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ARTICLE

Rule of Law Through the 'Urban Turn' in South African Constitutionalism

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Abstract

The 1996 South African Constitution transformed municipalities from creatures of statute into an interdependent sphere of government, thereby enabling South African cities to carve out a space for autonomous urban governance, which is closely associated with the progressive realisation of socio-economic rights. This article considers how South African courts have deployed, reconfigured and channelled the rule of law in intergovernmental relations disputes, disputes concerning the developmental obligations of local government and socio-economic rights disputes, in order to fortify urban autonomy, to substantively guide its exercise and to ensure dynamic accountability for urban local governments' role in ensuring the progressive realisation of socio-economic rights.

1 Introduction

It has been remarked that, in most domestic legal systems, the core doctrines, structures and concepts of constitutional law remain debilitatingly moored in a nation-state-fixated paradigm that is growingly out of step with a rapidly urbanizing world.[1] So slow has constitutional law typically been to catch up to the 'urban turn' in global politics, economics and international relations, that contemporary discussions of

[1] See Arban (2020); Hirschl (2020).

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progressive urban governance practices not uncommonly point to independent assertions of urban autonomy that belie, perhaps even defy, city governments' constitutional and legal confines.[2]

South African constitutional law is often held forth as a partial exception in this regard. Referring to its extensive devolution scheme, Ran Hirschl has described the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution') as being 'arguably the most effective' attempt to 'constitutionalize city power' in the world to date.[3] Embracing a notion of developmental local government within an intergovernmental relations framework nested in 'principles of co-operative government',[4] the Constitution requires local government to 'provide democratic and accountable government for local communities;… ensure the provision of services to communities in a sustainable manner;… promote social and economic development;… promote a safe and healthy environment; and encourage involvement of communities and community organisations in the matters of local government'.[5] These objectives are to be pursued as a matter of 'right' on municipalities' 'own initiative',[6] with capacity-enhancing support and oversight by national and provincial spheres of government.[7]

Not coincidentally, the Constitution is also a poster-child for the domestic constitutional entrenchment of justiciable socio-economic rights alongside the standard suite of civil and political rights. As a 'distinctive, interdependent and interrelated' sphere of the 'State',[8] municipalities are constitutionally obliged to 'respect, protect, promote and fulfill the rights in the Bill of Rights',[9] and to 'take reasonable legislative and other measures, within… available resources, to achieve the progressive realisation' of the rights of access to adequate housing, health care services, food, water and social security.[10] It so happens that these socio-economic rights have thus far near-exclusively been invoked against urban municipalities, thereby underlining a close entanglement between their subject-matter and cities' constitutional turf.[11]

Both the devolution of state power and socio-economic rights hold challenges and disruptive potential for constitutionalism's stalwarts, including the separation of powers, judicial independence and the rule of law. This article focuses on ways in which South African courts have, over the last quarter-century, deployed, reconfigured and channelled the rule of law in intergovernmental relations disputes and socio-economic rights disputes that pertained to the powers and responsibilities

[2] See, for example, Adams et al (2017) p. 2732; Barber (2013) pp. 166–171; Schragger (2016) pp. 86–87; 162–165.

[3] Hirschl (2020) pp. 12–13. See also ibid pp. 128–131; Arban (2020) pp. 337–338; Steytler (2019) p. 571.

[4] Listed in Sects. 40–41 of the Constitution. See Sect. 3 below.

[5] Section 152 of the Constitution.

[6] Section 151(3) of the Constitution.

[7] Sections 139, 151(4), 154(1) and 156 read with Schedules 4B and 5B of the Constitution.

[8] Section 40(1) of the Constitution.

[9] Section 7(2) of the Constitution.

[10] Sections 26(2) and 27(2) of the Constitution.

[11] See Angel-Cabo (2020) pp. 158, 164; Hirschl (2020) p. 175; Pieterse (2018) p. 13.

of urban local governments. It shows how, through descriptive concepts such as a 'cluster of public-law relationships' and 'good constitutional citizenship', and open-ended review standards such as 'reasonableness', courts have been able to use the rule of law to simultaneously fortify and delimit constitutional space for independent urban governance, to enable unscripted governance practices within constitutional confines, and to structure dynamic yet accountable margins of governmental discretion.

Section 2 below sets out the basic premises of the rule of law and elaborates on its normatively 'thick' manifestation in the South African Constitution. Then, Sect. 3 engages with the ways in which South African courts have relied on the doctrine in constructing, upholding and limiting the autonomy of urban local governments in intergovernmental disputes. Section 4 proceeds to highlight the employ of the doctrine within courts' evaluative paradigm for constitutional compliance of urban governance practices. Thereafter, Sect. 5 discusses how rule of law structures and animates the judicial approach to ensuring urban local governments' accountability in socio-economic rights cases. Some concluding reflections follow in Sect. 6.

2 Rule of Law in the South African Constitution

At its core an abhorrence of arbitrary power,[12] the doctrine of rule of law manifests both procedurally (in that it is often associated with 'lists' of requirements through adherence to which 'good' -e.g. clear, unambiguous, known-law can appropriately temper state power and structure pursuit of state goals) and substantively (in that non-arbitrary wielding of power can be understood to require, for instance, substantive input by governed populations into the formulation and content of laws, and/or that laws imbue respect for fundamental rights).[13] While its content (especially when it comes to its 'thicker', normative dimensions) inevitably remains contested and varies contextually,[14] the doctrine typically requires at a minimum that all public projects be accomplished through the medium of law and that all players, including lawmakers and other organs of state, adhere to the law in their implementation efforts (the so-called 'legality principle').[15]

Beyond this procedural core, more substantively thick conceptions of the rule of law locate justification for the legality principle in law's democratic character or, thicker still, its reflection of shared societal values such as fundamental rights, so that democratic legitimacy and rights-adherence are viewed as substantive prerequisites of legality.[16] While most theorists are comfortable with such a substantive

[12] Krygier (2016) p. 203; Raz (1979) pp. 216–217.

[13] See Krygier (2016) pp. 204–206, 214–216; Meyers (2021) pp. 407–410; Tamanaha (2014) pp. 91–92; Waldron (2002) p. 154.

[14] See Krygier (2016) pp. 200–202, 212–213; Møller and Skaaning (2012) p. 136; Waldron (2002).

[15] Raz (1979) pp. 211–21; Møller and Skaaning (2012) pp. 144–145; Tamanaha (2004) p. 92. See further generally Krygier (2016); Meyers (2021); Waldron (2021).

[16] Møller and Skaaning (2012) pp. 139–142; Tamanaha (2004) pp. 98–104.

conception of rule of law resting on representative democracy and respect for individual liberties, there is considerable disagreement on the desirability of its incorporation of ostensibly more politicized values.[17] Many are, for instance, uncomfortable with social-democratic or redistributive articulations of the doctrine which, it is argued, would invite value clashes that could render rule of law so unwieldy and contested as to be impractical and potentially self-defeating.[18]

South Africa has an uncomfortable history with the rule of law, with a thin, purely procedural conception of the doctrine having been complicit in masking gravely unjust rule *by* law during the apartheid era.[19] The drafters of the Constitution accordingly deliberately settled on a normatively 'thick', social-democratic conception of the doctrine, which is listed alongside constitutional supremacy, democracy, non-racism and non-sexism, 'accountability, responsiveness and openness' and 'human dignity, the achievement of equality and the advancement of human rights and freedoms' as a founding value of the 'new' South African constitutional order.[20] The Constitution situates itself as the pinnacle of South African rule of law, proclaiming itself to be 'the supreme law of the Republic' and determining that 'law or conduct inconsistent with it is invalid, and [that] the obligations imposed by it must be fulfilled'.[21] It proceeds to enshrine a Bill of Rights that includes both a redistributive right to equality and a range of socio-economic rights, and explicitly mandates the legislature to adopt measures aimed at the progressive realisation of socio-economic rights, the achievement of equality and the promotion of just administrative action.[22] Together, these features affirm the (by conventional standards, extraordinary) normative thickness and strong social-democratic build of 'new' South African rule of law.[23]

The rule of law served to smooth over the disruption implied by superimposing the supreme Constitution onto the pre-existing South African legal system (consisting of a blend of statutory law, judge-made common law and indigenous customary law), many aspects of which were substantively out of step with the Constitution's social-democratic value system.[24] In compliance with the doctrine, all statutory and subsidiary law remained in force until it was either judicially invalidated for unconstitutionality, or amended or repealed by the legislature,[25] whereas common law would continue to develop on a case-by-case basis, albeit now in a manner reflecting the 'spirit, purport and objects of the Bill of Rights'.[26] Over time, as laws were declared unconstitutional, amended, repealed, replaced and supplemented (including

[17] Møller and Skaaning (2012) pp. 141–144.
[18] Ibid p. 144; Tamanaha (2004) pp. 111–113.
[19] Dyzenhaus (2007) pp. 735–738.
[20] Section 1 of the Constitution.
[21] Section 2 of the Constitution.
[22] See Sects. 9(2), 9(4), 26(2), 27(2) and 33(3) of the Constitution.
[23] Dyzenhaus (2007) pp. 735–736; Ellmann (2015–16) pp. 67–71. On how socio-economic rights supplement and animate thick conceptions of the rule of law, see Çerniç (2016).
[24] See generally Dyzenhaus (2007); Ellmann (2015–16).
[25] Sections 44(4) and 172(1) of the Constitution.
[26] Section 39(2) of the Constitution.

by many acts passed in explicit compliance with constitutional decrees), the legal system slowly (albeit imperfectly) morphed into constitutionally compliant internal coherence, to the point where, as the Constitutional Court held in 2000, 'there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.[27]

The justiciability of the Constitution has positioned South African courts as the ultimate guardians of the rule of law, while their interpretation of constitutional provisions serve to elucidate the doctrine's substantive content. The Constitution's explicit social-democratic leanings have lent a particular edge to 'conventional' rule of law challenges facing the judiciary, particularly in relation to settling on an appropriate role when reviewing the constitutionality of legislative and executive action, evaluating the achievement of ambitious legislative targets pertaining to socio-economic rights, and ensuring executive compliance with court orders.[28] Moreover, the Constitution's extraordinary empowerment of local government makes urban autonomy a feature of South African rule of law and brings intergovernmental relations within the doctrine's direct ambit.[29] In what follows, I engage with some of the different ways in which the South African judiciary have employed conceptions of the rule of law, ranging from the legality principle at its core to its substantively thick outer layers, in safeguarding, enabling and overseeing urban autonomy and governance.

3 'Good Constitutional Citizenship': Rule of Law and Urban Autonomy

While South African municipalities were previously creatures of statute, the Constitution profoundly repositioned them in relation to the rule of law and the principle of legality. It vests municipalities with (constitutionally circumscribed) legislative and executive authority[30] and affords every municipality 'the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution'.[31] In *City of Cape Town v Robertson* (2005), where it dismissed a claim that a levying of property rates by the

[27] *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* (2000) para. 44.

[28] Dyzenhaus (2007) pp. 739, 758; Ellmann (2015–16) pp. 71–75; Waldron (2021) pp. 9; 102.

[29] De Visser (2019) pp. 258–260; Steytler (2019) pp. 557–562. On intergovernmental tensions and urban autonomy as rule of law issues more broadly see also Burgess (2020).

[30] Sections 43(c) and 151(2) of the Constitution.

[31] Section 151(3) of the Constitution. Under Sect. 155 of the Constitution read with various provisions of the Municipal Structures Act (1998), there are different categories of South African municipalities, with the so-called 'metropolitan' municipalities governing the country's eight biggest cities exercising the full gamut of powers and functions exposited here. A more varied and complex multilayered arrangement, beyond the scope of this article, pertains to smaller ('district' and 'local') municipalities.

city of Cape Town was ultra vires, the Constitutional Court explained the cumulative effect of these provisions as follows:

> 'The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws'.[32]

Given further that the Constitution does not permit national or provincial governments to 'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'[33] and that national and provincial governments must adopt legislative measures that 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions',[34] the determination that municipalities 'own initiative' may be tempered by legislation does not permit a legislative diminution of municipalities' 'original' powers[35] and instead serves simply to subject municipalities' exercise of their autonomy to constitutional supremacy and to the legality principle inherent to the rule of law.[36]

The exact constitutional demarcation of municipalities' executive and legislative authority is complex. Under Sect. 156(1) read with Schedules 4B and 5B of the

[32] *City of Cape Town v Robertson* (2005) para. 60. See also paras. 53–59. This passage was quoted, and the 'original' nature of municipalities' powers affirmed, by the Constitutional Court in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* (2014) paras. 11–14; *City of Johannesburg v Chairman of the National Building Regulations Review Board* (2018) paras. 20–21.

[33] Section 151(4) of the Constitution. National and provincial governments have limited powers to intervene in malfunctional municipalities under Sect. 139 of the Constitution read with Sect. 139 of the Municipal Finance Management Act (2003). These temporary powers, which are beyond the scope of this article, have been interpreted restrictively, as having to be exercised solely for the purpose of restoring municipal function and autonomy. See *Kosmos Ridge Home Owners Association v Madibeng Local Municipality* (2022) para. 17.7; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (2010) paras. 44, 66, 69. For discussion, see De Visser (2019) pp. 265–267; Mathenjwa (2014) pp. 542–547.

[34] Section 154(1) of the Constitution.

[35] See *City of Johannesburg v Chairman of the National Building Regulations Review Board* (2018) para. 34; *Kosmos Ridge Home Owners Association v Madibeng Local Municipality* (2022) para. 17.

[36] *City of Cape Town v Robertson* (2005) paras. 57; 59; *City of Johannesburg v Chairman of the National Building Regulations Review Board* (2018) paras. 32–35; *Fedsure Life Assurance v Greater Johannesburg Transitional Council* (1999) paras. 26, 38–42, 56–58. See further De Visser (2005) pp. 78–79, 113–114; Mathenjwa (2014) pp. 540–544; Pieterse (2019) p. 126.

Constitution, municipalities have 'executive authority in respect of' and 'the right to administer' lists of functional areas essential to sustainable service delivery, urban form and urban function,[37] while Sect. 156(4) additionally requires national and provincial governments to legislatively assign executive authority over other functional areas that 'would most effectively be administered locally' to municipalities that have demonstrated that they have the capacity to exercise such authority. Municipalities are then empowered to make by-laws for the effective administration of all functional areas within their demarcated authority,[38] or in relation to matters necessary for or incidental to the effective performance of their functions.[39] In addition, they exercise more conventional delegated authority when administering functional areas delegated by national or provincial governments.

Municipalities' constitutional status and their control over processes of essential service delivery and other core aspects of urban form and functioning were operationalized by a suite of local government legislation passed during the decade after the Constitution's enactment.[40] These laws fortified urban autonomy and associated intergovernmental relations, meaning that, instead of having to constantly renegotiate their powers and governance capacity in terms of (sometimes volatile) political relationships, South African city governments could count on national and provincial governments' respect for the rule of law, and courts' enforcement of the doctrine, to protect the core of their autonomy against undue encroachment.[41]

Demonstrating the importance of rule of law's procedural components, the most prominent intergovernmental disputes over the boundaries of urban autonomy in post-Apartheid South Africa have arisen in relation to functional areas (such as housing and transport) where the particularities of devolution was left to the legislature, which then either failed to pass appropriate legislation or failed to clearly demarcate the extent of municipalities' rights and obligations therein, or in functional areas (notably, the interrelated and overlapping competencies of 'regional planning and development', 'municipal planning' and 'provincial planning') where the constitutional demarcation of competencies was itself vague, confusing or contradictory.[42]

The Constitutional Court's decisions in cases flowing from these disputes have, without fail, declared national or provincial attempts to preempt, usurp, veto or

[37] The lists in Schedules 4B and 5B include, inter alia, municipal planning, municipal health services, municipal public transport, public place management, electricity reticulation and water and sanitation services. For discussion, see Pieterse (2019) pp. 125–130.

[38] Section 156(2) of the Constitution. For divergent views on whether the ties between this by-law-making authority and effective administration impacts the 'originality' of the legislative powers, see Bronstein (2015); De Visser (2005); Humby (2015).

[39] Section 156(5) of the Constitution.

[40] The 'core' instruments are the Municipal Structures Act (1998), the Municipal Systems Act (2000) and the Municipal Finance Management Act (2003).

[41] De Visser (2019) pp. 259–260, 264, 279–280; Pieterse (2019) p. 144; Steytler (2019) pp. 557–560.

[42] De Visser (2019) pp. 262–263; Pieterse (2019) pp. 144; Steytler (2019) p. 558.

overturn cities' control over town planning, zoning, building governance and land management unconstitutional and invalid.[43] While nowhere explicitly invoking the rule of law, these decisions have advanced it by clarifying constitutional terms and by directing the legislature to devise appropriate mechanisms for intergovernmental cooperation and interaction in overlapping functional areas.[44] The decisions have been praised for their unequivocal commitment to upholding constitutionally ensconced urban autonomy,[45] while the national and provincial sphere's (albeit sometimes begrudging) compliance with court orders requiring them to retreat from municipalities 'new' sphere of autonomy, has been heralded as testament of their commitment to the rule of law.[46]

Apart from rule of law thus operating to fortify the constitutional demarcation of a sphere of municipal autonomy within which 'parochial interests should prevail',[47] its substantive thickness in South Africa has further enabled progressive exercises of such autonomy beyond the letter of its constitutional delineation. In *Le Sueur v eThekwini Municipality* (2013), Durban's municipality incorporated an overlay zoning scheme, in terms of which development on land containing sensitive ecosystems and biodiversity could not proceed without special permission from a dedicated environmental unit in the City, into its town planning scheme. This was challenged by a property developer for exceeding the City's constitutional competencies, since the Constitution locates legislative competence over the 'environment' jointly with national and provincial governments. However, the High Court found that cities had to exercise their constitutionally enshrined 'municipal planning' powers in a manner that satisfies their obligation to take reasonable measures in fulfillment of the right to 'an environment that is not harmful to… health or well-being' in Sect. 24 of the Constitution, which measures had to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[48] Municipal planning powers could thus legitimately be wielded towards

[43] Prominent judgments include *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* (2010); *Maccsand v City of Cape Town* (2012); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* (2014) and *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board* (2018). For discussion of these judgments, see Pieterse (2019) pp. 136–141.

[44] The *Gauteng Development Tribunal* judgment is credited for spurring enactment of the Spatial Planning and Land Use Management Act (2013), which presents an elaborate scheme for intergovernmental cooperation that reflects and enhances urban municipalities' control over their spatial form and function. See Pieterse (2019) p. 137.

[45] See for instance De Visser (2019); Pieterse (2019).

[46] De Visser (2019) p. 264; Steytler (2019) p. 560.

[47] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council* (2014) para. 23.

[48] Section 24(b)(iii) of the Constitution.

the end of environmental protection, regardless of the allocation of legislative competence over environmental matters.[49]

While clearly both fortified and far-reaching, local autonomy under the South African Constitution is not boundless and comes with a degree of reciprocity. Municipalities must adhere to the principles of cooperative government listed in Sect. 41 of the Constitution, which require the national, provincial and local spheres of government to cooperate with each other 'in mutual trust and good faith', to 'preserve the peace, national unity and indivisibility of the Republic… secure the well-being of the people of the Republic [and] provide effective, transparent, accountable and coherent government for the Republic as a whole'.[50] All spheres must further 'respect the constitutional status, institutions, powers and functions of government in the other spheres' and 'exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.[51]

In addition, municipalities must adhere to the rule of law, which was invoked explicitly in the one instance where the Constitutional Court found that urban autonomy was being unacceptably wielded. In *Merafong City Local Municipality v Anglogold Ashanti* (2017), a mining company in the secondary city of Carletonville appealed to the national Minister of Minerals and Energy after the local Municipality substantially increased industrial water tariffs in an attempt to boost its revenue. The Minister set aside the increase, which she regarded as disproportionate and unjustifiable. Regarding this intervention as amounting to an unconstitutional usurpation of its power to administer water supply systems, the municipality indicated to the mining company that it would discontinue its water supply unless it payed what it was billed for. The dispute escalated to the courts, with the majority of the Constitutional Court eventually holding that, while there was merit in the municipality's constitutional argument (a question which was reverted back to the High Court for argument and decision),[52] its actions were deplorable. The Court stated:

> 'As a state organ, Merafong had the resources, and the responsibility, to obtain judicial clarity in its dispute with AngloGold about the ruling. Instead of doing so, it threatened to cut off AngloGold's water. That was not nice. Worse, it was not good constitutional citizenship. As a good constitutional citizen, Merafong should either have accepted the Minister's ruling as valid, or gone to court to challenge it head-on.… In enforcing its view of the Minister's disputed ruling, Merafong was resorting to a form of self-help. This was out of kilter with Merafong's duty as an organ of state and a constitutional citizen. This Court has affirmed as a fundamental principle that the state "should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help". What is more,… state functionaries are enjoined to uphold and protect

[49] *Le Sueur v eThekwini Municipality* (2013) paras. 19–21. For discussion, see Bronstein (2015) pp. 661–662; Humby (2014); Pieterse (2019) pp. 138–139.

[50] Respectively subsections 41(1)(h); 41(1)(a)-(c) of the Constitution.

[51] Subsections 41(1)(e) and 41(1)(g) of the Constitution.

[52] *Merafong City Local Municipality v Anglogold Ashanti* (2017) paras. 65–68.

> the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty "to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power".'[53]

Described elsewhere as a 'welcome conceptual bridge' between the constitutional principles of cooperative governance and the requirements of developmental local government,[54] the notion of 'good constitutional citizenship' invoked by the *Merafong* Court positions the rule of law as organizing principle in intergovernmental relations and as the channel by means of which cities must wield and defend their constitutional autonomy.

Rule of law's substantive thickness under the South African Constitution moreover infuses 'good constitutional citizenship' with an obligation to adhere to the rights in the Bill of Rights when wielding urban autonomy,[55] as well as an obligation to heed legal and constitutional imperatives for community participation in the formulation and implementation of local government policies. In *City of Tshwane Metropolitan Municipality v Afriforum* (2016) the Constitutional Court held that, provided that the rights in the Bill of Rights are respected and municipal policy decisions have been preceded by legislatively prescribed public participation,[56] courts will not interfere with cities' authority to govern matters within their functional competence according to their own parochial inclinations.[57]

4 'Special Cluster of Relationships': Rule of Law and the Intricacies of Urban Governance

The day-to-day realities of urban governance are exceedingly complex. First, urban governance in South Africa involves the collaborative efforts of local government, national and provincial governments and other organs of state, meaning that it must be pursued in accordance not only with the constitutional principles of cooperative government but also with structures and rules laid down by the Intergovernmental Relations Framework Act (2005) as well as the intergovernmental relations

[53] Ibid paras. 59–61. See also para 43.

[54] Pieterse (2019) p. 143. As discussed above, these are respectively found in Sects. 40–41 and 152 of the Constitution.

[55] See for instance *Beja v Premier of the Western Cape* (2011) and *Dladla v City of Johannesburg* (2018), where bespoke city policies aimed at meeting local government's developmental and socio-economic right obligations were declared unconstitutional for infringing on the right to dignity.

[56] Sections 16–22 of the Municipal Systems Act (2003) present an elaborate institutionalization of community participation in local governance. For critical discussion, see Pieterse (2018) pp. 16–17; Ray (2016) pp. 294–297.

[57] *City of Tshwane Metropolitan Municipality v Afriforum* (2016) paras. 35, 38, 42–43, 47, 52, 66–67. For discussion, see Pieterse (2018) p. 23; Pieterse (2019) p. 135.

arrangements in a range of sector-specific statutes.[58] These are typically fragmented, to the point that South African municipalities exercise different conglomerations of original and delegated powers in different sectors, which means that they are differently positioned, in each sector, in relation to other spheres and organs of state and in relation to the rule of law.[59] Secondly, due to its networked and relational nature, urban governance in different sectors draws on relationships with different conglomerations of non-state actors (such as civil society and the local business sector), which may be subject to different degrees of constitutional scrutiny and legislative regulation, and are governed also by a range of private legal instruments such as contracts and memoranda of understanding.[60]

Conventional understandings of the rule of law, which emphasize predictability and uniformity, seem antithetical to these fragmented, shifting and multidimensional realities of urban governance.[61] But, in adjudicating a wide variety of disputes relating to shortcomings or breakdowns in municipal governance or service delivery, South African courts have read cities' legal and constitutional obligations jointly and in light of the constitutional principles of cooperative governance, to construct a flexible, context-specific, relational and rights-based evaluative paradigm of urban governance decisions. In doing so, they have simultaneously invoked the rule of law and softened its edges, in attempts to both extend rights-based and procedural fairness obligations to all facets and actors involved in urban governance, and to enable flexible and dynamic relational governance practices that are not unduly circumscribed.[62]

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2010), the Constitutional Court dismissed a slew of administrative-law and right-to-housing challenges against the implementation of an urban informal settlement upgrading initiative involving both the Western Cape Provincial Government, the City of Cape Town and a company acting as public housing development agency. In ultimately allowing the temporary eviction and relocation of large numbers of residents subject to strict and elaborate conditions (boiling down to individualized engagement with every family that was to be relocated),[63] one of several separate concurring judgments explained that the legal framework within which the matter had to be decided transcended the many regulatory and contractual instruments involved. Sachs J stated:

> 'the question of the lawfulness of the occupation of council land by homeless families must be located not in the framework of the common law rights of landowners, but in *the context of the special cluster of legal relationships*

[58] Such as the Housing Act (1997), the Water Services Act (1997) and the Electricity Regulation Act (2006).

[59] For critical discussion see Du Plessis (2017) pp. 239–262.

[60] Adams et al (2017) p. 2732; Angel-Cabo (2020) p. 169. For discussion in the South African legal and constitutional landscape see Pieterse (2022a) pp. 8–20.

[61] See Krygier (2016) pp. 219–221, 224; Steytler (2019) p. 558.

[62] See Pieterse (2019) pp. 133–134; Ray (2016) pp. 132, 205.

[63] For discussion see Pieterse (2018) pp. 26–27; Ray (2016) pp. 122–125.

> *between the council and the occupants established by the Constitution and the Housing Act*.... The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law.... *They flow instead from an articulation of public responsibilities in relation to the achievement of guaranteed social and economic rights. Furthermore, unlike legal relationships between owners and occupiers established by the common law, the relationships between a local authority and homeless people on its land will have multiple dimensions, involve clusters of reciprocal rights and duties and possess an ongoing, organic and dynamic character that evolves over time*' [emphasis added].[64]

The notion of a 'special cluster' of multi-dimensional 'ongoing, organic and dynamic' legal relationships involving 'reciprocal rights and duties', aptly captures the complexity and extreme variability of urban governance arrangements such as those at issue in the *Joe Slovo* case. Importantly, the way in which the judge articulates this cluster simultaneously subjects all of its entangled actors, instruments and relationships to public-law scrutiny for Bill of Rights compliance and adherence to the rule of law, as represented by the legislative instruments giving effect to the right in question (in this instance, the Housing Act), without amounting to a one-size fits-all application of either. Depending on the context and characteristics of each challenged governance arrangement, different actors within the urban governance cluster can therefore be subjected to differing degrees of scrutiny, while all remaining under the umbrella of the Bill-of-Rights-infused rule of law.

The 'special cluster of relationships' would be invoked again, this time by a unanimous Constitutional Court, in *Joseph v City of Johannesburg* (2010), to justify application of some of the provisions of the Promotion of Administrative Justice Act (hereinafter 'the PAJA') to the City of Johannesburg's termination, without prior notice, of electricity to a residential building whose owner had failed to pay the City's monthly bills even though he collected monthly electricity payments from his tenants. In the course of dismissing the argument that the City owed no procedural fairness obligations to the tenants since its contractual relationship was only with the owner, the Court referred to the above-quoted passage from *Joe Slovo* and stated that:

> 'this case is similarly about the "special cluster of relationships" that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles operate to govern these relations beyond the law of contract'.[65]

[64] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2010) para. 343.
[65] *Joseph v City of Johannesburg* (2010) para. 25. See also para. 24.

The Court proceeded to find that 'provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government'[66] and to conclude from an analysis of relevant constitutional and statutory provisions that, even though there was no explicit right to electricity in the Bill of Rights, 'these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity', that '[t]he applicants are entitled to receive these services' and that '[t]hese rights and obligations have their basis in public law'.[67] It then conducted an analysis of relevant provisions of the PAJA and concluded that, since the City was supplying electricity to the applicants in their capacity as residents within its municipal jurisdiction, it owed them a duty of procedural fairness as correlative of their public-law right, sourced in the 'special cluster of relationships' and underwritten by the rights in the Bill of Rights and the developmental obligations of local government, to receive electricity.[68]

The *Joseph* court's employ of the 'special cluster of relationships' as the source for an un-enumerated 'public-law right' to procedurally fair essential service delivery simultaneously served as justification for its adoption of a rights-based approach to essential service delivery in pursuit of local government's developmental objectives.[69] It further served to bring the City of Johannesburg's actions in terms of 'private' governance instruments (in the present case, contract) under the public-law ambit of the legality principle as articulated in the PAJA.[70] But, given the particular context of the matter (with debt-control measures being essential for good urban governance and the potential scale of such measures making full compliance with the elaborate procedural fairness provisions of the PAJA severely administratively burdensome to the point of being impractical), the 'special' and context-dependent nature of the cluster was invoked to justify reading down the exactitude of the PAJA's requirements, with the Court holding that the Municipality needed only to provide notice of intended service terminations and create formal opportunities for residents to engage with it in the event of disputes, rather than to embark on full consultations in every single case where it intended to disconnect a service.[71]

The reach of the 'special cluster' beyond local government actors and its incorporation of principles of co-operative governance is illustrated by the similar judgments in *Cape Gate v Eskom Holdings* (2019) and *Eskom Holdings v Resilient Properties* (2021). Both cases turned on the involvement in urban governance of Eskom, an organ of state until recently near-exclusively responsible for the generation, transmission and sale of bulk electricity to South African municipalities, who then typically distribute (and thus sell on) electricity to private and commercial end-users within their jurisdiction. Near paralysed by the massive-scale and persistent

[66] Ibid para. 33.
[67] Ibid para. 39.
[68] Ibid paras. 45–46.
[69] See Dube and Moyo (2021) pp. 6–7; Ray (2016) p. 130.
[70] See Pieterse (2022a) pp. 20–21; Ray (2016) p. 196.
[71] *Joseph v City of Johannesburg* (2010) paras. 55–63. On this interpretative flexibility, see Ray (2016) 132.

failure of dysfunctional municipalities to pay for bulk electricity, Eskom resolved to altogether terminate electricity supply to non-paying towns. This would have the effect of entirely de-capacitating local economies, and thus predictably spurred legal action by desperate local businesses.

In finding that Eskom's planned action in the Emfuleni municipality (comprising the industrial secondary cities of Vanderbijlpark and Vereeniging) was impermissible, the Gauteng High Court in *Cape Gate* held that Eskom formed part of the 'special cluster of relationships' articulated in *Joseph* and, as such, incurred public-law obligations of administrative justice and procedural fairness towards local electricity consumers.[72] Given that the cluster in the present context also contained the defaulting municipality as well as national and provincial governments (who are constitutionally obliged to oversee and enable municipalities' performance of their developmental obligations), the dispute had to be resolved through intergovernmental dialogue and cooperation instead of within a contractual paradigm.[73] Eskom was thus interdicted from terminating the town's electricity supply, though the court's order made provision for the large industrial consumers to bypass Emfuleni and pay Eskom directly for their consumption, for the duration of the municipality's delinquency.[74]

Adjudicating similar facts in two small towns in the Mpumalanga Province, the Supreme Court of Appeal in *Resilient Properties* added that the intended disconnection would be impermissible self-help in contravention of the rule of law[75] since Eskom, as an organ of state, was constitutionally obliged as member of the 'special cluster of relationships' to enable municipalities to fulfil their developmental obligations (which would be impossible without electricity).[76] Acting contrary to the overarching public law obligations attaching to the special cluster of relationships was found to render Eskom's conduct irrational,[77] and it had to instead pursue legally prescribed intergovernmental dispute resolution processes.[78]

Resilient Properties and *Cape Gate* illustrate that the 'special cluster of relationships' obliges a range of public actors to respect rights implied by the developmental obligations of local government, not least by conducting themselves in accordance with the rule of law and the principles of cooperative government.[79] It is at this juncture unclear whether the cluster could with similar ease extend also to encompass the involvement in urban governance of private sector or civil society actors.[80]

[72] *Cape Gate v Eskom Holdings* (2019) paras. 118–135.
[73] Ibid paras. 148, 160.
[74] Ibid para. 174.
[75] *Eskom Holdings v Resilient Properties* (2021) paras. 22, 52.
[76] Ibid paras. 58–60.
[77] Ibid para. 88.
[78] Ibid paras. 61–67.
[79] See Dube and Moyo (2021) pp. 8, 16; Pieterse (2022a) pp. 21–22.
[80] On possibilities in this regard, see Pieterse (2022a) pp. 13–24.

5 'Reasonableness' and Subsidiarity: Rule of Law and Urban Accountability for Socio-Economic Rights

The close overlap between the objectives of socio-economic rights and the developmental responsibilities and constitutional competencies of local government, has meant that South Africa's socio-economic rights jurisprudence has predominantly focussed on the accountability of urban municipalities. The judicial stance adopted throughout this jurisprudence, which has been extensively studied,[81] has centred on the requirement in Sects. 26(2) and 27(2) of the Constitution that 'the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. The explicit legislative mandate contained in this provision serves to align compliance with the rights, and the adjudication of such compliance, directly to the rule of law.[82]

The macro-level connections between socio-economic rights and rule of law were elaborated in *President of the RSA v Modderklip Boerdery* (2005), where the Constitutional Court was approached by a landowner who was unable to secure a municipality's cooperation in enforcing an eviction order against thousands of people who had informally settled on its land. While the lower courts dealt with the matter as requiring a balance between the owner's right to property and the residents' right of access to housing, the Court instead recast it as one of access to justice and rule of law, finding that the State was 'obliged to take reasonable steps, where possible, to ensure that large-scale disruptions to the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law'.[83] It explained that the implementation of socio-economic rights accordingly had to proceed in accordance with the rule of law, and that this required of local governments to act dynamically and flexibly, stating:

> 'The progressive realisation of access to adequate housing... requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital.... At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable'.[84]

Since, given their lack of alternative settlement options, the informal occupiers could not be evicted without severe social upheaval that would threaten the rule of

[81] There are too many sources to list here, of which Liebenberg (2010) remains the most comprehensive and authoritative. See for present purposes especially pp. 173–179.

[82] Waldron (2021) p. 92; Steytler (2019) pp. 567, 585.

[83] *President of the RSA v Modderklip Boerdery* (2005) para. 43.

[84] Ibid para. 49.

law, the Court found that the owner's right to an effective remedy (as required by the rule of law and entrenched by the right of access to Court) was infringed by the municipality's failure to act, and confirmed an order of damages awarded by the lower courts.[85]

In *Government of the Republic of South African v Grootboom* (2000), the first case in which it vindicated the right of access to adequate housing, the Constitutional Court indicated that it would enforce socio-economic rights primarily through assessing the reasonableness of legislative and other measures adopted in pursuit of the rights' progressive realisation. The Court explained:

> 'In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. 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. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met'.[86]

In the later *Mazibuko v City of Johannesburg* (2010), this was elucidated as follows:

> 'The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness. Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness'.[87]

The Court's choice of reasonableness, rather than a more demanding and less flexible minimum core standard[88] for judging compliance with socio-economic rights, has been ascribed to its dual desire to leave the prescription of enforceable

[85] Ibid paras. 46, 51. For discussion, see Pieterse (2022b) p. 48.

[86] *Government of the RSA v Grootboom* (2000) para. 41. See also *Minister of Health v Treatment Action Campaign* (2002) paras. 36–38.

[87] *Mazibuko v City of Johannesburg* (2010) paras. 66–67. See also paras. 50, 57–59.

[88] As is found in international law and was proposed by parties to several early socio-economic rights cases. See Liebenberg (2010) pp. 148–151, 163–165.

content for socio-economic rights to the legislature, and to maintain for governmental agents a broad margin of discretion over how obligations are to be met.[89] The content of the reasonableness analysis, meanwhile, evokes requirements typically associated with a substantive understanding of the rule of law.[90] According to the *Grootboom* Court, laws and policies aimed at giving effect to socio-economic rights must, judged in their totality, be balanced, flexible, realistically implementable, capable of meeting short, medium and long-term needs, and inclusive (also of the emergency needs of the most vulnerable members of society).[91] Importantly for present purposes, they must also reflect a workable, clear and unambiguous demarcation of intergovernmental relations, with each sphere of government accepting responsibility for the implementation of appropriate parts.[92]

Understood thus, the 'reasonableness' approach not only awards the State a wide margin of discretion in choosing how to give effect to socio-economic rights, but also clearly concretises the rule of law and embraces the subsidiarity principle.[93] Indeed, the Constitutional Court has on several occasions insisted that parties either challenge the reasonableness of legislation or policies that give effect to socio-economic rights, or solve their disputes within the relevant legislative or policy framework.[94] While this subsidiarity-infused approach to adjudicating socio-economic rights has rightly been criticised for stunting the jurisprudential content and remedial potential of the rights,[95] it has enabled the Court to deflect separation-of-powers-based objections to its involvement in socio-economic rights matters, by couching its interventions as amounting to little more than enforcing the legislative and executive branches' own laws and policies against them.[96] As such, Çerniç has argued that the reasonableness approach 'could be the way to reconcile the rule of law with the state obligations under socio-economic rights'.[97]

Indeed, by employing the reasonableness standard alongside the subsidiarity approach in this manner, courts have been able to hold urban municipalities accountable even in relation to far-reaching positive obligations imposed by socio-economic rights, as well as obligations that transcend the constitutional delineation of their functional competencies. In *Adonisi v Minister for Transport and Public Works, Western Cape* (2021) the Cape High Court issued a declaratory order that the Western Cape Provincial Government and the City of Cape Town were amiss

[89] See, for instance, Steinberg (2006); Wesson (2004).

[90] Ellmann (2015–2016) p. 74.

[91] *Government of the RSA v Grootboom* (2000) paras. 41–44. On these requirements as manifestation of the rule of law see Çerniç (2016) pp. 244–245.

[92] *Government of the RSA v Grootboom* (2000) paras. 39–40.

[93] Pieterse (2022b) pp. 46–47; Ray (2016) pp. 6–7.

[94] Held explicitly in *Mazibuko v City of Johannesburg* (2010) para. 73. See also e.g. *Port Elizabeth Municipality v Various Occupiers* (2005); *Maphango v Aengus Lifestyle Properties* (2012). For discussion, see Ray (2016) pp. 71, 162–165, 226.

[95] See Bilchitz (2010); Wilson and Dugard (2011); Pieterse (2022b) p. 46.

[96] Ray (2016) pp. 92, 163, 206. See the Constitutional Court's exposition of its remedial powers in *Minister of Health v Treatment Action Campaign* (2002) paras 99–101.

[97] Çerniç (2016) p. 244. See also Ellmann (2015–2016) p. 74.

of their constitutional obligations to progressive realise access to adequate housing and equitable access to land,[98] and accordingly set aside the sale of land in a central Cape Town suburb owned by the Provincial Government, which had previously been earmarked for the development of affordable housing. This order was enabled by a reasonableness analysis, which concluded that there existed several reasonable legislative measures[99] that enabled local and provincial government to address the spatial legacies of apartheid and improve access to well-located housing in Cape Town. All government actions in the housing realm thus had to resonate with this legal framework, as well as related laws pertaining to intergovernmental cooperation and public participation. The Province and City's failure to take steps to fulfil their reasonable legislative mandate was by extension also found to be unconstitutional, while the sale of the land's non-compliance with the reasonable legal frameworks rendered it voidable.[100]

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* (2012) the Constitutional Court found that the obligation to ensure that homelessness does not result from evictions (constructed over several judgments that interpreted the right of access to housing through the prism of the Prevention of Illegal Eviction and Occupation of Land Act (1998)[101]) required municipalities to ensure that persons evicted by private landlords or building owners within their jurisdiction are afforded temporary emergency accommodation where necessary. The City of Johannesburg argued that, since housing was a joint national and provincial competence under Schedule 4A of the Constitution, it played only a secondary role in realizing the right, by implementing programmes conceived and funded by the 'upper' spheres'. It accordingly had not budgeted to provide emergency accommodation for anyone other than people that it evicted when implementing health and safety legislation.

Affirming that the duty to progressively realise the housing right fell on all three spheres of government, and pointing to the devolution of housing responsibilities, including a duty to prevent homelessness, in the Housing Act (1997), the Constitutional Court dismissed the City's argument as an incorrect construction of its statutory obligations. It stated:

> 'This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it

[98] Respectively Sects. 26(2) and 25(5) of the Constitution.

[99] Specifically, the Housing Act (1997), the Social Housing Act (2008) and the Spatial Planning and Land Use Management Act (2013).

[100] *Adonisi v Minister for Transport and Public Works, Western Cape* (2021) paras. 262, 267, 445, 475-476, 480, order of court. For discussion, see Pieterse (2022b) pp. 56–58.

[101] For example *Port Elizabeth Municipality v Various Occupiers* (2005); *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* (2008). On the metamorphosis of this obligation see Pieterse (2022b) pp. 47–55.

has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations'.[102]

Reverberating with what was held in *Le Sueur*, the Court dismissed the argument that the City was prohibited by the legality principle from doing anything other than what was explicitly statutorily stipulated,[103] finding that its obligations under the relevant provisions of the Bill of Rights not only enabled but required of the City to act dynamically, 'especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities'.[104] It was accordingly both entitled and required to self-fund such emergency responses as was necessary to give effect to the right to housing.

Where cities do comply with prevailing statutory obligations in functional areas over which they enjoy executive autonomy, on the other hand, the subsidiarity-infused reasonableness approach serves to insulate their policy decisions from constitutional attack. Thus, in *Mazibuko*, the City of Johannesburg's decision to install pre-paid domestic water meters in certain poor areas earmarked by a water conservation and cost-recovery programme was held to be reasonable and therefore constitutionally sound, not least since the City could show that the policy enjoyed community support and that the meters dispensed more free water than it was obliged to provide under national regulations passed pursuant to the Water Services Act (1997). Claims that the water meters infringed the right of access to water (since they would only dispense water above the free allocation upon payment) and the right to equality (since they were not installed everywhere in the city) were accordingly dismissed, since the City had the autonomy and latitude to decide on differentiated modes of water delivery falling within the bounds of reasonableness, and could show that its measures were aimed at achieving substantively equal access to water across the city.[105]

6 Reflections

While South African cities' transformation from creatures of statute into autonomous constitutional actors with dynamic responsibilities has significantly altered constitutional power balances, South African courts' navigation of the 'urban turn' ushered in by the 1996 Constitution's embrace of local autonomy underlines that 'having the combination of both constitutional rules on decentralization and respect for the rule of law is a precious resource'.[106]

[102] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* (2012) para. 74. See also paras. 88, 96.
[103] Ibid paras. 56–62. For discussion, see Ray (2016) pp. 150–159, 197.
[104] Ibid para. 57.
[105] *Mazibuko v City of Johannesburg* (2010) paras. 66–97, 145–157. For discussion, see Pieterse (2018) pp. 29–31.
[106] De Visser (2019) p. 280.

Like any system of decentralization, the devolution scheme in the South African Constitution is inherently rule-based, and the rule of law is accordingly foundational to its maintenance.[107] Not only could rule of law be placed at risk by attempts by national or provincial governments to subvert constitutionally ensconced urban autonomy,[108] but it is also implicated in the day-to-day functioning of municipalities as primary duty-bearers in relation to the implementation of laws pertaining to the progressive realisation of socio-economic rights. Both extra-legal assertions of municipal authority and failure (whether through lack of political will, awareness, skill, capacity or resources) of municipalities to fully 'occupy' their 'constitutional space'[109] and/or to fulfil their considerable constitutional and statutory developmental responsibilities may undermine the rule of law.[110]

In intergovernmental disputes, the close connection between the devolution arrangements codified in the Constitution and the rule of law has enabled South African courts to further define and enforce a constitutional zone of local autonomy, within which cities can pursue their own vision of the places they would like to become, free from undue national or provincial interference. Recast as 'good constitutional citizenship', the rule of law tempers this urban autonomy by requiring it to be wielded in conformance with the doctrine's tenets, while its considerable substantive thickness expands these tenets to encompass adherence to the constitutional principles of cooperative governance and the rights in the Bill of Rights. Moreover, this substantively thickness allows for flexible invocation of the rule of law in a manner that 'tempers' rather than 'straitjackets' power and allows its innovative wielding towards progressive ends,[111] as illustrated both by the *Le Sueuer* and *Blue Moonlight* decisions.

In this same context, the perhaps extraordinary substantive thickness of South African rule of law has served to allay one of the primary rule of law challenges triggered by a fragmented system of decentralized urban power: that of equal application of the law.[112] Since no municipal entity in South Africa may, as a matter of rule of law, wield its powers in ways that infringe the principles of cooperative governance, the developmental and participatory objectives of local government and the substantive rights in the Bill of Rights, a threshold of uniform application of, and accountability to, 'higher-level' common-good values has been established.[113] In this respect, it is especially useful that South African rule of law also encompasses commitment to the realisation of socio-economic rights, since these rights closely correspond to the ingredients of everyday urban governance[114] and since expressions of urban autonomy may well involve legitimate differentiation and experimentation in the pursuit of their progressive realisation.

This is illustrated by the South African Constitutional Court's employ of a subsidiarity-infused reasonableness approach in adjudicating local government compliance

[107] Ibid p. 259.
[108] Ibid; Steytler (2019) pp. 557–558.
[109] Steytler (2019) pp. 567, 585.
[110] Ibid pp. 567, 588.
[111] As advocated by Krygier (2016) 205–206.
[112] See Adams et al (2017) 2734–2735.
[113] On the need for such an approach see Adams et al (2017) pp. 2736–2739.
[114] See Angel-Cabo (2020) pp. 158, 160–163.

with the socio-economic rights in the Bill of Rights. This approach has at once allowed the Court to insist that local government conform to 'core standards' of socio-economic rights expounded by the legislature and to allow for a considerable margin of discretion in relation both to how these standards are attained and to how the rights are pursued beyond this threshold, whilst simultaneously subjecting the measures articulating the threshold to rigorous scrutiny that mimics the doctrine of rule of law itself.[115]

The reasonableness approach further illustrates how rule of law can at once accommodate and be advanced by 'open-ended standards of discretion' within an overarching rules-based system.[116] Furthermore, through conceiving of pluralistic and relational urban governance arrangements as involving 'a special cluster of relationships' which maintains a public-law character notwithstanding the actors or instruments involved, South African courts have been able to insist that a variety of state (and perhaps non-state) actors remain true to the developmental objectives of local government and the legality principle, while simultaneously ensuring that spaces and processes of urban governance remain flexible, deliberative and dynamic and retain for local government sufficient discretion to govern.[117]

Over and above establishing and fortifying the boundaries of urban autonomy, the rule of law doctrine has clearly played an important role in enabling effective judicial oversight of how such autonomy is wielded in South African cities. Contrary to fears that a substantively thick, social-democratic conception of rule of law would turn the doctrine into 'a proxy battleground for a dispute about broader social issues, detracting from a fuller consideration of those issues on their own terms, and in the process emptying the rule of law of any distinctive meaning',[118] the South African experience suggests that such a substantive conception of the rule of law has been essential in enabling the doctrine to play a crucial stabilizing role in the hyper-diverse and -complex space of autonomous urban governance.

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[115] See Çerniç (2016) pp. 228, 231; Ray (2016) pp. 133, 163.
[116] Tamanaha (2004) pp. 98–99. See also Krygier (2016) p. 205.
[117] See further Pieterse (2018) pp. 23, 28–32; Pieterse (2019) pp. 132–134.
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