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***NEEDS, RIGHTS AND TRANSFORMATION: ADJUDICATING
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***NEEDS, RIGHTS AND TRANSFORMATION: ADJUDICATING SOCIAL
RIGHTS***

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Abstract

South Africa's Constitution is widely acknowledged as a transformative constitution. Its primary concern is to facilitate a fundamental change in unjust political, economic and social relations in South Africa. The commitment to social justice proclaimed in the preamble is central to the transformative goals and processes of the Constitution, and must inform the interpretation of the Bill of Rights. Notions of social justice are of course highly contested in a pluralist society. This article explores the implications of a theory of social justice and transformation developed by the philosopher and political theorist, Nancy Fraser, for the adjudication of social rights claims under the South African Constitution. Fraser conceives of social justice in terms of the notion of participatory parity. She identifies two major obstacles to overcoming institutional patterns of subordination that impede people's ability to participate equally in society. The first, which she terms "misrecognition", involves the systemic devaluing and disadvantaging of certain groups on grounds such as race, gender and sexual orientation. The second major obstacle to participatory parity arises when some actors lack the necessary resources to interact with others as peers. Both these dimensions of injustice overlap and interact with each other, and this intersection is critical in formulating an effective strategy to advance social justice. Fraser goes on to draw a distinction between affirmative and transformative strategies to redress these two forms of injustice, but points to the *via media* of 'nonreformist reforms'. Such reforms meet people's needs within existing institutional frameworks while at the same time setting in motion "a trajectory of change that is transformative over time." Fraser's theories have significant insights to offer in the quest to develop a transformative jurisprudence on social rights. It also challenges us to become more conscious of the depoliticising effects of adjudication, and to adopt strategies that can counter these effects. The second part of the article critically evaluates the transformative potential of South Africa's burgeoning jurisprudence on social rights. Finally, four key areas are identified in which the courts' jurisprudence on social rights can develop to better facilitate fundamental transformation in South Africa.

NEEDS, RIGHTS AND TRANSFORMATION: ADJUDICATING SOCIAL RIGHTS

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1 INTRODUCTION

One of the most contested issues in South Africa's burgeoning jurisprudence on social rights relates to how the courts should enforce the duties imposed by these rights. Debate has focused in particular on the extent to which the courts should affirm an enforceable right to the provision of basic needs by those who lack access to these needs. In the South African context, this is a plight affecting a substantial portion of our population, and must also be contextualised within the high degree of inequality existing in our society.²

This article explores the relationship between a jurisprudence of basic needs and the transformative goals of the Constitution. The question that interests me is whether a jurisprudence relating to the fulfilment of social and economic needs can have transformative potential, and if so, under what conditions. My aim is to examine how such a perspective can inform the development of our socio-economic rights jurisprudence in a way that supports a project of social transformation consistent with constitutional values and rights.

In the first part of the paper I draw on the work of philosopher and political theorist, Prof. Nancy Fraser, to examine the concepts of social justice and transformation which are foundational to South Africa's constitutional project. The second part of the paper examines the specific implications of the adjudication of social rights for pursuing a broader project of social transformation and justice. The final section analyses and evaluates the transformative potential of South Africa's evolving jurisprudence on socio-economic rights in the light of the theoretical underpinnings I have developed.

2. SOCIAL JUSTICE, TRANSFORMATION AND 'NONREFORMIST REFORM'

2.1 Social justice in a transformative constitution

¹ This article formed the basis for my inaugural lecture delivered on 4 October 2005 at the Stellenbosch University law faculty. I would like to thank Professors André van der Walt and Lourens du Plessis for encouraging me to reflect on the theoretical dimensions of social rights adjudication. In particular, I would like to thank Jan Theron for his critical perspectives and valuable comments.

² See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), para. 8.

The South African Constitution is widely described as a transformative Constitution.³ Unlike many classic liberal constitutions, its primary concern is not to restrain State power, but to facilitate a fundamental change in unjust political, economic and social relations in South Africa.⁴ Thus the preamble of the Constitution proclaims that it was adopted “so as to – [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.” The founding values of the Constitution refer to “the achievement of equality”, “non-racism and non-sexism”, and a system of democratic governance that is accountable, responsive and open.⁵

The commitment to social justice is central to the transformative goals and processes of our Constitution, and must infuse the interpretation of the Bill of Rights. In his Fourth Bram Fischer Memorial lecture, the Chief Justice, Dikgang Moseneke in the Fourth Bram Fischer Memorial lecture describes the important role of social justice in constitutional adjudication:

“...[I]t is argued here that a creative jurisprudence of equality coupled with substantive interpretation of the content of ‘socio-economic’ rights should restore social justice as a premier foundational value of our constitutional democracy side by side, if not interactively with, human dignity, equality, freedom, accountability, responsiveness and openness.”⁶

By arguing that a conception of social justice should inform our interpretation of rights claims, I am aligning myself with critical legal theorists who argue that it is necessary ‘to step outside of’ rights discourse in order to fill rights with legal and institutional meaning.⁷ I turn now to consider one theory of social justice and transformation that I

³ Karl Klare “Legal Culture and Transformative Constitutionalism” (1998) *SAJHR* 146. Klare describes transformative constitutionalism as ‘a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.’ (at 150); C Albertyn & B Goldblatt “Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) *SAJHR* 248, 249; A van der Walt “Tentative urgency: sensitivity for the paradoxes of stability and change in the social transformation decisions of the Constitutional Court” (2001) 16 *SA Public Law* 1; H Botha “Metaphoric reasoning and transformative constitutionalism” (2003) *TSAR* 20; D Moseneke “Transformative adjudication” (2002) 18 *SAJHR* 309.

⁴ *S v Makwanyane* 1995 (6) BCLR 665 (CC), para 262 (per Mahomed J); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC); *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC); *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C), para. 100.

⁵ Section 1.

⁶ “Transformative Adjudication” (2002) *SAJHR* 309, 314. See also: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2000 (10) BCLR 1079 (CC), para. 21; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) [hereafter ‘Grootboom’], para 1; *Bel Porto School Governing Body and Others v Premier, Western Cape and another* 2002 (9) BCLR 891, para. 6; *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC), para. 25; *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC), para 55.

⁷ Thus Karl Klare argues:

believe can assist in evaluating and developing our jurisprudence on socio-economic rights.

2.2 Social justice as ‘participatory parity’

Notions of social justice are of course highly contested in a pluralist society. Any theory of social justice that is to do real work in interpreting and adjudicating constitutional claims must be compatible with a diversity of opinions regarding the good life. This is a pre-requisite in a constitutional dispensation such as our own that takes seriously the equal autonomy and moral worth of human beings.⁸ At the same time, it must supply sufficiently determinative criteria for adjudicating concrete cases. Finally, it must be consonant with the values and ethos of the Constitution.

Nancy Fraser develops a theory of social justice based on the principle of participatory parity.⁹ This principle recognises the right of all to participate and interact with each other as peers in social life. As such it is compatible with a plurality of different views of the good and ethical disagreements. At the same time, she develops specific criteria for assessing whether institutional arrangements accord people “the status of full partners in social interaction”.¹⁰ Formal notions of equality are rejected as insufficient. Instead her theory focuses on the substantive requirements to ensure that everyone has access to “the institutional prerequisites of participatory parity”, particularly the economic resources and the social standing needed to participate on a par with others.¹¹

Fraser identifies two major obstacles to social justice conceived in terms of promoting greater parity of participation in social life and overcoming institutional patterns of subordination of different classes and groups. The first, misrecognition, entails a form of status subordination “in which institutionalized patterns of cultural value impede parity of participation for some.”¹² This involves systemic forms of discrimination and

“One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts.” “Legal Theory and Democratic Reconstruction: Reflections on 1989” (1991) 25 *U.B.C. Law Review* 69, 101.

⁸ The recognition of the equal moral worth of people requires respect for difference and a diversity of views and lifestyles: *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC): “The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity.” (per Ngcobo J, para 49).

⁹ See, for example: N Fraser *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (1997); N Fraser “Rethinking Recognition” (May/June 2000) 3 *New Left Review* 107; N Fraser ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in N Fraser and A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003).

¹⁰ Fraser *Redistribution or Recognition* 229.

¹¹ Participatory parity is described as constituting “a radical democratic interpretation of equal autonomy. Far more demanding than standard liberal interpretations, this principle is not only deontological but also substantive.” *Ibid.*

¹² Fraser *Redistribution or Recognition?* 87.

disadvantaging of certain groups on grounds such as race, gender and sexual orientation. Examples are marriage laws that exclude same-sex partnerships, social-welfare policies that stigmatise single mothers as sexually irresponsible scroungers, and policing practices that associate black persons with criminality.¹³ A second major obstacle to participatory parity arises when some actors lack the necessary resources to interact with others as peers.¹⁴ This distributive dimension “corresponds to the economic structure of society, hence to the constitution, by property regimes and labour markets of economically defined categories of actors, or classes, distinguished by their differential endowments of resources.”¹⁵ Thus, according to Fraser, social injustice has (at least) two analytically distinct dimensions: misrecognition and maldistribution.¹⁶

These forms of injustice, while analytically distinct¹⁷, overlap and interact causally with each other. Fraser describes the nature of this intertwining as follows:

“Economic issues such as income distribution have recognition subtexts: value patterns institutionalized in labour markets may privilege activities coded ‘masculine’, ‘white’ and so on over those coded ‘feminine’ and ‘black.’ Conversely, recognition issues – judgements of aesthetic value, for instance – have distribution subtexts: diminished access to economic resources may impede equal participation in the making of art. The result can be a vicious circle of subordination, as the status order and the economic structure interpenetrate and reinforce each other.”¹⁸

By theorising a two-dimensional concept of social justice, Fraser also aims at countering the recent tendency of recognition struggles (particularly in the form of ‘identity politics’) to displace the distributive dimension of social justice and to reify rigid group identities.¹⁹ A project aimed at advancing social justice must seek to address both dimensions *and* consider the impact of their interrelationship. Such a project aims at overcoming systemic patterns of racial, gender, class and other forms of subordination.

2.3 Affirmation, transformation and ‘nonreformist reform’

Fraser goes on to consider institutional reforms and strategies that can serve to promote greater participatory parity along both the axes of recognition and redistribution, “while also mitigating the mutual interferences that can arise when those two aims are pursued in tandem.”²⁰ She clarifies, however, that she is not aiming to devise ‘institutional blueprints’, but to delimit the range of possible policies and programmes that are compatible with the requirements of justice while leaving the weighing of the choices within the range to citizen deliberation.²¹

¹³ Fraser “Rethinking Recognition” 114.

¹⁴ Fraser “Rethinking Recognition” 116.

¹⁵ Fraser “Rethinking Recognition” 117.

¹⁶ Fraser “Rethinking Recognition” 116.

¹⁷ Fraser argues that, under “capitalist conditions, neither is wholly reducible to the other.” “Rethinking Recognition” “Rethinking Recognition” 118.

¹⁸ Fraser “Rethinking Recognition” 118.

¹⁹ Fraser “Rethinking Recognition”.

²⁰ Fraser *Redistribution or Recognition?* 72 – 73.

²¹ Fraser *Redistribution or Recognition?* 72.

She distinguishes two broad strategies for remedying injustice that cut across the redistribution-recognition divide: “*affirmation*” and “*transformation*.”²² The distinction between these remedies relates to the level at which distributional and recognition injustices are addressed. As Fraser explains:

“Affirmative strategies for redressing injustice aim to correct inequitable outcomes of social arrangements without disturbing the underlying social structures that generate them. Transformative strategies, in contrast, aim to correct unjust outcomes precisely by restructuring the underlying generative framework.”²³

In the context of distributive justice the ‘paradigmatic example’ of an affirmative strategy is the liberal welfare state which aims to redress maldistribution through income transfers. In contrast, a transformative strategy would address the underlying causes of an unjust distribution, for example, changing the division of labour, the forms of ownership, and other deep structures of the economic system.²⁴ In the context of recognition injustices, affirmative and transformative strategies can also be distinguished.²⁵

One of the key disadvantages of affirmative strategies to remedy maldistribution such as social assistance programmes is that they tend to provoke ‘a recognition backlash’. They can mark out the beneficiaries as “inherently deficient and insatiable, as always needing more and more.”²⁶ Their net effect can be “to add the insult of disrespect to the injury of deprivation.”²⁷ This is illustrated by the many gender stereotypes surrounding welfare programmes aimed at mothers and children. In the South African context this is exemplified by popular perceptions that the child support grant encourages young women to become pregnant and encourages ‘dependency’ on the State.²⁸ In contrast transformative strategies by tending to cast entitlements in universalist terms promote solidarity and reduce inequality “without creating stigmatized classes of vulnerable people perceived as beneficiaries of special largesse.”²⁹

However, transformative strategies also have their difficulties. Strategies aimed at transforming the underlying conditions of economic injustice may seem remote for those faced with the struggle to meet immediate daily needs.³⁰ They stand to benefit much

²² Fraser *Redistribution or Recognition?* 74

²³ Fraser *Redistribution or Recognition?* 74. She goes on to clarify that the distinction “is *not* equivalent to reform versus revolution, nor to gradual versus apocalyptic change. Rather, the nub of the contrast is the level at which injustice is addressed: whereas affirmation targets end-state outcomes, transformation addresses root causes.”

²⁴ Fraser *Redistribution or Recognition?* 74.

²⁵ Fraser *Redistribution or Recognition?* 75 – 76.

²⁶ Fraser *Redistribution or Recognition?* 77.

²⁷ Fraser *Redistribution or Recognition?* 77.

²⁸ B. Goldblatt “Gender and Social Assistance in the First Decade of Democracy” (2005) vol 32 no. 2 *Politikon*. The deeply gendered structure of the US welfare system is dissected by Fraser in her earlier work: “Women, Welfare and the Politics of Need Interpretation” in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* 144 – 160 (ch. 7).

²⁹ Fraser *Redistribution or Recognition?* 77.

³⁰ Fraser *Redistribution or Recognition?* 78.

more directly from income transfers that help meet subsistence needs. It can thus be much more difficult to mobilise communities in pursuance of transformative goals.³¹

However, according to Fraser, the dilemma of substantively problematic affirmative strategies and politically impractical transformative strategies is not intractable. Affirmative programmes can have transformative effects if they are consistently pursued.³² They can both meet people's needs within existing institutional frameworks and set in motion "a trajectory of change" in which deeper reforms become practical over time.³³ Fraser elaborates:

"By changing incentive and political opportunity structures, they expand the set of feasible options for future reform. Over time their cumulative effect could be to transform the underlying structures that generate injustice."³⁴

She calls these interventions "nonreformist reforms".³⁵

An example of a 'nonreformist reform' in the South African context might be a universal basic income grant. Such a grant together with other social programmes assists people in their struggle to meet basic survival needs. At the same time, it creates the security and space needed both for greater participation in economic activities as well as popular mobilisation around deeper reforms. By providing women in poor communities with an independent source of income, it also expands the set of choices available to them and assists in challenging women's subordination within the family and community.³⁶ In this way an affirmative remedy such as a basic income grant can set in motion a series of changes which can have a transformative impact over time.

2.4 The unrealised potential of social rights advocacy in the US

An illustration of the interaction of affirmative and transformatory remedies in the context of legal strategies to advance entitlements to social benefits is provided by Lucy William in her account of welfare labour rights advocacy in the United States. She documents how civil and welfare rights movements in the late 1960s and early 1970s were able to effectively mobilise around the legal breakthroughs in cases such as *King v*

³¹ Fraser *Redistribution or Recognition?* 78.

³² Fraser *Redistribution or Recognition?* 78.

³³ Fraser *Redistribution or Recognition?* 78.

³⁴ Fraser *Redistribution or Recognition?* 79 - 80.

³⁵ Fraser *Redistribution or Recognition?* 79. She credits the idea of nonreformist reform to André Gortz, *Strategy for Labor: A Radical Proposal*, trans. Martin A. Nicolaus and Victoria Ortiz (Boston, 1967).

³⁶ The phased introduction of a basic income grant was one of the key proposals to close the large gap in social security provisioning made by the government-appointed Committee of Inquiry into a Comprehensive Social Security System in South Africa. See their report, *Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) National Department of Social Development, Pretoria: Government Printers. There is also a coalition of civil society organisations, the Basic Income Grant Coalition, mobilising in support of this proposal (See: www.big.org.za). For a discussion of the transformative potential of an unconditional basic income grant, see Fraser *Redistribution or Recognition?* 78 – 79.

*Smith*³⁷ in which the Supreme Court interpreted social security legislation as creating by statute a categorical entitlement to the receipt of cash assistance for families.³⁸ The right to a hearing prior to the termination of benefits under the AFDC programme won in *Goldberg v Kelly*³⁹ was seen as “a vehicle to empower recipients – to make them less afraid of losing subsistence benefits in retaliation for taking collective action.”⁴⁰

Furthermore she argues how winning recognition for the right to welfare assistance introduced “a radically destabilizing concept into US legal discourse in two distinct but related ways.”⁴¹ First, by creating an entitlement that redistributed income, it exposed “the socially created nature of all background rules of entitlement and exposed their distributive significance – that is their role in maintaining inequality.”⁴² In other words, if rights are constructed it implies that they can be reconstructed so as to promote greater social equity.⁴³ If poverty is not natural but a result of political, legal and social choices, it can also be redressed through political will combined with appropriate social and legal reforms.

Second, the concept of a welfare entitlement illustrated the notion that entitlements could accrue to people outside of individual effort and exchange in traditional labour markets. In doing so, it “challenged the idea of a neutral and natural definition of effort and exchange.”⁴⁴ The privileging of the ‘public’ space of labour markets in tradition social insurance programmes renders other forms of valuable social contributions such as the care-giving functions traditionally performed by women invisible. Welfare entitlements have the potential to validate such unrecognised social roles. It also exposes the false dichotomy between traditional notions of independence associated with wage work and dependency associated with the receipt of government benefits.⁴⁵ The concept of a welfare benefit (“not the meagre amount of actual benefits”) theoretically gives some workers an alternative to wage work. In this way it helps surface the reality of dependency in wage work relationships created by the employer’s superior market power.⁴⁶

Ultimately, however, Williams argues that the progressive movement failed to exploit the transformative potential of the welfare entitlement concept.⁴⁷ She argues that welfare and labour rights advocates unwittingly played into a discourse that reinforced the economic *status quo*, and thus failed to advance a more fundamental redistribution. Welfare lawyers did this by fixating on government transfer policy and failing to adequately expose the

³⁷ 392 U.S. 309 (1968).

³⁸ The relevant programme, Aid to Families with Dependent Children (AFDC), provided means-tested cash benefits from tax revenues to indigent families with children.

³⁹ 397 U.S. 254 (1970).

⁴⁰ L.A. Williams “Welfare and Legal Entitlements: The Social Roots of Poverty” in D. Kairys (ed) *The Politics of Law: A Progressive Critique* (1998) 575.

⁴¹ Williams “Welfare and Legal Entitlements” 578.

⁴² Williams “Welfare and Legal Entitlements” 578.

⁴³ Williams “Welfare and Legal Entitlements” 578.

⁴⁴ Williams “Welfare and Legal Entitlements” 578.

⁴⁵ Williams “Welfare and Legal Entitlements” 579.

⁴⁶ Williams “Welfare and Legal Entitlements” 579

⁴⁷ Williams “Welfare and Legal Entitlements” 580 – 581.

contingency and distributional implications of the background rules of property and contract.

“Thus welfare law becomes a market corrective technique, an adjunct to private law, rather than a redistributive hub.”⁴⁸

Labour lawyers failed to challenge the privileging of waged work over family, care-giving in the organisation and distribution of social benefits. By doing so, they alienated many potential allies and perpetuated a male discourse of citizenship in the public sphere.⁴⁹

Thus Williams illustrates how an affirmative strategy (the winning of entitlement to a welfare benefit) had substantial transformative potential. However, this potential was not realised as the underlying structures and choices generating deep wealth inequalities in the US have not been effectively challenged.

3 SOCIAL JUSTICE, DEMOCRACY AND ADJUDICATION

3.1 Adjudication and participatory parity

Fraser’s project is to articulate a philosophical theory of social justice under contemporary conditions. She also examines the institutional arrangements, the broad types of policies and reforms that can advance participatory parity under contemporary social conditions.⁵⁰ In this context, she explores the interplay between affirmative and transformative remedies as outlined above. It is no simple task to consider the implications of her theory in the context of the adjudication of social rights claims. Karl Klare observes, the fact “that South Africa opted to accomplish some significant portion of their law-making through adjudication is a decision fraught with institutional consequences.”⁵¹

As we have seen, Fraser’s conception of social justice is inextricably linked to the notion of participatory parity in which patterns of institutionalised value or lack of access to resources deny to certain groups the possibility of participating on a par in social processes. It rejects formal equality as insufficient:

“On this view, anything short of participatory parity constitutes a failure of equal respect. And denial of access to parity’s social prerequisites makes a mockery of a society’s

⁴⁸ L.A. Williams “Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution” in J. Conaghan, R. Fischl and K. Klare (eds) *Labour Law in an Era of Globalization* (date?), 93, 113 – 114.

⁴⁹ Williams “Beyond Labour Law’s Parochialism” 114.

⁵⁰ Fraser *Redistribution or Recognition* 70 – 72.

⁵¹ Klare, *Transformative Constitutionalism* 147. He cites Duncan Kennedy’s famous critique of adjudication: “The diffusion of law-making power reduces the power of ideologically organized majorities, whether liberal or conservative, to bring about significant change in any subject-matter heavily governed by law. It empowers the legal fractions of intelligentsias to decide the outcomes of ideological conflict among themselves, outside the legislative processes. And it increases the appearances of naturalness, necessity; and relative justice of the status quo, whatever it may be, over what would prevail under a more transparent regime.” Duncan Kennedy *A Critique of Adjudication: {fin de siècle}* (1997) 2.

professed commitment to equal autonomy. Participatory parity constitutes *a radical democratic interpretation of equal autonomy*.⁵²

She observes that, although participatory parity supplies a powerful justificatory standard, “it cannot be applied monologically, in the manner of a decision procedure.”⁵³ There is “no wholly transparent perspicuous sign that accompanies participatory parity, announcing its arrival for all to see.”⁵⁴ Instead, “the norm of participatory parity must be applied dialogically and discursively, through democratic processes of public debate.”⁵⁵

Yet, adjudication is supposed to represent precisely ‘a decision-making procedure’ in which judges are given the power to pronounce authoritatively on what justice requires in the case under consideration.⁵⁶

The impact of judicial review on democratic processes has been a major subject of academic debate in political theory and constitutional law.⁵⁷ In the context of highly contested social rights claims, the democratic objection to adjudication acquires a particular intensity.⁵⁸ Libertarians traditionally object to social rights on the substantive

⁵² Fraser *Redistribution or Recognition?* 229.

⁵³ Fraser *Redistribution or Recognition?* 42.

⁵⁴ Fraser *Redistribution or Recognition?* 43.

⁵⁵ Fraser *Redistribution or Recognition?* 43.

⁵⁶ In this role the judge is cast in the role of the ‘Platonic philosopher-kings of yore’: D M Davis “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles” (1992) *SAJHR* 475, 483. See also the discussion by Fraser on the “appropriate division of labour between theorist and citizenry”: *Redistribution or Recognition?* 70 – 71. The metaphor of dialogue has gained currency in describing the process of judicial review under a supreme constitution, particularly in describing the interaction between the judiciary and legislature. This represents a less authoritarian and more democracy-enriching model of judicial review than the monological model: See K. Roach “Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience” (2005) 40 *Texas International Law Journal* 537 -576 (see particularly the sources cited at 1 – 3). But while certain reforms to litigation processes can enhance the diversity of voices able to participate in litigation, at the end of the day the court ultimately has the power “to privilege some interpretations over others”: H. Botha “Democracy and rights: Constitutional interpretation in a postrealist world” (2000) 63 *THRHR* 561, 573. Lenta observes: “Judges most often write in a monological voice that effaces the appearance of freedom of choice, and presents the verdict as forced by the logic of the situation itself...” “Democracy, Rights Disagreements and Judicial Review” (2004) *SAJHR* 1, 29.

⁵⁷ For insightful reviews of the literature, see: P Lenta “Democracy, Rights Disagreements and Judicial Review” 1; H. Botha “Democracy and rights: Constitutional interpretation in a postrealist world” (2000) 63 *THRHR* 561.

⁵⁸ It is naturally possible to constitutionalise social rights without necessarily vesting significant power in the judiciary to enforce them directly. This could entail, for example, including them in the constitution as directive principles of State policy following the examples of India, Namibia and Ireland. However, in the case of India the judiciary has utilised the directive principles to infuse substantive content into traditional civil rights, such as the right to life: See, for example, S. B. Shah “Illuminating the possible in the developing world: Guaranteeing the human right to health in India” (1999) 32 *Vand. J. Transnat’l L.* 435. See also: F I Michelman “The constitution, social rights, and liberal political justification” (2003) *I. Con.* 13, 28 – 30. In the South African context, for example, other constitutional institutions, particularly the SA Human Rights Commission, has significant functions in relation to socio-economic rights, including an information-gathering and monitoring role (s 184(3): D.G. Newman “Institutional Monitoring of

basis that they entrench an unacceptable role for the state and the courts in resource redistribution.⁵⁹ However, there is also an objection to the judicial review of social rights from the perspective of democracy. It is emphasised that social rights guarantees allow for a vast array of institutional and policy measures. In contrast it is argued that the relevant norms in relation to civil and political rights are relatively clear and uncontested.⁶⁰ Both representative and participatory democracy are undermined by giving judges the power to decide highly contested issues of public policy. Thus Davis articulated his opposition to the inclusion of socio-economic demands as fully justiciable constitutional rights in the South African constitution as follows:

“It elevates judges to the role of social engineers, concentrates power at the centre of the state and consequently erodes the influence of civil society.”⁶¹

Many academic contributions that aim at explaining or justifying the role of the courts in the adjudication of social rights focus on questions of institutional politics - that is, the impact of judicial review on the functioning of the legislative and executive branches of government.⁶² For example, it is pointed out that in recent times the legislature has declined in political influence in comparison to the executive which “has burgeoned in size, influence over the legislature and power over the citizenry.”⁶³ As executives and bureaucracies are usually only indirectly accountable to the people, and given their extensive power to affect people’s socio-economic well-being, there is an evident need for mechanisms to hold them accountable for their decisions. In many constitutional democracies, citizens have increasingly turned to the courts to protect their rights, including in the realm of socio-economic interests.⁶⁴

Social and Economic Rights: A South African Case Study and a New Research Agenda” (2003) 19 *SAJHR* 189. In this article, I focus specifically on the implications of vesting power in the courts to directly adjudicate socio-economic rights claims.

⁵⁹ See, for example, the discussion by Davis of the views of Robert Nozick developed in *Anarchy, State & Utopia* (1974): “Socio-Economic Demands in a Bill of Rights” 477.

⁶⁰ See the discussion by Davis of Dworkin’s distinction between ‘choice insensitive’ issues which are equated with basic civil and political rights which are enforceable by the judiciary, whereas ‘choice sensitive issues’ are equated with socio-economic policy choices which are best resolved through democratic processes: “The Case Against the Inclusion of Socio-Economic Demands” 478 – 479. Thus Davis argues that whilst judicial interpretation is inevitably indeterminate, in the case of ‘first generation rights’, “judicial interpretation is often predictable because background norms are uncontested.” 484. In contrast, judicial interpretation of ‘second generation’ rights inevitably involves contested policy choices, and is hence far less predictable.

⁶¹ Davis, 489. Lenta highlights the democratic erosion that occurs through judicial decision-making in the following terms: “The fact that constitutional courts are regarded as the forum for deciding fundamental questions facing the political community in the areas of employment, education, housing, freedom of association among many others, decreases the number of decisions left for the political arena and contributes to the erosion of politics.” “Democracy, Rights Disagreement and Judicial Review” 29 (footnote omitted).

⁶² This is raised most frequently in the context of the ‘counter-majoritarian’ dilemma created by the institution of judicial review.

⁶³ See M Pieterse “Coming to Terms Judicial Enforcement of Socio-Economic Rights (2004) *SAJHR* 383,388.

⁶⁴ M Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” 388.

However, it is the implications of the adjudication of basic needs claims on participatory politics that I am interested in exploring further in this paper. If the adjudication of needs claims operates to destruct radical participatory democracy and depoliticises questions concerning the definition and meeting of needs it will ultimately undermine the project of advancing social transformation through constitutionally-based processes.⁶⁵ At least we should be conscious of the implications of adjudication in this sphere to maximise our prospects to developing a transformative jurisprudence on socio-economic rights.

3.2 Adjudication and the ‘Politics of Need Interpretation’

In order to understand the potential effects of adjudication on transformative strategies, it is necessary to examine more closely what Fraser refers to as “the politics of needs interpretation.”⁶⁶ She describes needs claims as ‘nested’ in that they are “connected to one another in ramified chains of ‘in order to’ relations.”⁶⁷ Thus it is relatively uncontroversial to argue that homeless people who live in nontropical climates, need shelter ‘in order to’ survive (what Fraser calls ‘thin needs’). However, as soon as we descend to lesser levels of generality - to questions such as precisely what form of shelter do people need and what else do they need in order to sustain their homes - controversy proliferates. As the chains of ‘in order to’ relations are progressively unravelled, the deeper the level of political contestation and disagreement. As Fraser observes:

“Precisely how such chains are unravelled depends on what the interlocutors share in the way of background assumptions. Does it go without saying that policy designed to deal with homelessness must not challenge the basic ownership and investment structure of urban real estate. Or is that the point at which people’s assumptions and commitments diverge?”⁶⁸

Thin theories of need assume that the issue is only whether various predefined needs “will or will not be provided for”.⁶⁹ In so doing they ignore the underlying relational chains and “deflect attention” from a number of important political questions.⁷⁰

Fraser identifies the politics of needs to comprise “three moments that are analytically distinct but interrelated in practice.”⁷¹ The first is the struggle to validate the need in

⁶⁵ Fraser distinguishes between the following concepts: Institutional politics in terms of which “a matter is deemed ‘political’ if it is handled directly in the institutions of the official governmental system, including parliaments, administrative apparatuses, and the like.” This ‘official political’ contrasts with what is handled by institutions that are defined as being outside the official political system like “the family” and “the economy” (“even though in reality they are underpinned and regulated by the official political system”). The second concept is ‘discursive political’ or ‘politized’. In this sense “something is ‘political’ if it is contested across a range of different discursive areas and among a range of different publics.” This contrasts with “what is not contested in public at all and with what is contested only in relatively specialized, enclaved, and/or segmented publics.” *Unruly Practices* 166.

⁶⁶ Fraser *Unruly Practices* 163.

⁶⁷ Fraser *Unruly Practices* 163. See also Michelman, *The Constitution, Social Rights and Liberal Political Justification* 30 – 31.

⁶⁸ Fraser *Unruly Practices* 163.

⁶⁹ Fraser *Unruly Practices* 164.

⁷⁰ Fraser *Unruly Practices* 163-4.

⁷¹ Fraser *Unruly Practices* 164.

question as a legitimate political concern. The second constitutes the struggle over the definition or interpretation of the need. The third moment is the struggle over the implementation of the need.⁷² She identifies two major institutions which serve to depoliticise needs discourses in the course of these struggles. One strategy is to define the needs as questions of personal as opposed to public responsibility. Here the family is seen as a major institution for meeting the needs in question.⁷³ A second prevalent strategy is to cast the needs in questions “as impersonal market imperatives, or as ‘private’ ownership prerogatives, or as technical problems for managers and planners, all in contradistinction to political matters.”⁷⁴ In this case the depoliticisation of needs occurs through the institutions of the market economy in the capitalist system. The effect of such depoliticising discourses is to perpetuate class, gender and race relations of domination and subordination. Adjudication in a constitutional democracy such as South Africa is a significant socio-cultural forum in all three moments of the politics of needs.

3.2.1 *The first moment: Recognising needs as entitlements*

The inclusion of a range of socio-economic rights as justiciable rights in the 1996 Constitution can be seen as a successful struggle by various political actors and civil society organisations to establish the meeting of these needs as objects of constitutionally mandated state responsibility.⁷⁵ By placing a constitutional obligation on the State to ensure that everyone has “access to” a variety of socio-economic rights, the meeting of the needs in question are clearly recognised as a public matter, and not simply to be relegated to the ‘private’ domestic or market sphere.⁷⁶

The very distinction between ‘justiciable’ civil and political rights versus non-justiciable socio-economic rights is in itself deeply political. It privileges negative liberty and the existing economic status quo, and obscures the costs and policy dimensions of civil and political rights.⁷⁷ In constitutional democracies where adjudication is an important component of a country’s fundamental governance structures, the exclusion or weak enforcement of socio-economic rights can have the effect of marginalising the interests of the poor and masking the socio-economic barriers to more egalitarian social relations.⁷⁸

⁷² Fraser *Unruly Practices* 164.

⁷³ I would also add that the amorphous ‘community’ also falls into this category of ‘privatizing’ the needs in question. For example, by cutting back on state care for mental health patients on the supposition that they will be cared for by ‘the community’. Or that ‘the community’ can take care of AIDS-orphans.

⁷⁴ Fraser *Unruly Practices* 168.

⁷⁵ This struggle has not been comprehensively documented. For an abbreviated account, see: S. Liebenberg and K. Pillay (eds) *Socio-Economic Rights in South Africa: A Resource Book* (2000) 19 – 20.

⁷⁶ In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (hereafter ‘*Grootboom*’), the Court emphasised that that “the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the State’s section 26 obligations.” (para. 40).

⁷⁷ M Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” 397 – 398; S Liebenberg “Social and Economic Rights: A Critical Challenge” in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79, 84.

⁷⁸ As Scott & Maklem argued:

By contrast, the inclusion of social rights transforms the issue of unmet needs into a question of entitlement.⁷⁹

The constitutional status of these rights clearly does not avoid on-going contestation and the emergence “reprivatization” discourses aimed at re-establishing the needs in question as matters for the family or the market to deal with.⁸⁰ In the current era of neo-liberalism, social assistance and social insurance programmes in many countries are being privatized or cut back.⁸¹ This presents a new set of challenges for asserting the state’s role in the public provision of social benefits to mitigate current inequalities in resources. The constitutional recognition of justiciable social rights provides oppositional social movements with a potentially powerful tool to assert the state responsibility for meeting basic needs.

3.2.2 *The second and third moments: Interpreting and implementing needs as rights*

How does adjudication relate to the two further dimensions of needs struggles in late capitalist societies? The second moment is the struggle around “the interpreted *content* of contested needs once their political status has been successfully secured.”⁸² The third moment corresponds to the processes and institutions through which the need in question is implemented and administered. These moments frequently result in the proliferation of expert needs discourses and the creation of agencies for the satisfaction of the need in question. These discourses are aimed at translating “politicized needs into administrable needs.”⁸³ Expert needs discourses tend to be depoliticising by repositioning the people whose needs are in question as individual “cases.” As Fraser explains:

“Perhaps the strongest reason for including a certain number of economic and social rights is that by constitutionalising half of the human rights equation, South Africans would be constitutionalising only part of what it is to be a full person. A constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally it excludes those segments of society for whom autonomy means little without the necessities of life.” C Scott & P Maklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) *Univ. of Penn LR* 1, 29.

⁷⁹ As Fraser observes, ‘After all, conservatives traditionally prefer to distribute aid as a matter of need *instead* of right precisely in order to avoid assumptions of entitlement that could carry egalitarian implications.’ *Unruly Practices* 182. André van der Walt also comments that the power of Frank Michelman’s translation of a moral obligation arising from extreme need into a constitution duty “is that social theory and practice do not remain locked into needs talk, but take place within the traditionally powerful discourse of rights.” “A South African Reading of Frank Michelman’s Theory of Social Justice” 196.

⁸⁰ Fraser describes it thus: “Institutionally, ‘reprivatization’ designates initiatives aimed at dismantling or cutting back social-welfare services, selling off nationalized assets, and/or deregulating ‘private’ enterprise; discursively, it means depoliticization.” *Unruly Practices* 172.

⁸¹ L.A. Williams “Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis” (2005) forthcoming *SAJHR*; B Porter ‘Socio-Economic Rights Advocacy – Using International Law’ (1999) 2(1) *ESR Review* 1 (discussing cut-backs in social assistance in Canada).

⁸² Fraser *Unruly Practices* 173.

⁸³ Fraser *Unruly Practices* 174.

“...they are rendered passive, positioned as potential recipients of predefined services rather than as agents involved in interpreting their needs and shaping their life conditions.”⁸⁴

Judicial interpretations of social rights can powerfully shape political discourse and administrative practice in both these dimensions. Danie Brand describes the political and symbolic role of the courts around needs discourses:

“First, courts’ adjudication of socio-economic rights claims becomes part of the political discourse, even a medium through which this discourse partly plays out. ...Second, courts also occupy a symbolic, or perhaps more accurately, an exemplary role with respect to poverty and need discourses – their vocabulary, the conceptual structures they rely on, the rhetorical strategies they employ infiltrate and so influence and shape the political discourses around poverty and need.”⁸⁵

Brand has illustrated how adjudication of social rights in the South African courts has the potential both to reinforce and counter reprivatization discourses around needs, and to deepen or erode participatory democracy.⁸⁶ Here I wish to focus on the tendency in interpreting social rights to divert attention away from the underlying conditions that give rise to economic deprivations, and to take existing resource distributions for granted. This is illustrated by the Constitutional Court’s reluctance to probe the resource allocation priorities in the *Soobramoney* case, accepting without much analysis the existing budget allocation for the provincial health department of Kwa-Zulu-Natal as the appropriate framework for analysing the claim.⁸⁷ The injustice that money can purchase the needed treatment in the private health sector is portrayed as a “hard and unpalatable fact.”⁸⁸ The

⁸⁴ Fraser *Unruly Practices* 174.

⁸⁵ D Brand “The ‘Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights Claims in South Africa” in A J van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17, 24. On the use of rights-based discourses in social rights advocacy in South Africa, see S Wilson ‘Taming the Constitution: Rights and Reform in the South African System’ (2004) *SAJHR* 418; M. Heywood ‘Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health’ (2003) *SAJHR* 278.

⁸⁶ Brand “ ‘The Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights Claims in South Africa.” Significant ‘countervailing tendencies’ identified by Brand in the Court’s social rights jurisprudence that encourage participatory democracy are: the requirement that government social assistance programmes include permanent residents (*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC)); the acknowledgment by the Supreme Court of Appeal of the role of the political agency of the property owners and the occupiers in resolving the case (*Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA)); and the emphasis placed on the political agency of the local authority and occupiers and mediation in resolving eviction cases (*Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)). To this I would add the requirement of transparency as one of the criteria for ‘reasonable’ government action in the context of social rights (*Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (10) BCLR 1033 (CC), para. 123).

⁸⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997(12) BCLR 1696 (CC), paras 24 – 29.

⁸⁸ *Soobramoney*: “One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment. But the State’s resources are

State is not required to justify the allocation and distribution of health resources. While the Court's restraint may be understandable from the perspective of institutional relations, it nonetheless serves to 'naturalise' systemic socio-economic inequalities.⁸⁹

In interpreting socio-economic rights, courts authoritatively declare that a certain standard of provisioning fulfils or fails to fulfil the constitutional obligation. In so doing, judicial discourse can serve to artificially curtail democratic debate on the underlying changes needed to transform social relations so as to eliminate conditions of deprivation and inequality.⁹⁰ To return to our earlier distinction, while the adjudication of social rights claims may sometimes achieve affirmative remedies, they may simultaneously deflect attention from more transformative strategies to remedy social injustice.

Once the court has interpreted and upheld a social rights claim, the focus shifts to the implementation of the court's judgment.⁹¹ In this process, judicial discourse can tend to position poor litigants and the class they represent as passive beneficiaries of the court's order instead of active participants in defining their needs and the methods of their implementation.⁹² As Fraser observes, these are highly complex struggles as social movements aim at establishing state provision of various needs in question, but "oppose the administrative and therapeutic need interpretations."⁹³ Even when needs become depoliticised through the administration of need satisfaction, Fraser records "a countertendency that runs from administration to client resistance and potentially back to politics."⁹⁴

limited and the appellant does not meet the criteria for admission to the renal dialysis programme." (para. 31).

⁸⁹ Brand's main critique of the Court's jurisprudence is that it tends to endorse an institutional concept of politics in which communities and civil society are viewed as passive recipients of needs predefined by the political branches of government. He identifies as problematic, not so much the fact that the court defers, "but what it is that it defers to". Deference is to the formally constituted official branches of government and downplays the role of participatory democracy in the interpretation and satisfaction of needs. "The Politics of Need Interpretation' and the Adjudication of Socio-Economic Rights Claims in South Africa." 31 – 33.

⁹⁰ In other words, adjudication can serve to "occlude the interpretative dimension of needs politics, the fact that not just satisfactions but *need interpretations* are politically contested." Moreover, they neglect the question of whether socially authorised forms of public discourse available for interpreting people's needs are adequate and fair, or "skewed in favor of the self-interpretations and interests of dominant social groups and, so, work to the disadvantage of subordinate or oppositional groups." Fraser *Unruly Practices* 164.

⁹¹ See, for example, K Pillay "Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights" (2002) *LDD* 255.

⁹² For example, there is significant potential for structural interdicts to enhance participation by litigants and other civil society organisations in the implementation of socio-economic rights judgments. See, for example, D Davis "Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years" (2004) *ESR Review* 3, 5 – 7. Thus far, the Constitutional Court has been reluctant to grant structural interdicts in socio-economic rights cases: see, for example *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002 (10) BCLR 1033 (CC), para 129.

⁹³ Fraser *Unruly Practices* 175.

⁹⁴ Fraser *Unruly Practices* 177. She cites the example of clients of social-welfare programmes in the US joining together 'as *clients*' to challenge administrative interpretations of their needs: "They may take hold of the passive, normalized, and individualized or familialized identities

3.3 Enhancing participatory parity

Paradoxically, despite its depoliticising tendencies, the adjudication of social rights can also serve to enhance participatory politics. In his contribution to the early social rights debates, Nicolas Haysom articulated a justification from the perspective of participatory democracy for including a basic floor of justiciable social rights in the Constitution:

“By constitutionalising selected socio-economic rights, society is elevating certain rights to a necessary condition for the exercise of a *minimum* civic equality. This in turn, establishes the conditions for democracy for the effective use of civil and political rights. ...This article goes no further than arguing that a minimum floor of rights should be constitutionalised to enrich political contest and democratic participation – not by limiting political choice but by facilitating real participation in social and political rights.”⁹⁵

Fraser argues in favour of translating justified needs claims into social rights, despite left criticisms that they obstruct radical social transformation, on the basis that they “begin to overcome some of the obstacles to the effective exercise of existing rights.”⁹⁶ Thus they can help to transform a formalist conception of classic liberal rights into substantive rights.⁹⁷ In other words, the inclusion of social rights in a Bill of Rights can help infuse a substantive dimension into the Bill of Rights as a whole. The Constitutional Court’s explicit endorsement of the concept of the interrelationship and interdependence of all the rights in the Bill of Rights underscores this point.⁹⁸ Social rights have an important role to play in securing civil and political participation while civil and political rights in turn can help facilitate greater equity in resource distribution. By emphasising the interdependence and interrelatedness of the Bill of Rights as a whole, the courts help to counter some of the ‘recognition’ problems associated with social rights and the social benefit programmes they facilitate. This in turn helps establish the conditions for a more inclusive, equitable public debate regarding the measures needed to transform unjust social and economic relations.⁹⁹ In this context, the courts can serve as a forum for

fashioned for them in expert discourses and transform them into a basis for collective political action.” 180 – 181.

⁹⁵ N Haysom “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) *SAJHR* 451, 461.

⁹⁶ Fraser *Unruly Practices* 183.

⁹⁷ Fraser *Unruly Practices* 183.

⁹⁸ See, for example, *Grootboom*, paras 23, 44; *TAC*, para. 78; *Khosa v Minister of Social Development*; *Mahlaule v Min of Social Development* 2004 (6) BCLR 569 (CC), paras. 49, 52.

⁹⁹ As we have seen Fraser emphasises that “the norm of participatory parity must be applied dialogically and discursively through democratic processes of public debate.” However, fair democratic deliberation concerning the merits of redistribution and recognition claims “requires parity of participation for all actual and possible deliberators. This in turn requires just distribution and reciprocal recognition.” To eliminate this circularity in democratic justice requires that we “work to abolish it in practice by changing social reality. ... By arguing publicly that the conditions for genuine democratic public argument are currently lacking, one expresses the reflexivity of democratic justice in the process of struggling to realise it practically.” *Redistribution or Recognition* 43 - 44.

highlighting the needs of those marginalised in official political processes and thereby enhance democratic participation in the meeting of socio-economic needs.¹⁰⁰

But if social rights are to make a meaningful contribution to transformation, it is vital that they are substantively interpreted. If individuals and groups are unable to reliably enforce their claims to the provision of subsistence needs, the role of socio-economic rights in enhancing participatory parity becomes largely illusory.

In the following section, I analyse the Court's current jurisprudence on socio-economic rights and evaluate its transformative potential.

4. TOWARDS A TRANSFORMATIVE JURISPRUDENCE ON SOCIAL RIGHTS?

4.1 South Africa's constitutional jurisprudence on social rights

4.1.1 Reasonableness review for positive duties

In the first three socio-economic rights cases it considered, *Soobramoney*, *Grootboom* and *TAC*, the Constitutional Court was squarely confronted with the challenge of developing a model for the enforcement of the positive duties imposed by sections 26 and 27. The Court rejected the notion that these provisions impose a direct, unqualified obligation on the state to provide social resources and services to people on demand. It did so in the context of arguments raised by the *amici curiae* interventions in the *Grootboom* and *TAC* cases. The *amici* sought to persuade the Court to adopt the notion of minimum core obligations as developed by the United Nations Committee on Economic, Social and Cultural Rights.¹⁰¹ The Court rejected an interpretation of socio-economic rights that would "give rise to a self-standing and independent positive right enforceable

¹⁰⁰ L.A. Williams "Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis." (2005) forthcoming *SAJHR* 16.

¹⁰¹ This is the primary body responsible for supervising States parties' obligations under the International Covenant on Economic, Social and Cultural Rights (1966). In its General Comment No 3, the Committee stated that it "is of the view that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." General Comment No 3 (Fifth session, 1990) *The nature of States' parties obligations (article 2(1) of the Covenant)* UN doc. E/1991/23, para. 10. For an application of this concept in the context of the specific rights protected in the Covenant, see General Comment No. 12 (Twentieth sess, 1999) *The right to adequate food (art 11 of the Covenant)* UN doc. E/2000/22, para. 17; General Comment No. 14 (Twenty-second sess, 2000) *The right to the highest attainable standard of health (art 12 of the Covenant)* UN doc. E/C.12/2000/4, paras 43 - 47; General Comment No. 15 (Twenty-ninth sess) *The right to water (art 11 and 12 of the Covenant)* UN doc. E/C.12/2002/11, paras 37 - 38.

irrespective of the considerations in the second subsections of sections 26 and 27.”¹⁰² Thus the extent of the State’s positive duties are qualified by the following three key elements: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”¹⁰³

The Court voiced a number of concerns regarding the concept of minimum core obligations. First, the Court identified the problem of defining ‘the minimum core’ given the fact that groups are differently situated and have varying social needs.¹⁰⁴ Second, the Court expressed the view that minimum core obligations impose unrealistic duties on the State in that it is “impossible to give everyone access even to a ‘core’ service immediately.”¹⁰⁵ Finally, the Court held that the minimum core was incompatible with the institutional competencies and role of the courts.¹⁰⁶ However, it did indicate that the evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether the measures adopted by the State are reasonable.¹⁰⁷

The Court proceeded to develop a model of ‘reasonableness review’ for adjudicating positive claims to the provision of social services and resources. In reviewing the positive duties imposed by the social rights provisions on the State, the central question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the rights in question.¹⁰⁸ The Court is careful to emphasise that a wide latitude is given to the political branches of government to make the appropriate policy choices, with the Court’s role being to determine whether they fall within the bounds of ‘reasonableness.’¹⁰⁹ The reasonableness of government social policy is assessed in primarily in terms of its inclusiveness in the sense that it must cater for all major social groups as well as for short, medium and long term needs.¹¹⁰ At this point, reasonableness review seems formalistic and abstract, equating the needs of the wealthy with those of the poor and requiring government to be even-handed in attending to both. However, the Court goes on to recognise that the “The poor are particularly vulnerable and their needs

¹⁰² TAC para. 39.

¹⁰³ *Grootboom* para 38.

¹⁰⁴ *Grootboom* paras 32 and 33. Thus in the context of the right to have access to adequate housing, the Court highlighted the fact that the needs of differently situated groups are diverse: “there are those who need land; others need both land and houses; yet others need financial assistance.” (para. 33).

¹⁰⁵ TAC para. 35.

¹⁰⁶ Thus it held that “courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards” should be. (TAC para. 37).

¹⁰⁷ *Grootboom* para. 33; TAC para. 34.

¹⁰⁸ See *Grootboom* para. 41. This constitutes a means-end justificatory model in which the Court asks itself the basic question whether a particular policy or programme can be justified. It will be justified if “it is reasonably related to the constitutionally prescribed goal of providing access to the relevant socio-economic rights.” See Danie Brand ‘The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights For?’ in Henk Botha, André van der Walt and Johan van der Walt (eds.) *Rights and Democracy in a Transformative Constitution* (2004), 33 at 39 – 43.

¹⁰⁹ *Grootboom* para. 41.

¹¹⁰ *Grootboom* para. 43.

require special attention.”¹¹¹ Reasonableness is not assessed solely by a statistical advance in facilitating access to the various socio-economic rights. It is also informed by the dignity-interests of the affected group, particularly the impact of the denial of particular rights on the affected claimants. The Court held in *Grootboom*:

“Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their *basic human needs*. A society must seek to ensure that the *basic necessities of life* are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and *whose ability to enjoy all rights* therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. ...If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹¹²

The standard of reasonableness review requires that government programmes makes some reasonable short-term provision for those whose socio-economic circumstances are urgent or intolerable. In *Grootboom* the lack of a programme catering for immediate housing needs was held to be unreasonable and thus inconsistent with section 26.¹¹³ In *TAC*, the government’s rigid policy that it would not extend the provision of the anti-retroviral drug, Nevirapine for purposes of reducing mother-to-child transmission of HIV beyond the 18 pilot sites, was found to be unreasonable. There was simply no reasonable justification for withholding a “simple, cheap and potentially lifesaving medical intervention”¹¹⁴ from poor women and their newborn babies in the public health sector.¹¹⁵ The Court emphasised that its ruling did not imply “that everyone can immediately claim access to such treatment”, although “the ideal...is to achieve that goal.”¹¹⁶

In both these cases, the Court subjected the government’s justifications for failing to make provision for the fulfilment of the basic needs in issue to a high level of scrutiny. The resource and policy justifications for failing to provide for the needs in question were found to be unpersuasive. In *Grootboom*, the Court confined itself to a declaratory order¹¹⁷ whereas in *TAC*, the Court granted far-reaching mandatory relief requiring government to provide Nevirapine and extend testing and counselling facilities at hospitals and clinics throughout the public health sector for the purpose of reducing the

¹¹¹ *Grootboom* para. 36. See also *TAC*: ‘There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of those differences.’ para. 70.

¹¹² *Grootboom* para. 44 (emphasis added).

¹¹³ *Grootboom*: “In other words there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.” para 52.

¹¹⁴ *TAC* para. 73.

¹¹⁵ *TAC*: “We have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV.” para. 125.

¹¹⁶ *TAC* para. 125.

¹¹⁷ *Grootboom*, para 99.

risk of mother-to-child transmission of HIV.¹¹⁸ However, the Court was careful to clarify that the relevant provisions on socio-economic rights do not give rise to a direct individually enforceable entitlement to the provision of socio-economic resources and services.¹¹⁹

4.1.2 *The intersection of social rights and equality rights*

The second type of situation where the Court has been called upon to adjudicate the positive duties imposed by social rights is in relation to the enactment of exclusionary social benefit legislation. This is well illustrated by the Constitutional Court decision in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* (hereafter '*Khosa*').¹²⁰ The case concerned two challenges to the validity of social assistance legislation which restricted eligibility for social grants to South African citizens.¹²¹ The Court held that the exclusion of the category of permanent residents from the social grants legislation constituted both a limitation of the right of access to social assistance (s 27) and the right against unfair discrimination (s 9). It further held that the requirement that both the adult primary care giver and the child be South African citizens in order to be eligible for the child support grant "trenches upon" the socio-economic rights of children under s 28(1)(c) of the Constitution.¹²²

In its analysis of the reasonableness of the legislative scheme in terms of s 27(2), the Court closely scrutinised and found unconvincing, the financial considerations presented by the State for limiting access to social grants to citizens.¹²³ The Court also rejected the State's reasoning that the exclusion of permanent residents from social grants was a legitimate because it prevented them becoming 'a burden' on the State, and thereby encouraged self-sufficiency among foreign nationals. According to the Court immigration could be controlled "*in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times.*"¹²⁴ There were other less drastic methods for reducing the risk of permanent residents becoming 'a burden' to the State than excluding them from gaining access to social assistance.¹²⁵ The application of a proportionality test in this assessment of the

¹¹⁸ *TAC*, para 135.

¹¹⁹ *Grootboom*: "Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand" para 95; *TAC*: "...the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them." para 34; See also: *TAC* para. 39; *Jaftha* paras. 32 – 33 (distinguishing negative and positive duties).

¹²⁰ 2004 (6) BCLR 569 (CC)

¹²¹ The relevant legislation was the Social Assistance Act 59 of 1992, and the Welfare Laws Amendment Act 106 of 1997.

¹²² *Khosa* para. 78.

¹²³ Given that the State had already acknowledged the unconstitutionality of the citizenship requirement in respect of child support grants, the inclusion of permanent residents in the remaining social grants would constitute an increase of less than 2% on the present cost of social grants. The Court thus concluded that "the cost of including permanent residents in the system will be only a small proportion of the total cost." (para 62).

¹²⁴ *Khosa* para. 65 (emphasis added)

¹²⁵ *Khosa* paras. 64 - 65.

reasonableness of these two justifications presented by the State is clearly evident. Ultimately, the impact of the exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations on which the State relied.¹²⁶

The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group, and the intersecting breaches of a socio-economic right and the right against unfair discrimination.¹²⁷ Having found violations of section 9 and 27, the Court acknowledged the difficulty of applying a limitations clause analysis to the socio-economic rights in sections 26 and 27.¹²⁸ It held that it was not necessary to decide whether a different threshold of reasonableness was required in relation to s 36. Even if this was assumed to be the case, the Court was satisfied that the exclusion of permanent residents from social assistance “is neither reasonable nor justifiable within the meaning of section 36.”¹²⁹ The Court granted the strong remedy of reading permanent residents into the eligibility requirements of the legislation.¹³⁰

4.1.3 *Reviewing deprivations of existing access*

The third type of situation considered by the courts has involved groups being deprived of the existing access that they enjoy to social rights.¹³¹

The Constitutional Court has characterised these situations as violations of the *negative* duties imposed by social rights.¹³² They have mostly arisen in the context of the eviction of people from their homes, reinforced by the explicit guarantee in s 26(3).¹³³ Much of the jurisprudence has concerned the interpretation of key pieces of legislation enacted to give effect to s 26(3), particularly the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’).¹³⁴

The leading decision on the interpretation of PIE is that of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* (‘PE Municipality’).¹³⁵ The judgment

¹²⁶ *Khosa* para. 82.

¹²⁷ *Khosa*: “What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.” para 44; See also para. 49.

¹²⁸ *Khosa* para. 83.

¹²⁹ *Khosa* para. 84.

¹³⁰ *Khosa* paras. 86 – 89; *The Order* (para. 98).

¹³¹ *Jaftha* para, 34.

¹³² *Grootboom* para 34; *TAC* para 46.

¹³³ Section 26(3) reads: “No one may be evicted from their homes or have their homes demolished without an order of Court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.”

¹³⁴ PIE repealed the old Prevention of Illegal Squatting Act 52 of 1951 referred to above. Another key piece of legislation giving effect to s 26(3) is The Extension of Security of Tenure Act 62 of 1997 (ESTA).

¹³⁵ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)

illuminates how PIE must be interpreted to promote the purposes and values behind s 26(3). The case concerned an eviction application by the Port Elizabeth Municipality against some 68 people who were occupying shacks erected on privately owned land within the jurisdiction of the Municipality. Most had come to the undeveloped land after being evicted from other land. In launching the application, the Municipality was responding to a neighbourhood petition. The Court observed that s 26(3) acknowledges that the “eviction of people living in informal settlements may take place, even if it results in loss of a home.”¹³⁶ However, it went on to affirm that generally “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”¹³⁷ Thus in order to satisfy a court that is ‘just and equitable’ to evict people from their homes, organs of state will have to show that serious consideration was given to the possibility of providing alternative accommodation to the occupiers.¹³⁸ The Court also indicated that, in the absence of special circumstances, “it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.”¹³⁹ The critical point that Sachs J makes in his judgment is that in the clash between property rights and “the genuine despair of people in dire need of accommodation”, the courts should not automatically privilege property rights.¹⁴⁰ Their role instead is to find a just and equitable solution in the context of the specific factors relevant in each particular case. *PE Municipality* certainly envisages that there are circumstances in which people may be evicted from their homes. This could include, for example, situations where people deliberately invade land with the purpose of disrupting the organised housing programme and placing themselves in the front of the queue.¹⁴¹ While the provision of suitable alternative accommodation is not an absolute requirement, it is nonetheless a weighty consideration in the assessment of whether an eviction order is ‘just and equitable’ in the circumstances.¹⁴²

The recent decision of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (*‘Modderklip’*)¹⁴³ concerned the interpretation of the State’s duties in the context of a private landowner’s unsuccessful efforts to execute an eviction order granted in terms of PIE against a community occupying his land. At the time of the landowner’s attempted execution of order, it was estimated that the community numbered approximately 40 000, of whom roughly a third were alleged to be illegal immigrants.¹⁴⁴ The owner was confronted by a demand from the sheriff of the

¹³⁶ *PE Municipality* para. 21.

¹³⁷ *PE Municipality* para. 28.

¹³⁸ *PE Municipality*: The existence of a housing programme “designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way” is not enough to determine “whether and under what conditions an actual eviction order should be made in a particular case.” para 29.

¹³⁹ *PE Municipality* paras 39 – 47, para 43.

¹⁴⁰ *PE Municipality* para. 23.

¹⁴¹ *PE Municipality* para 26.

¹⁴² *PE Municipality* para. 58.

¹⁴³ *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC).

¹⁴⁴ *Modderklip* para. 9

High Court for a deposit of R1,8 million to secure the costs of the eviction, an amount exceeding the value of the land. After attempts to get various organs of State to assist him in enforcing the eviction order failed, he applied to the court for an order obliging the State to assist him in vindicating his property rights in terms of the Constitution. The Constitutional Court did not consider it necessary to resolve the case on the basis of the landowner's property rights (in terms of s 25) or the housing rights of the occupiers (s 26).¹⁴⁵ Instead it held that the state's failure to take reasonable steps to assist the landowner to vindicate his property and at the same time avoid the large-scale social disruption caused by the eviction of a large community with nowhere to go, was a violation of the principle of the rule of law in section 1 (c) as well as the right of access to courts or other independent forums in s 34 of the Constitution.¹⁴⁶ The Court held that the progressive realisation of the right of access to housing or land for the homeless requires "careful planning", "fair procedures" and "orderly and predictable processes".¹⁴⁷ Land invasions should always be discouraged.¹⁴⁸ At the same time, these measures will not be deemed reasonable if they leave "no scope whatsoever for relatively marginal adjustments in the light of evolving reality."¹⁴⁹ The novel remedy granted by the Court was to require the State to compensate the landowner for the unlawful occupation of his property. Significantly, the order expressly declared "that the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority."¹⁵⁰

The Court's decision in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* ('*Jaftha*')¹⁵¹ represents a significant development in the Court's approach to the review of the obligations imposed by social rights. This case involved a challenge to the constitutionality of provisions of the Magistrates' Court Act that permitted the sale in execution of people's homes in order to satisfy (sometimes trifling) debts. The two applicants, both women of meagre means, owned homes that had been acquired through the assistance of state subsidies. When they fell in arrears in respect of very minor debts (e.g. the purchase of vegetables), a judgment was obtained against them and their homes were ultimately sold in execution. The effect of such sales-in-execution would be the eviction of people from their homes. It was also common cause, that if the applicants were evicted, they would have no suitable alternative accommodation.¹⁵² The High Court had held that the loss of the right of the applicants to occupy their homes was not caused by the sale-in-execution process authorised by the Magistrate's Court Act. If the judgment debtor elected to "hold over" (remain in occupation after the sale in execution), PIE would be applicable to the eviction proceedings brought by the purchaser. The

¹⁴⁵ *Modderklip* para. 26. This is in contrast with the SCA judgement in the case: *President of the Republic of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821. In addition, the SCA held that the equality provisions in terms of s 9(1) and (2) of the Constitution had also been infringed.

¹⁴⁶ *Modderklip* paras. 43 – 51.

¹⁴⁷ *Modderklip* para. 49.

¹⁴⁸ *Modderklip* para. 49.

¹⁴⁹ *Modderklip* para. 49.

¹⁵⁰ *Modderklip* para. 68, Order, para 3(c).

¹⁵¹ 2005 (1) BCLR 78 (CC).

¹⁵² *Jaftha* para. 12.

execution process, though it brings the ownership of the judgment debtor to an end, does not violate section 26 as this provision did not entitle anyone to ownership of a home or occupation of a specific residential unit.¹⁵³

The Constitutional Court, on the other hand, characterised the provisions of the Act as authorising a negative violation of s 26(1) in that it permitted “a person to be deprived of existing access to adequate housing.”¹⁵⁴ This negative duty is not subject to the qualifications in subsection (2) relating to resource constraints and progressive realisation. Where people are deprived of existing access to housing (and by implication, other socio-economic rights), this constitutes a limitation of their rights which falls to be justified in terms of the stringent requirements of the general limitations clause (s 36), including the requirement of law of general application.¹⁵⁵ The Court expressly did not elaborate on the circumstances which would constitute a violation of the negative duties imposed by the Constitution.¹⁵⁶

The Court found no justification for the overbroad provisions of the Magistrate’s Court Act in terms of the general limitations clause.¹⁵⁷ By way of remedy it ‘read in’ provisions to the Act requiring judicial oversight of executions against the immovable property of debtors taking into consideration “all relevant circumstances”.¹⁵⁸ Among the guiding factors relevant to the exercise of this judicial oversight is whether an order authorising the sale-in-execution would be “grossly disproportionate”:

“This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.”¹⁵⁹

Another consideration is the finding of “creative alternatives” allowing for debt recovery but which use the sale-in-execution of the debtor’s home “only as a last resort.”¹⁶⁰ Thus the fact that a person might be rendered homeless is a weighty consideration in judicial oversight over sales-in-execution.

Although the Court has not gone so far as to recognise an unqualified right to alternative accommodation in eviction cases, it has required serious consideration of the impact of the eviction and the availability of feasible alternatives to avoid homelessness. It also illustrates that, in the context of housing, property rights are no longer automatically privileged. The housing needs of those who are poor and vulnerable to homelessness are now highly relevant considerations in cases which expose people to evictions.

¹⁵³ *Jaftha* para. 32.

¹⁵⁴ *Jaftha* paras. 31 – 34.

¹⁵⁵ In addition, s 36 requires an evaluation of the extent to which the purposes of the limitation is compatible with “an open and democratic society based on human dignity, equality and freedom.” It also incorporates a stringent proportionality assessment, including the availability of “less restrictive means” to achieve the State’s purposes (s 36(1)(e)).

¹⁵⁶ *Jaftha* para. 34.

¹⁵⁷ *Jaftha* paras 35 – 51.

¹⁵⁸ *Jaftha* paras 52 – 67.

¹⁵⁹ *Jaftha* para. 56.

¹⁶⁰ *Jaftha* para. 59.

I turn now to evaluate the transformative potential of this jurisprudence within the theoretical perspectives developed above.

4.2 The transformative potential of the jurisprudence

I have been critical of the Constitutional Court's ambivalence regarding individual entitlements to basic needs.¹⁶¹ I have argued that the model of reasonableness review creates a number of difficulties for the enforcement of socio-economic rights by individuals and groups living in poverty.¹⁶² The Court's reluctance to recognise direct individual positive rights discourages social rights claiming.¹⁶³ The bifurcated structure of review for negative and positive obligations endorsed by the Court in *Jaftha* may also have problematic implications. While the poor's access to resources certainly warrants strong judicial protection, the distinction between strongly protected negative rights and weakly protected positive rights can operate to marginalise the claims of those whose needs have been neglected, and leave unexplored the patterns of social exclusion that lie behind unmet needs.

It is important to recognise that reasonableness review can easily come to represent a very deferential standard of review. Dennis Davis argues that that the concept of reasonableness can be moulded by the courts "so that, on occasion, it resembles a test for rationality and ensures that the court can give a wide berth to any possible engagement with direct issues of socio-economic policy."¹⁶⁴ The danger is that reasonableness review becomes a proxy for the courts endorsing the State's own views about the justifiability of its policies.¹⁶⁵

¹⁶¹ Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 *LDD* 159; Liebenberg "The Interpretation of Socio-Economic Rights" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (2004) ch.33, particularly at 27 – 33.

¹⁶² Thus the applicants have to marshal a considerable array of economic and expert evidence to convince the Court that the government's social policy is unreasonable. See in this regard, Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights" at 177, 187 – 188.

¹⁶³ As Scott and Alston argue, while public interest groups are likely to bring challenges to policy and legislation that will benefit disadvantaged groups in general, individual claimants "will understandably wish to see something geared more to their own situation and are unlikely to wish to bring constitutional cases purely to serve as constitutional triggers for general policy processes." C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) *SAJHR* 206, 254-255.

¹⁶⁴ D Davis "Socio-economic rights in South Africa: The record of the Constitutional Court after 10 years" (2004) 5 *ESR Review* 3, 5. As Currie and de Waal point out: "A characteristic of a legal standard is that considerable interpretative discretion is given to the adjudicator responsible for its application and that it therefore does not specify an outcome in advance." *The Bill of Rights Handbook* (5th ed, 2005) 579.

¹⁶⁵ See Sandy Fredman's critique of the Supreme Court of Canada's approach in *Gosselin v Quebec (Attorney General)* 2002 SCC 84 to the review of social security regulations in Quebec which discriminated in the provision of welfare benefits against persons under 30 years of age. Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" forthcoming in *SAJHR* (2005). Pieterse also expresses doubt whether the "relatively abstract and open-ended nature of the reasonableness inquiry" is suitable "in developing a socio-economic rights jurisprudence resonating with international law and with the transformative aims of the

However, I have also argued that reasonableness review has the advantage of being a flexible, context-sensitive model of review for socio-economic rights claims.¹⁶⁶ Thus the Court held in *Grootboom* that the reasonableness of a set of measures in giving effect to particular socio-economic rights has to be assessed in the light of their social, economic and historical context as well as the context of the Bill of Rights as a whole.¹⁶⁷ In this sense, ‘reasonableness review’ avoids closure and creates the on-going possibility of challenging socio-economic deprivations in the light of changing contexts. Thus ‘reasonableness review’ can facilitate the creation of a participatory, dialogical space for considering social rights claims. This is exemplified by the way in which the Treatment Action Campaign has been able to use reasonableness review to win a major victory in the provision of appropriate medical treatment to reduce the risk of the transmission of HIV from mother to child.¹⁶⁸ This victory was a significant breakthrough in the broader transformative strategy of the TAC to achieve a general anti-retroviral programme announced by government in August 2003 for people living with HIV/AIDS. The TAC and other civil society organisations were able to use the criteria for a reasonable programme established in *Grootboom* and the mother-to-child transmission case in broad-based advocacy for a general anti-retroviral roll-out programme.¹⁶⁹

In contrast, a rigid and abstract notion of ‘minimum core obligations’ may have an exclusionary impact as it fails to account for the diversity of needs and experiences of various groups.¹⁷⁰ Moreover, it may be applied a-contextually and without exploring the underlying factors which generate socio-economic inequalities and deprivations.¹⁷¹ Its effect can be to close down debate and artificially curtail an evolution in our standards of social provisioning as processes of struggle around social needs unfold. However, I do not believe that a rigid, a-contextual interpretation is an inevitable feature of an approach advocating for a more rigorous protection of basic needs. Thus in recent work I have

constitutional order.” “The Judicial Enforcement of Socio-Economic Rights” 410. Bilchitz criticises reasonableness review for failing to adequately develop the content of the obligations imposed by the various rights, and observes that at present “it seems to stand in for whatever the Court regards as desirable features of state policy.” “Towards a Reasonable Approach to the Minimum Core” 19 *SAJHR* 9 -10.

¹⁶⁶ S. Liebenberg “Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review” M. Langford (ed) *Litigation of Socio-Economic Rights: The State of Play* (The University of New South Wales Press, Sydney) forthcoming 2005.

¹⁶⁷ *Grootboom*: “Reasonableness must be determined on the facts of each case” paras. 43 – 44; para. 92.

¹⁶⁸ See the account by Mark Heywood of TAC’s strategies in the MTCT case: ‘Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health’ (2003) *SAJHR*, 278.

¹⁶⁹ See, for example, the civil society submission on the operational plan for the rollout of an antiretroviral programme entitled, “A People-Centred ARV Programme” online at www.tac.org.za/Documents/TreatmentPlan/FullFinalSubmissiontoARVTaskTeam.doc

¹⁷⁰ Martha Nussbaum argues that approaches to socio-economic justice based on only the distribution of resources is insufficient in that it fails to take sufficient account of individual variations of need and the extent to which differently situated individuals can “convert resources into valuable functionings”: *Women and Human Development – The Capabilities Approach* (2000) 68 – 70.

¹⁷¹ See the discussion concerning Fraser’s theory of ‘thin’ needs above.

explored how to achieve a stronger measure of protection for basic needs within the structure of reasonableness review.¹⁷² This approach will be elaborated on the following section in which I explore strategies for realising the transformative potential of social rights.

5. REALISING THE TRANSFORMATIVE POTENTIAL OF SOCIAL RIGHTS

Given accumulated historical injustices, the full realisation of social rights will require deep-seated structural changes over time. Can the courts play a meaningful role in facilitating these fundamental changes? My own view is that there is considerable transformative potential within the courts' current social rights jurisprudence. However, the realisation of this potential depends on the courts giving social rights a sufficiently substantive interpretation. I identify four areas in which the courts' interpretation of social rights can facilitate transformation.

5.1 Substantive reasonableness review

First, claims involving a deprivation of basic needs should attract a high level of judicial scrutiny. I have alluded to the tension in the judicial interpretation of basic needs between fostering a more participatory, dialogical space through avoiding overly narrow and rigid interpretations of basic needs and the importance of articulating clear obligations to ensure that people's immediate needs are met. This can be accommodated within the context-sensitive structure of reasonableness review developed by the Court.

In evaluating the reasonableness of the State's acts or omissions, the central consideration should be the position of the claimant in society, the history and nature of the deprivation experienced and its impact on her and others in a similar situation.¹⁷³ A particular focus of this inquiry should be the impact of the deprivations in question on the ability of the affected groups to participate as peers in society. Close attention should be paid to the interaction of the obstacles to participatory parity identified by Fraser, namely the lack of access to economic and social resources, the social stigma and stereotypes associated with poverty, and their interaction with other forms of recognition injustice such as race, gender and sexual orientation. In considering the State's justifications for failing to ensure that the subsistence needs in question are met, the courts would be required to conduct a rigorous proportionality analysis (not dissimilar to the approach of the Court in the *Khosa* case). In this process, the courts are well-positioned to highlight the impact of macro-injustices on particular claimants in concrete situations. Sachs J describes the

¹⁷² S. Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) *SAJHR* 1.

¹⁷³ In this respect, socio-economic rights jurisprudence converges with substantive equality jurisprudence, particularly in relation to the test for unfair discrimination and the court's approach to restitutionary equality: *Harksen v Lane* No 1998 (1) SA 300 (CC), para 53; *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC), paras. 25 – 32. For a discussion of this convergence, see: P de Vos "Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) *SAJHR* 258.

responsibility of the courts to strive to achieve justice for the litigants before them against a backdrop of systemic social inequality:

“The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systematic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.”¹⁷⁴

It is further important that the assessment of ‘reasonableness’ in socio-economic rights cases be informed by requirement of ‘progressive realisation’ in sections 26(2) and 27(2). This concept, borrowed from article 2 of the International Covenant on Economic, Social and Cultural Rights, implies a dynamic process in which standards of provisioning improve over time.¹⁷⁵ In *Grootboom*, the Court endorsed the UN Committee on Economic, Social and Cultural Rights’ views that ‘progressive realisation’ “imposes an obligation to move as expeditiously and effectively as possible” towards the goal of full realisation. It also endorsed the Committee’s views that “deliberately retrogressive measures” require justification and close scrutiny.¹⁷⁶

The real challenge for social rights litigation is situations where large groups are currently excluded from social provisioning. This is illustrated by South Africa’s current social security system. Provision is made for those formally employed through social insurance schemes¹⁷⁷, and for the payment, from public funds, of social grants to certain targeted groups (children, the aged and those living with disabilities).¹⁷⁸ However, no social assistance is provided for children of 14 years and older¹⁷⁹ and adults under 60 years (for women) and 65 years (for men) who live in poverty and are affected by long-term structural unemployment.¹⁸⁰ For this group (approximately 8.4 million people¹⁸¹), the right protected in s 27(1)(c) of the Constitution¹⁸² is largely illusory.¹⁸³ It remains to

¹⁷⁴ *PE Municipality* para. 38.

¹⁷⁵ *Grootboom*: “It means that accessibility should be progressively facilitated: legal, administrative, operational and financial burdens should be examined and, where possible, lowered over time.” para. 45.

¹⁷⁶ *Grootboom* para. 45 citing with approval General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights, para. 9 (emphasis added).

¹⁷⁷ These include the Compensation for Occupational Injuries and Diseases Act (COIDA) Act No. 130 of 1992, the Unemployment Insurance Act 63 of 2001 and a large number of workplace pension fund schemes.

¹⁷⁸ These social grants are paid in terms of the Social Assistance Act No. 59 of 1992 which has recently been replaced by the Social Assistance Act No. 13 of 2004. [in force yet?]

¹⁷⁹ The definition of ‘a child’ in s 28(3) of the Constitution is “a person under the age of 18 years.”

¹⁸⁰ S. Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” (2001) 17 *SAJHR* 232.

¹⁸¹ J. Streak “Government’s social development response to children made vulnerable by HIV/AIDS: Identifying gaps in policy and budgeting” IDASA Occasional Paper, 9 September 2005, 21.

¹⁸² Section 27(1)(c) gives everyone the right to have access to “social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

¹⁸³ The only exception is the Social Relief of Distress Grant (SROD) provided for under the Social Assistance Act. However, this grant is limited to a maximum period of 3 successive months, has restrictive eligibility requirements, and is poorly administered. See Regulations in terms of the

be seen whether the courts will, when confronted by a relevant case, require the State to adopt positive measures to close this gap in social security provisioning. Of relevance in this context is the obligation recognised by the UN Committee on Economic, Social and Cultural Rights of the State to formulate and implement a national strategy and plan of action to address access to socio-economic rights by the whole population. This strategy and plan of action must be formulated, and periodically reviewed, on the basis of a participatory and transparent process, and must include indicators and benchmarks by which progress can be closely monitored.¹⁸⁴ Even if the courts cannot order the entire gap in social security provisioning to be immediately closed, they can at least require participatory planning and the taking of concrete steps towards the full realisation of this important social right.

It will require constant vigilance to ensure that reasonableness review does not degenerate into an excessively deferential standard. Placing the claimants and the nature and history of the deprivation experienced at the centre of the reasonableness inquiry will help keep the focus on the systemic social and economic barriers to a more egalitarian society.

5.2 Robust remedies

Second, the courts can use their wide remedial powers to grant more effective remedies in social rights cases. Thus, for example, the Courts can require the State to put in place a plan or programme that facilitates the changes needed, and to take concrete and targeted steps in terms of that plan.¹⁸⁵ In this context, the Court should overcome its reluctance to grant supervisory remedies in order to facilitate the long-term structural reforms required to realise socio-economic rights.¹⁸⁶ Supervisory orders have a rich potential not only for the courts to monitor the implementation of such orders, but also to enhance the participation of both civil society and the state institutions supporting constitutional democracy in socio-economic rights litigation. Courts can also give forms of tangible relief to those experiencing immediate deprivations to avoid irreparable threats to life, health and future development. The nature and extent of this relief will depend on the context, but must reflect the conviction expressed in *Grootboom* that a society “must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.”¹⁸⁷

Social Assistance Act 13 of 2004, No. R. 162, Government Notice 27316, 22 February 2005, items 9, 14, 15 and 23.

¹⁸⁴ General Comment No. 14, para. 43(f); General Comment No. 15, para. 37(f).

¹⁸⁵ See the discussion at note 185 above and the accompanying text.

¹⁸⁶ On supervisory remedies in the context of socio-economic rights litigation, see W. Trengove “Judicial Remedies for Violations of Socio-economic Rights (1999) *ESR Review* 8. For criticisms of the Court’s reticence to grant supervisory orders, see D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence (2003) *SAJHR* 1, 23 – 4; K Pillay “Implementing *Grootboom*” 275 -6; Heywood “Preventing Mother-to-Child HIV Transmission in South Africa” 311 -12.

¹⁸⁷ *Grootboom* para. 44.

By applying a heightened standard of review and robust remedies in cases where deprivations of basic needs are at issue, the courts can bring into public consciousness the impact and social consequences of poverty. Transformation is thus promoted by calling into question existing unjust resource distributions and affirming rights to social and economic benefits where previously no such rights were recognised.¹⁸⁸

5.3 A transformative discourse

Third, the courts can contribute to transformation by the nature of their discourse in socio-economic rights judgments. This rhetorical role is important even where the courts feel constrained by institutional politics from making orders that will have an extensive impact on existing budgetary allocations. Thus the courts can resist the temptation to focus only on ‘thin’ needs, and instead strive to expose the underlying patterns of social injustice that generate the deprivations in question. Sachs J’s judgment in *PE Municipality* is an excellent illustration of how courts can engage with the historical, socio-economic, political and legal factors behind the eviction of poor people from their homes in South Africa.¹⁸⁹ Judicial discourse of this nature helps to counter the depoliticising tendencies of adjudication by locating the needs in question within a broader historical and social context of systemic injustice.

Furthermore, the courts can assist in destabilising existing stereotypes and perceptions about the role of publicly provided benefits in society. This is illustrated by the manner in which Mokgoro J in *Khosa* subverts the normal discourse around social assistance creating dependency on the State by highlighting its role in relieving the burden on poor communities and fostering the dignity of permanent residents.¹⁹⁰ Finally, the Court’s discourse can serve as a constant reminder that the redress of poverty and inequality are questions of political morality and a collective social responsibility. This is illustrated again in the *Khosa* case by the following observation of Mokgoro J:

“Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of

¹⁸⁸ In commenting on Frank Michelman’s needs-based theories, André van der Walt points to an important rhetorical and theoretical implication of this approach:

“...[I]t turns the traditional theoretical strategy of rights-based theories on its head by concentrating not on legal power, but on individual need, marginality, weakness and powerlessness. The constitutional guarantee is not based on what one has, but on what one lacks and needs, what makes one weak.”

In this way, his theory rejects a purely stabilising, preservative notion of social justice, and replaces it with norms and principles relevant to the evaluation of distributional outcomes: A. van der Walt “A South African Reading of Frank Michelman’s Theory of Social Justice” in H Botha, A Van der Walt and J Van der Walts (eds) *Rights and Democracy in a Transformative Constitution* (2004) 163, 193; see also 198 – 199. On Frank Michelman’s needs-based theory, see F I Michelman “The Supreme Court 1968 Term – Foreword: On Protecting the Poor through the Fourteenth Amendment” (1969) *Harv LR* 7; “Welfare Rights in a Constitutional Democracy” (1979) *Wash LQ* 659.

¹⁸⁹ *PE Municipality* paras 8 – 23.

¹⁹⁰ *Khosa* para. 76.

public benefits present the extent to which poor people are treated as equal members of society.”¹⁹¹

In this respect, the role of the courts is to keep at the forefront of public consciousness the vast chasm between the vision of a just society reflected in the Constitution and social reality. As Langa ACJ (as he then was) noted in *Modderklip*:

“The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.”¹⁹²

Through discourse of this nature, the courts contribute to countering the ‘recognition backlash’ associated with the provision of social benefits to the poor.

5.4 Transforming background common law rules

In a market economy, common law background rules structure access to and distribution to resources. Thus Danie Brand argues:

“Although the development of constitutional socio-economic rights to establish new and unique constitutionally based remedies is an important endeavour on its own, to explore the full transformative potential of socio-economic rights, sustained critical engagement also with these common law background rules is crucial.”¹⁹³

As the cases relating to the evictions and homelessness illustrate, social rights have contributed to deconstructing hierarchical and absolute notions of property rights.¹⁹⁴ The interest of poor people in the protection of their homes and in avoiding homelessness is now a highly relevant factor in eviction cases, and property is no longer the ultimate trump card.¹⁹⁵ In other areas, the courts have been less willing to transform common law rules in the light of socio-economic rights commitments.¹⁹⁶

¹⁹¹ *Khosa* para. 74 (footnotes omitted).

¹⁹² *Modderklip* para. 36 (footnotes omitted).

¹⁹³ Brand “Introduction to socio-economic rights in the South African Constitution” 39. The impact of social rights on the common law may also take place through the adoption of legislation to give effect to these rights, for example, PIE. See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA): “Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically.” (para 16). See also: T Roux “Continuing and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law” (2004) 121 *SALJ* 466.

¹⁹⁴ See the following observation in *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) in relation to the provisions of PIE:

“Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically.” para 16.

¹⁹⁵ A van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Critical Evaluation of Recent Case Law” (2002) 18 *SAJHR* 371;

¹⁹⁶ See, for example, *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Healthcare (Pty) Ltd v Strydom* 2002 6 SA 21 (SCA); D. Brand “Introduction to socio-economic rights in the South African

Although, it is beyond the scope of this paper, the transformatory potential of the courts' social rights jurisprudence will not be realised without broader forms of the processes and practices of adjudication to make them more accessible and participatory.¹⁹⁷ Such reforms would encompass achieving equitable access to quality legal services, improved mechanisms for the implementation of social rights judgments, and transforming judicial ideology and culture.¹⁹⁸

6 CONCLUSION

In conclusion, there will probably be an enduring tension between the depoliticising tendencies of social rights adjudication and its transformative potential. Those engaged in social rights litigation need to be conscious of both tendencies and seek to minimise the former while maximising the prospects to realising the latter.

The winning of affirmative social benefits through litigation can create a favourable terrain for broader mobilisation around deeper reforms. A substantive jurisprudence on social rights can facilitate 'nonreformist reforms' and advance transformation in South Africa. In particular, it can serve to enhance the participatory capabilities of those living in poverty and expose the socially constructed nature of poverty and inequality. At its best it should constantly remind us of our constitutional commitment to establishing a society based on social justice, and facilitate the inclusion of marginalised voices in the debate on what is required to achieve such a society.

However, we cannot take for granted that this transformative trajectory will be found. Exploring the theoretical underpinnings of important concepts to our constitutional democracy such as social justice and transformation can help us in finding our way.

Constitution" in D. Brand and C. Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1, 41 – 42.

¹⁹⁷ Thus Fraser argues that procedural considerations are an essential element of assessing competing need interpretations:

"In general, procedural considerations dictate that, all other things being equal, the best need interpretations are those reached by means of communicative processes that most closely approximate ideals of democracy, equality and fairness." *Unruly Practices*, 182. See also 164.

¹⁹⁸ For a discussion of the problems of judicial ideology and culture in the context of socio-economic rights adjudication, see M. Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" 396 – 399