations constituted legislative action, and were therefore not justiciable, at least in so far as the challenge had been brought under the right to just *administrative* action. However, the third allocation 'was a justiciable matter over which the ... Court had jurisdiction'.[73] On appeal to the Constitutional Court, the applicants – the permanent secretary for the provincial education department

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and the provincial education minister – argued that the allocation of resources to independent schools was in its entirety 'a matter of policy, taken [sic] by an elected person, after due deliberation'.[74] The court rejected this argument. The first two allocations, it held, were both clearly legislative in character – the first because the actual amount allocated to education was listed in a schedule to the Appropriation Bill,[75] and the second because the estimated expenditure on each educational sub-programme had been considered by the legislature when approving the Bill.[76] The third allocation was harder to classify. Although the minister's decision determining the subsidy formula purported to be a decision about how the budget allocated to independent schools should be distributed, it also conclusively determined the amount that each school should receive.[77] This fact, the court held, was decisive. It meant that the minister's conduct amounted to the implementation of legislation, rather than the formulation of policy. As such, it was subject to review as administrative action, notwithstanding the fact that the minister was a senior member of the provincial executive.[78]

This finding effectively concluded the Constitutional Court's role in the case, since the appeal had been taken to it before evidence had been led on the procedure that had been followed by the minister prior to determining the subsidy formula. Nevertheless, the court took the opportunity presented to it in *Ed-U-College* to comment on the procedural fairness standard articulated in *Premier, Mpumalanga*, as follows:

> Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount of the annual subsidy to be paid. Subsidies are paid annually and, given the precarious financial circumstances of education departments at present, schools and parents cannot assume, in the absence of any undertaking or promise by an education department, that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the legislature has reduced the amount allocated for distribution.[79]

As before, this passage reflects the court's striving for a balance between the need to enforce procedural rights and the need to promote efficient government. The primary distributional choice determining the amount to be allocated towards school subsidies in any particular year, the court makes clear, is within the preserve of the legislature. However, to the extent that the political branches, by their conduct, create a legitimate expectation that subsidies will not be reduced or withdrawn in any particular year without a prior hearing, the court will enforce citizens' rights to participate in any interstitial change in policy.

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Once again, the court is here scripting a role for itself as legitimator of the social transformation project – endorsing the political branches' power to redistribute resources along more equitable lines, but indicating its preparedness to strike down poorly conceived policies that infringe on procedural rights.

Conclusion

The four cases discussed in this article indicate that, rather than abdicating responsibility for the transformation of South Africa from a racially divided and deeply unequal society to one in which resources are more rationally and fairly distributed, the Constitutional Court has chosen to put itself at the centre of that project. In *Grootboom*, the court developed a review standard that allowed it to engage the political branches in rational discussion over the fairness of the national housing programme, without, however, setting government's priorities for it. In *Walker*, the court appears to have deliberately elected to decide the constitutional challenge on a potentially controversial basis in order to give its stamp of approval to the restructuring of the municipal services sector. And in the *Premier, Mpumalanga* and *Ed-U-College* cases the court, without being required to do so, was at pains to express its appreciation for the balance that needed to be struck between the redistribution of resources in the education sector and respect for procedural rights.

All four of these cases involved constitutional challenges to the allocation of resources, an area of public policy that conventional wisdom dictates should be left to the political branches. Notwithstanding the possible threat to its legitimacy posed by involvement in these types of cases, and the considerable difficulties associated with reviewing the complex policy choices at issue, the court has entered this terrain with a remarkable degree of success. In so doing, it has scripted a role for itself as legitimator of the political branches' social transformation project, a role that simultaneously allows it to build its legitimacy even as it intrudes into one of the most sacrosanct areas of politics.

If that is an accurate assessment, the record of the Constitutional Court in these four cases confirms Ruti Teitel's insight that, 'during periods of political upheaval', the rule of law, 'rather than grounding legal order, ... serves to mediate the normative shift in justice that characterizes these extraordinary periods'.[80] Although this remark was made primarily in relation to countries in transition, it applies equally well to new democracies. Constitutional courts in this context, it would seem, cannot afford the luxury of the separation of powers doctrine. The consolidation of

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democracy after a long period of authoritarianism depends on the ability of the political branches to make law-governed social transformation work. If the social transformation project is to succeed, it must in turn be legitimated by law. Counter-intuitively, this means that judges in new democracies may have to intrude further into politics than their colleagues in mature democracies would deem necessary or prudent. In so doing, they run the risk that the political branches may become disaffected. However, if skilfully handled, intruding into politics may also become the means by which constitutional courts in new democracies build the institutional legitimacy required to survive, and eventually to assist in the consolidation of democracy.

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NOTES

1. The term was coined by Lon L. Fuller in ‘The Forms and Limits of Adjudication’, *Harvard Law Review*, Vol.92, No.2 (1978), pp.394–404.
2. The only decision to have elicited a hostile response from the executive to date was that of the trial court in *Treatment Action Campaign and Others v. Minister of Health and Others* 2002 (4) BCLR 356 (T) (ordering the state to extend its programme for the prevention of mother-to-child transmission of HIV/AIDS). When asked on national television whether the government would implement the court’s order if confirmed by the Constitutional Court, the Minister of Health unequivocally said ‘no’. She was, however, quickly forced to retract this remark. And, when the Constitutional Court eventually did approve the trial court’s order in substantially the same form (*Minister of Health and Others v. Treatment Action Campaign and Others (No.2)* 2002 (5) SA 721 (CC)), the executive did not publicly question it.
3. See, for example, Lee Epstein, Olga Shvetsova and Jack Knight, ‘The Role of Constitutional Courts in the Establishment of Democratic Systems of Government’, *Law and Society Review* Vol.35, No.1 (2001), pp.117–63 (attempting to model the strategic calculations made by the Russian Constitutional Court in relation to politically controversial decisions).
4. For a rare exception, see Thomas J. Bollyky, ‘R if C>B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations’, *South African Journal on Human Rights* Vol.18, No.2 (2002), p.165 (arguing that ‘when remedying a violation of the Bill of Rights, courts intuitively weigh the degree to which they must make choices regarding policies and budgets against the extent of the constitutional violation’).
5. Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim constitution’).
6. Constitution of the Republic of South Africa Act 108 of 1996 (‘the final Constitution’).
7. *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).
8. Short biographies of the sitting and former judges are available at <http://www.concourt.gov.za>.
9. Complete statistics on the record of the South African Constitutional Court, including voting patterns, are published each year in the *South African Journal on Human Rights*.
10. Section 178(1) of the constitution provides for the appointment of 23 people to serve on the

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Judicial Service Commission, including 12 whose appointment is directly controlled by the ruling party.

11. See Hermann Giliomee and Charles Simkins, ‘The Dominant Party Regimes of South Africa, Mexico, Taiwan and Malaysia: A Comparative Assessment’, in Hermann Giliomee and Charles Simkins (eds), *The Awkward Embrace: One-party Domination and Democracy* (Cape Town: Tafelberg, 1999), pp.1–45.
12. See Robert A. Dahl, ‘Decision-making in a Democracy: The Supreme Court as a National Policy-maker’, *Journal of Public Law*, Vol.6, No.2 (1957), pp.285–6 (demonstrating, through an examination of the interval between appointments to the United States Supreme Court, that presidents of the United States have generally been able to appoint a majority of judges who share their political views within their first term of office).
13. See note 8 above.
14. Section 2 of the final constitution provides that ‘law *or conduct* inconsistent with it is invalid’ (emphasis added), while section 167(7) provides that ‘a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution’, and section 167(1)(c) provides that the Constitutional Court ‘makes the final decision whether a matter is a constitutional matter’. In theory, this gives the Court the power to review the constitutionality of all executive conduct, including conduct that would in other jurisdictions be regarded as purely political.
15. See Maurice Finkelstein, ‘Judicial Self-Limitation’, *Harvard Law Review*, Vol.37, No.3 (1924), pp.338–64 and Louis Henkin, ‘Is There a “Political Question” Doctrine?’, *Yale Law Journal*, Vol.85, No.5 (1976), pp.597–625.
16. The only exception to this rule concerns applications for direct access in terms of section 167(6)(a) of the final constitution, where the court has been more circumspect.
17. Cf. Iain Currie, ‘Judicious Avoidance’, *South African Journal on Human Rights*, Vol.15, No.2 (1999), pp.138–65. My approach in this article is both narrower and broader than that of Currie inasmuch as I am only interested in cases dealing with political resource allocation, whilst at the same time arguing that the court has sometimes deliberately taken on issues that it might have avoided.
18. 2001(1) SA 46 (CC) (hereafter ‘*Grootboom*’). The trial court decision is reported as *Grootboom and Others v. Oostenberg Municipality and Others* 2000(3) 277 BCLR (C).
19. See Cass R. Sunstein, ‘Social and Economic Rights? Lessons from South Africa’, *Constitutional Forum*, Vol.11, No.4 (2001), pp.123–32.
20. *Grootboom* par.99.
21. *Grootboom* par.27 n.29.
22. See sections 231-33 of the final constitution, providing for the incorporation of international agreements into domestic law through enactment ‘by national legislation’ (section 231(4)) and specifying that both international agreements and customary international law, in order to constitute ‘law in the Republic’, must be consistent with the constitution or an Act of Parliament (section 232).
23. *Grootboom* par.33.
24. Ibid.
25. Ibid. paras 32–3.
26. See ibid. par.40. Comprehensiveness has three different senses in *Grootboom*: geographic coverage (par.54); effective co-ordination of government action at all levels (par.55); and inclusion of all classes in the relevant programme (paras 63 and 64). The national housing programme was found to be lacking only in the third sense.
27. Ibid. par.43.
28. Ibid. par.36.
29. See *Grootboom* par.43: ‘A programme that excludes a significant segment of society cannot be said to be reasonable’.
30. See *Grootboom* paras 36, 63–5, 69.
31. See *Bel Porto School Governing Body and Others v. Premier of the Province, Western Cape and Another* 2002(9) BCLR 891 (CC) par.46 (holding that the *Grootboom* reasonableness review standard was a ‘higher standard’ than the review standard applied under section 9(1) of the final constitution).

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32. See *Grootboom* par.54 (finding that the national housing programme was 'not haphazard' but 'systematic').
33. This standard is discussed in detail in the analysis of the *Walker* case in the next section.
34. This test, which is applied under the general limitations clause in section 36 of the final constitution, empowers the court to strike down laws that are disproportional in the sense that the state might have achieved its legislative purpose by means less invasive of the right in question. This standard is a very strict standard since it permits the court to substitute its view of a less invasive policy for that of the political branches. The court in *Grootboom* clearly signalled that its reasonableness review standard was less strict than this when holding that 'a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent' (par.41).
35. This argument has been developed at greater length in Theunis Roux, 'Understanding *Grootboom* – A Response to Cass R. Sunstein', *Constitutional Forum*, Vol.12, No.2 (2002), pp.41–51.
36. *Grootboom* par. 66.
37. 2002(5) SA 721 (CC) (hereafter 'the *TAC* case').
38. Ibid. par.38.
39. 1998(2) SA 363 (CC) (hereafter '*Walker*').
40. Section 8 of the interim constitution provides: '(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language….'
41. *Walker* par.27.
42. 1998(1) SA 300 (CC).
43. Ibid. par.54.
44. Ibid. par.32. Both section 8(2) of the interim constitution and section 9(3) of the final constitution prohibit the state from discriminating 'directly or indirectly'. Judge Sachs's dissenting judgement in *Walker* was premised on a finding that the differentiation at issue was based on 'objectively determinable characteristics of different geographical areas, and not on race' (Ibid. par.105.)
45. Cf. Section 9(5) of the final constitution.
46. *Walker* paras 37–81.
47. *Harksen* (note 42 above) para. 52 (cited in *Walker* para. 38).
48. *Walker* para. 43.
49. Ibid. par.44.
50. Ibid. paras 45–8.
51. Ibid. par.53.
52. Ibid. paras 57–63.
53. Ibid. par.68.
54. Ibid. par.79.
55. Ibid. par.72.
56. Ibid. par.74.
57. Ibid. par.81.
58. Ibid. paras 40–42.
59. Note that Judge Sachs's dissent was based on a finding that there was no evidence of *prima facie* discrimination on a listed ground (*Walker* par.107).
60. The presumption is contained in section 8(4) of the interim constitution (the provision applied in this case) and section 9(5) of the final constitution.
61. *Walker* par.22.
62. Ibid. par.81.
63. Ibid. par.79.
64. See Cathi Albertyn, 'Equality', in M.H. Cheadle, D.M. Davis and N.R.L. Haysom, *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths, 2002), pp.51–121, at

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p.70 (arguing that the *Walker* case 'provides one of the best examples of a failure to meet the rationality requirement ... although it was not decided as such').

65. *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 2000(1) SA 1 (CC) par.141.
66. 1999(2) SA 83 (CC) (hereafter '*Premier, Mpumalanga*').
67. Ibid. paras 17–18.
68. Ibid. par.22(b).
69. Ibid. par.51.
70. *Premier, Mpumalanga* para. 41.
71. 2001(2) SA 1 (CC) (hereafter '*Ed-U-College*').
72. The challenge was brought under section 33(1) of the final constitution, which, like section 24 of the interim constitution, guarantees the right to procedurally fair administrative action.
73. *Ed-U-College* par.6.
74. Ibid. par.8 (citing the applicants' notice of appeal).
75. Ibid. par.12. The court made it clear that its finding that the first two allocations constituted legislative rather than administrative action was not necessarily a bar to judicial review under other provisions of the Bill of Rights. However, the respondent had based its case purely on 'administrative law principles' (ibid. par.11).
76. Ibid. par.14.
77. Ibid. par.21.
78. Ibid. par.18, citing *President of the Republic of South Africa v South African Rugby Football Union* (note 65 above) paras 141–3.
79. Ibid. par.22.
80. See Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', *Yale Law Journal*, Vol.106, No.7 (1997), p.2016.

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