

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.¹

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.

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¹ See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) par 8.

2 Social Justice, Transformation and “Non-reformist Reform”

2.1 Social justice in a transformative Constitution

The South African Constitution is widely described as a transformative Constitution.² 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.³ 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.⁴

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 the Fourth Bram Fischer Memorial Lecture, the Chief Justice, Dikgang Moseneke,⁵ 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.”

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.⁶ I

² 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” (150). See Albertyn & Goldblatt “Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248 249; 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; Botha “Metaphoric Reasoning and Transformative Constitutionalism” 2003 *TSAR* 20; Moseneke “Transformative Adjudication” 2002 18 *SAJHR* 309.

³ *S v Makwanyane* 1995 6 BCLR 665 (CC) par 262 (per Mahomed J); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC); *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) par 100.

⁴ S 1.

⁵ 2002 *SAJHR* 309 314. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) par 21; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 1; *Bel Porto School Governing Body v Premier, Western Cape* 2002 9 BCLR 891 par 6; *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) par 25; *President of RSA v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) par 55.

⁶ Thus Klare “Legal Theory and Democratic Reconstruction: Reflections on 1989” 1991 25 *UBC Law Review* 69 101 argues: “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.”

turn now to consider one theory of social justice and transformation that I 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.⁷ 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.

Fraser⁸ develops a theory of social justice based on the principle of participatory parity. 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”.⁹ 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.¹⁰

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”.¹¹ This involves systemic forms of discrimination and 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

⁷ 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 par 49).

⁸ *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (1997); “Rethinking Recognition” 2000 3 *New Left Review* 107; *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation* in Fraser & Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003).

⁹ Fraser *Redistribution* 229.

¹⁰ 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.” See Fraser *Redistribution* 229.

¹¹ Fraser *Redistribution* 87.

that associate black persons with criminality.¹² A second major obstacle to participatory parity arises when some actors lack the necessary resources to interact with others as peers.¹³ 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”.¹⁴ Thus, according to Fraser,¹⁵ social injustice has (at least) two analytically distinct dimensions: misrecognition and maldistribution.

These forms of injustice, while analytically distinct,¹⁶ overlap and interact causally with each other. Fraser¹⁷ describes the nature of this intertwinement 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.”

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.¹⁸ 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 “non-reformist reform”

Fraser¹⁹ 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”. 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.²⁰

¹² Fraser 2000 3 *New Left Review* 114.

¹³ Fraser 2000 3 *New Left Review* 116.

¹⁴ Fraser 2000 3 *New Left Review* 117.

¹⁵ 2000 3 *New Left Review* 116.

¹⁶ Fraser 2000 3 *New Left Review* 118 argues that under “capitalist conditions, neither is wholly reducible to the other”.

¹⁷ 2000 3 *New Left Review* 118.

¹⁸ 2000 3 *New Left Review* 110-113.

¹⁹ *Redistribution* 72-73.

²⁰ *Redistribution* 72.

She distinguishes two broad strategies for remedying injustice that cut across the redistribution-recognition divide: “*affirmation*” and “*transformation*”.²¹ The distinction between these remedies relates to the level at which distributional and recognition injustices are addressed. As Fraser²² 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.”

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.²³ In the context of recognition injustices, affirmative and transformative strategies can also be distinguished.²⁴

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”.²⁵ Their net effect can be “to add the insult of disrespect to the injury of deprivation”.²⁶ 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.²⁷ 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”.²⁸

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.²⁹ They stand to benefit much more directly from

²¹ *Redistribution* 74

²² *Redistribution* 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.”

²³ Fraser *Redistribution* 74.

²⁴ Fraser *Redistribution* 75-76.

²⁵ Fraser *Redistribution* 77.

²⁶ Fraser *Redistribution* 77.

²⁷ 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* (ch 7) 144-160.

²⁸ Fraser *Redistribution* 77.

²⁹ Fraser *Redistribution* 78.

income transfers that help meet subsistence needs. It can thus be much more difficult to mobilise communities in pursuance of transformative goals.³⁰

However, according to Fraser,³¹ 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. 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.³² Fraser³³ 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."

She calls these interventions "non-reformist reforms".³⁴ An example of a "no-reformist 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.³⁵ 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 Williams 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

³⁰ Fraser *Redistribution* 78.

³¹ *Redistribution* 78.

³² Fraser *Redistribution* 78.

³³ *Redistribution* 79-80.

³⁴ *Redistribution* 79. She credits the idea of non-reformist reform to Gortz *Strategy for Labor: A Radical Proposal* trans Nicolaus & Ortiz (Boston 1967).

³⁵ 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* 78-79.

*King v Smith*³⁶ in which the Supreme Court interpreted social security legislation as creating by statute a categorical entitlement to the receipt of cash assistance for families.³⁷ The right to a hearing prior to the termination of benefits under the AFDC programme won in *Goldberg v Kelly*³⁸ was seen as “a vehicle to empower recipients — to make them less afraid of losing subsistence benefits in retaliation for taking collective action”.³⁹

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”.⁴⁰ 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”.⁴¹ In other words, if rights are constructed it implies that they can be reconstructed so as to promote greater social equity.⁴² 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.

Secondly, 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”.⁴³ The privileging of the “public” space of labour markets in traditional 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.⁴⁴ 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.⁴⁵

Ultimately, however, Williams⁴⁶ argues that the progressive movement failed to exploit the transformative potential of the welfare entitlement

³⁶ 392 US 309 (1968).

³⁷ The relevant programme, Aid to Families with Dependent Children (AFDC), provided means-tested cash benefits from tax revenues to indigent families with children.

³⁸ 397 US 254 (1970).

³⁹ Williams *Welfare and Legal Entitlements: The Social Roots of Poverty* in Kairys (ed) *The Politics of Law: A Progressive Critique* (1998) 575.

⁴⁰ Williams *Welfare and Legal Entitlements* 578.

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* 579.

⁴⁵ Williams *Welfare and Legal Entitlements* 579.

⁴⁶ *Welfare and Legal Entitlements* 580-581.

concept. 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 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.”⁴⁷

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.⁴⁸

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’s⁴⁹ 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. 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 Klare⁵⁰ 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”.

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:

⁴⁷ Williams *Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution* in Conaghan, Fischl & Klare (eds) *Labour Law in an Era of Globalization* 93 113-114.

⁴⁸ Williams *Beyond Labour Law’s Parochialism* 114.

⁴⁹ *Redistribution* 70-72.

⁵⁰ *Transformative Constitutionalism* 147. He cites the famous critique of adjudication of Duncan Kennedy *A Critique of Adjudication: (Fin de Siècle)* (1997) 2: “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.”

“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 professed commitment to equal autonomy. Participatory parity constitutes a radical democratic interpretation of equal autonomy.”⁵¹

She observes that, although participatory parity supplies a powerful justificatory standard, “it cannot be applied monologically, in the manner of a decision procedure”.⁵² There is “no wholly transparent perspicuous sign that accompanies participatory parity, announcing its arrival for all to see”.⁵³ Instead, “the norm of participatory parity must be applied dialogically and discursively, through democratic processes of public debate”.⁵⁴

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.⁵⁵

The impact of judicial review on democratic processes has been a major subject of academic debate in political theory and constitutional law.⁵⁶ In the context of highly contested social rights claims, the democratic objection to adjudication acquires a particular intensity.⁵⁷ Libertarians traditionally object to social rights on the substantive basis that they entrench an unacceptable role for the State and the courts in resource

⁵¹ Fraser *Redistribution* 229.

⁵² Fraser *Redistribution* 42.

⁵³ Fraser *Redistribution* 43.

⁵⁴ Fraser *Redistribution* 43.

⁵⁵ In this role the judge is cast in the role of the “platonic philosopher-kings of yore”: 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 *Redistribution* 70-71 on the “appropriate division of labour between theorist and citizenry”. 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 Roach “Constitutional, Remedial and International Dialogues about Rights: The Canadian Experience” 2005 40 *Texas International Law Journal* 537-576 (see particularly the sources cited 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”: Botha “Democracy and Rights: Constitutional Interpretation in a Postrealist World” 2000 63 *THRHR* 561 573. Lenta “Democracy, Rights Disagreements and Judicial Review” 2004 *SAJHR* 1 29 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.”

⁵⁶ For insightful reviews of the literature, see Lenta 2004 *SAJHR* 1; Botha 2000 63 *THRHR* 561.

⁵⁷ It is naturally possible to constitutionalise social rights without necessarily vesting significant power in the judiciary to enforce them directly. This could entail, eg, 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, eg, 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 Michelman “The Constitution, Social Rights, and Liberal Political Justification” 2003 *I Con* 13 28-30. In the South African context, eg, other constitutional institutions, particularly the SA Human Rights Commission, have significant functions in relation to socio-economic rights, including an information-gathering and monitoring role (s 184(3)). See Newman “Institutional Monitoring of 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.

redistribution.⁵⁸ 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.⁵⁹ Both representative and participatory democracy are undermined by giving judges the power to decide highly contested issues of public policy. Thus Davis⁶⁰ 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.”

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.⁶¹ 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”.⁶² 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.⁶³

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

⁵⁸ See, eg, the discussion by Davis 1992 *SAJHR* 475 477 of the views of Nozick developed in *Anarchy, State & Utopia* (1974).

⁵⁹ See the discussion by Davis 1992 *SAJHR* 475 478-479 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. 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.

⁶⁰ Davis 489. Lenta 2004 *SAJHR* 29 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.” (footnote omitted).

⁶¹ This is raised most frequently in the context of the “counter-majoritarian” dilemma created by the institution of judicial review.

⁶² See Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” 2004 *SAJHR* 383 388.

⁶³ Pieterse 2004 *SAJHR* 388.

definition and meeting of needs it will ultimately undermine the project of advancing social transformation through constitutionally-based processes.⁶⁴ 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 Fraser⁶⁵ refers to as “the politics of needs interpretation”. She describes needs claims as “nested” in that they are “connected to one another in ramified chains of ‘in order to’ relations”.⁶⁶ Thus it is relatively uncontroversial to argue that homeless people, who live in non-tropical 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 Fraser⁶⁷ 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?”

Thin theories of need assume that the issue is only whether various predefined needs “will or will not be provided for”.⁶⁸ In so doing they ignore the underlying relational chains and “deflect attention” from a number of important political questions.⁶⁹

Fraser⁷⁰ identifies the politics of needs to comprise “three moments that are analytically distinct but interrelated in practice”. The first is the struggle to validate the need in 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

⁶⁴ Fraser *Unruly Practices* 166 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”.

⁶⁵ *Unruly Practices* 163.

⁶⁶ Fraser *Unruly Practices* 163. See also Michelman 2003 *I Con* 30-31.

⁶⁷ *Unruly Practices* 163.

⁶⁸ Fraser *Unruly Practices* 164.

⁶⁹ Fraser *Unruly Practices* 163-164.

⁷⁰ *Unruly Practices* 164.

the need.⁷¹ 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.⁷² 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”.⁷³ 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.⁷⁴ 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.⁷⁵

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.⁷⁶ 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

⁷¹ Fraser *Unruly Practices* 164.

⁷² I would also add that the amorphous “community” also falls into this category of “privatizing” the needs in question. Eg, 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.

⁷³ Fraser *Unruly Practices* 168.

⁷⁴ This struggle has not been comprehensively documented. For an abbreviated account, see Liebenberg & Pillay (eds) *Socio-Economic Rights in South Africa: A Resource Book* (2000) 19-20.

⁷⁵ In *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 40 the Court emphasised 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”.

⁷⁶ Pieterse 2004 *SAJHR* 397-398; Liebenberg *Social and Economic Rights: A Critical Challenge* in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79 84.

barriers to more egalitarian social relations.⁷⁷ By contrast, the inclusion of social rights transforms the issue of unmet needs into a question of entitlement.⁷⁸

The constitutional status of these rights clearly does not avoid ongoing contestation and the emergence of “reprivatization” discourses aimed at re-establishing the needs in question as matters for the family or the market to deal with.⁷⁹ In the current era of neo-liberalism, social assistance and social insurance programmes in many countries are being privatised or cut back.⁸⁰ 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”.⁸¹ 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”.⁸² Expert needs

⁷⁷ As Scott & Maklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” 1992 *Univ of Penn LR* 1 29 argued: “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.”

⁷⁸ As Fraser *Unruly Practices* 182 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.” Van der Walt *A South African Reading of Frank Michelman’s Theory of Social Justice* in Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* 163 196 also comments that the power of 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”.

⁷⁹ Fraser *Unruly Practices* 172 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.”

⁸⁰ Williams “Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis” 2005 *SAJHR* 436; Porter “Socio-economic Rights Advocacy Using International Law” 1999 2(1) *ESR Review* 1 (discussing cut-backs in social assistance in Canada).

⁸¹ Fraser *Unruly Practices* 173.

⁸² Fraser *Unruly Practices* 174.

discourses tend to be depoliticising by repositioning the people whose needs are in question as individual “cases”. As Fraser⁸³ explains:

“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”.

Judicial interpretations of social rights can powerfully shape political discourse and administrative practice in both these dimensions. Brand⁸⁴ 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.”

Brand⁸⁵ has illustrated how adjudication of social rights in the South African courts has the potential both to reinforce and counter privatisation discourses around needs, and to deepen or erode participatory democracy. 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,⁸⁶ accepting without much analysis the existing budget allocation for the provincial health department of KwaZulu-Natal as the appropriate framework for analysing the claim. The injustice that money can purchase the needed treatment in the private health sector is portrayed as a “hard and unpalatable fact”.⁸⁷ The State is not required to

⁸³ *Unruly Practices* 174.

⁸⁴ The “Politics of Need Interpretation” and the Adjudication of Socio-Economic Rights Claims in South Africa in 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 Wilson “Taming the Constitution: Rights and Reform in the South African System” 2004 *SAJHR* 418; 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.

⁸⁵ “Politics of Need Interpretation”. 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; Mahlale 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 v Treatment Action Campaign (1)* 2002 10 BCLR 1033 (CC) par 123).

⁸⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) pars 24-29.

⁸⁷ “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 limited and the appellant does not meet the criteria for admission to the renal dialysis programme.” (par 31).

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.⁸⁸

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.⁸⁹ 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.⁹⁰ 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.⁹¹ As Fraser⁹² 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". 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".⁹³

⁸⁸ 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. See "*Politics of Need Interpretation*" 31-33.

⁸⁹ 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". See Fraser *Unruly Practices* 164.

⁹⁰ See, eg, Pillay "Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights" 2002 *LDD* 255.

⁹¹ Eg, 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, eg, 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, eg, *Minister of Health v Treatment Action Campaign (1)* 2002 10 BCLR 1033 (CC) par 129.

⁹² *Unruly Practices* 175.

⁹³ *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 fashioned for them in expert discourses and transform them into a basis for collective political action." (180-181).

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, Haysom⁹⁴ 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.”

Fraser⁹⁵ 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”. Thus they can help to transform a formalist conception of classic liberal rights into substantive rights.⁹⁶ 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.⁹⁷ 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 inter-relatedness 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.⁹⁸ In this context, the courts can serve as a forum for highlighting the needs of those marginalised in official political processes and thereby enhance democratic participation in the meeting of socio-economic needs.⁹⁹

But if social rights are to make a meaningful contribution to

⁹⁴ “Constitutionalism, Majoritarian Democracy and Socio-economic Rights” 1992 *SAJHR* 451 461.

⁹⁵ *Unruly Practices* 183.

⁹⁶ Fraser *Unruly Practices* 183.

⁹⁷ See, eg, the *Grootboom* case pars 23 44; the *TAC* case par 78; *Khosa v Minister of Social Development; Mahlale v Min of Social Development* 2004 6 BCLR 569 (CC) pars 49 52.

⁹⁸ As we have seen, Fraser *Redistribution* 43-44 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.”

⁹⁹ Williams “Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis” 2005 *SAJHR* 16.

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 — *Sobramoney*, *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.¹⁰⁰ The Court rejected an interpretation of socio-economic rights that would “give rise to a self-standing and independent positive right enforceable irrespective of the considerations in the second subsections of sections 26 and 27”.¹⁰¹ Thus the extent of the State's positive duties is qualified by the following three key elements:

- the obligation to “take reasonable legislative and other measures”;
- “to achieve the progressive realisation” of the right, and

¹⁰⁰ 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.” See General Comment No 3 (Fifth session 1990) *The Nature of States' Parties Obligations (art 2(1) of the Covenant)* UN doc E/1991/23 par 10. For an application of this concept in the context of the specific rights protected in the Covenant, see General Comment No 12 (Twentieth session 1999) *The Right to Adequate Food (art 11 of the Covenant)* UN doc E/2000/22 par 17; General Comment No 14 (Twenty-second session 2000) *The Right to the Highest Attainable Standard of Health (art 12 of the Covenant)* UN doc E/C12/2000/4 pars 43-47; General Comment No 15 (Twenty-ninth session) *The Right to Water (art 11 and 12 of the Covenant)* UN doc E/C12/2002/11 pars 37-38.

¹⁰¹ *TAC* case par 39.

- “within available resources”.¹⁰²

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.¹⁰³ Secondly, 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”.¹⁰⁴ Finally, the Court held that the minimum core was incompatible with the institutional competencies and role of the courts.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ The Court is careful to emphasise that 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”.¹⁰⁸ The reasonableness of government social policy is assessed 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.¹⁰⁹ 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 “poor are particularly vulnerable and their needs

¹⁰² *Grootboom* case par 38.

¹⁰³ *Grootboom* case pars 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”. (par 33).

¹⁰⁴ *TAC* case par 35.

¹⁰⁵ 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* case par 37).

¹⁰⁶ *Grootboom* case par 33; *TAC* case par 34.

¹⁰⁷ See *Grootboom* case par 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 Brand *The Proceduralisation of South African Socio-economic Rights Jurisprudence or “What are Socio-Economic Rights For?”* in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy* 33.

See also Brand *The Racy in a Transformative Constitution* (2004) 33 39-43.

¹⁰⁸ *Grootboom* case par 41.

¹⁰⁹ *Grootboom* case par 43.

require special attention”.¹¹⁰ 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 the *Grootboom* case:¹¹¹

“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.”

The standard of reasonableness review requires that government programmes make some reasonable short-term provision for those whose socio-economic circumstances are urgent or intolerable. In the *Grootboom* case the lack of a programme catering for immediate housing needs was held to be unreasonable and thus inconsistent with section 26.¹¹² In the *TAC* case,¹¹³ 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” from poor women and their newborn babies in the public health sector.¹¹⁴ 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”.¹¹⁵

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 the *Grootboom* case, the Court confined itself to a declaratory order¹¹⁶ whereas in the *TAC* case, the Court granted far-reaching mandatory relief requiring government to provide Nevirapine and extend testing and counselling facilities at hospitals and clinics

¹¹⁰ *Grootboom* case par 36. See also *TAC* case par 70: “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.”

¹¹¹ Par 44 (emphasis added).

¹¹² “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.” (par 52).

¹¹³ Par 73.

¹¹⁴ *TAC* case par 125: “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.”

¹¹⁵ *TAC* case par 125.

¹¹⁶ *Grootboom* case par 99.

throughout the public health sector for the purpose of reducing the risk of mother-to-child transmission of HIV.¹¹⁷ 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.¹¹⁸

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*.¹¹⁹ The case concerned two challenges to the validity of social assistance legislation which restricted eligibility for social grants to South African citizens.¹²⁰ 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 (section 27) and the right against unfair discrimination (section 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 section 28(1)(c) of the Constitution.¹²¹

In its analysis of the reasonableness of the legislative scheme in terms of section 27(2), the Court closely scrutinised and found unconvincing the financial considerations presented by the State for limiting access to social grants to citizens.¹²² The Court also rejected the State’s reasoning that the exclusion of permanent residents from social grants was 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*”.¹²³ There were other less drastic methods for reducing the risk of permanent

¹¹⁷ *TAC* case par 135.

¹¹⁸ *Grootboom* case par 95: “Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand”; *TAC* case par 34: “the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them”. See also *TAC* case par 39; *Jaftha* case pars 32-33 (distinguishing negative and positive duties).

¹¹⁹ 2004 6 BCLR 569 (CC).

¹²⁰ The relevant legislation was the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997.

¹²¹ *Khosa* case par 78.

¹²² 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”. (par 62).

¹²³ *Khosa* case par 65 (emphasis added).

residents becoming “a burden” to the State than excluding them from gaining access to social assistance.¹²⁴ The application of a proportionality test in this assessment of the 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.¹²⁵

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.¹²⁶ Having found violations of sections 9 and 27, the Court acknowledged the difficulty of applying a limitations clause analysis to the socio-economic rights in sections 26 and 27.¹²⁷ It held that it was not necessary to decide whether a different threshold of reasonableness was required in relation to section 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”.¹²⁸ The Court granted the strong remedy of reading permanent residents into the eligibility requirements of the legislation.¹²⁹

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.¹³⁰

The Constitutional Court has characterised these situations as violations of the *negative* duties imposed by social rights.¹³¹ They have mostly arisen in the context of the eviction of people from their homes, reinforced by the explicit guarantee in section 26(3).¹³² Much of the jurisprudence has concerned the interpretation of key pieces of legislation enacted to give effect to section 26(3), particularly the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).¹³³

¹²⁴ *Khosa* case pars 64-65.

¹²⁵ *Khosa* case par 82.

¹²⁶ *Khosa* case par 44: “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.” See also par 49.

¹²⁷ *Khosa* case par 83.

¹²⁸ *Khosa* case par 84.

¹²⁹ *Khosa* case pars 86-89; Order (par 98).

¹³⁰ *Jaftha* case par 34.

¹³¹ *Grootboom* case par 34; *TAC* case par 46.

¹³² S 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.”

¹³³ The 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).

The leading decision on the interpretation of the PIE is that of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*.¹³⁴ The judgment illuminates how the PIE must be interpreted to promote the purposes and values behind section 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 section 26(3) acknowledges that the “eviction of people living in informal settlements may take place, even if it results in loss of a home”.¹³⁵ 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”.¹³⁶ Thus, in order to satisfy a court that it 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.¹³⁷ 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”.¹³⁸ 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.¹³⁹ Their role instead is to find a just and equitable solution in the context of the specific factors relevant in each particular case. The *PE Municipality* case 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.¹⁴⁰ 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.¹⁴¹

¹³⁴ 2004 12 BCLR 1268 (CC)

¹³⁵ *PE Municipality* case par 21.

¹³⁶ *PE Municipality* case par 28.

¹³⁷ *PE Municipality* case par 29: 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”.

¹³⁸ *PE Municipality* case pars 39-47.

¹³⁹ *PE Municipality* case par 23.

¹⁴⁰ *PE Municipality* case par 26.

¹⁴¹ *PE Municipality* case par 58.

The recent decision of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*¹⁴² 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 the PIE against a community occupying his land. At the time of the landowner's attempted execution order, it was estimated that the community numbered approximately 40 000, of whom roughly a third were alleged to be illegal immigrants.¹⁴³ The owner was confronted by a demand from the sheriff of the 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 failed to get various organs of State to assist him in enforcing the eviction order, 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 section 25) or the housing rights of the occupiers (section 26).¹⁴⁴ 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 section 34 of the Constitution.¹⁴⁵ 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".¹⁴⁶ Land invasions should always be discouraged.¹⁴⁷ 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".¹⁴⁸ 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".¹⁴⁹

The Court's decision in *Jaftha v Schoeman; Van Rooyen v Stoltz*¹⁵⁰ 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

¹⁴² 2005 8 BCLR 786 (CC).

¹⁴³ Par 9.

¹⁴⁴ Par 26. This is in contrast with the SCA judgement in the case *President of the Republic of the Republic of South Africa 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.

¹⁴⁵ Pars 43-51.

¹⁴⁶ Par 49.

¹⁴⁷ Par 49.

¹⁴⁸ Par 49.

¹⁴⁹ Par 68, Order par 3(c).

¹⁵⁰ 2005 1 BCLR 78 (CC).

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 (for example for 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.¹⁵¹ The High Court 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), the PIE would be applicable to the eviction proceedings brought by the purchaser. The 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.¹⁵²

The Constitutional Court, on the other hand, characterised the provisions of the Act as authorising a negative violation of section 26(1) in that it permitted "a person to be deprived of existing access to adequate housing".¹⁵³ 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 (section 36), including the requirement of law of general application.¹⁵⁴ The Court expressly did not elaborate on the circumstances which would constitute a violation of the negative duties imposed by the Constitution.¹⁵⁵

The Court found no justification for the overbroad provisions of the Magistrate's Court Act in terms of the general limitations clause.¹⁵⁶ 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".¹⁵⁷ 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":

¹⁵¹ Par 12.

¹⁵² Par 32.

¹⁵³ Pars 31-34.

¹⁵⁴ 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)).

¹⁵⁵ *Jaftha* case par 34.

¹⁵⁶ Pars 35-51.

¹⁵⁷ Pars 52-67.

“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.”¹⁵⁸

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”.¹⁵⁹ 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.

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.¹⁶⁰ 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.¹⁶¹ The Court’s reluctance to recognise direct individual positive rights discourages social rights claiming.¹⁶² The bifurcated structure of review for negative and positive obligations endorsed by the Court in the *Jaftha* case 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.

¹⁵⁸ Par 56.

¹⁵⁹ Par 59.

¹⁶⁰ Liebenberg “South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?” 2002 6 *LDD* 159; *The Interpretation of Socio-economic Rights* in Chaskalson et al (eds) *Constitutional Law of South Africa* (2004) ch 33 particularly at 27-33.

¹⁶¹ 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 2002 6 *LDD* 177 187-188.

¹⁶² As Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise” 2000 *SAJHR* 206 254-255 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”.

It is important to recognise that reasonableness review can easily come to represent a very deferential standard of review. Davis¹⁶³ 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”. The danger is that reasonableness review becomes a proxy for the courts endorsing the State’s own views about the justifiability of its policies.¹⁶⁴

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.¹⁶⁵ Thus the Court held in the *Grootboom* case 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.¹⁶⁶ 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 (TAC) 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.¹⁶⁷ 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 the

¹⁶³ 2004 5 *ESR Review* 3 5. As Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 579 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.”

¹⁶⁴ See 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: “Providing Equality: Substantive Equality and the Positive Duty to Provide” 2005 *SAJHR* 163. Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” 2004 *SAJHR* 383 410-411 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 constitutional order”. Bilchitz “Towards a Reasonable Approach to the Minimum Core” 2003 *SAJHR* 9-10 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”.

¹⁶⁵ Liebenberg *Enforcing Positive Socio-economic Rights Claims: The South African Model of Reasonableness Review* in Squires, Langford and Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic Social and Cultural Rights* 2005 73.

¹⁶⁶ “Reasonableness must be determined on the facts of each case”: pars 43-44 92.

¹⁶⁷ See the account by Heywood of the 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.

Grootboom case and the mother-to-child transmission case in broad-based advocacy for a general anti-retroviral roll-out programme.¹⁶⁸

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.¹⁶⁹ Moreover, it may be applied a-contextually and without exploring the underlying factors which generate socio-economic inequalities and deprivations.¹⁷⁰ 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 explored how to achieve a stronger measure of protection for basic needs within the structure of reasonableness review.¹⁷¹ 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

¹⁶⁸ See, eg, 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

¹⁶⁹ Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 68-70, 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”.

¹⁷⁰ See the discussion concerning Fraser’s theory of “thin” needs *supra*.

¹⁷¹ Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” 2005 *SAJHR* 1.

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.¹⁷² 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 of injustices 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 J¹⁷³ describes the 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."

It is further important that the assessment of "reasonableness" in socio-economic rights cases be informed by the 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.¹⁷⁴ In the *Grootboom* case, 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.¹⁷⁵

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

¹⁷² 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)* par 53; *Minister of Finance v Van Heerden 2004 11 BCLR 1125 (CC)* pars 25-32. For a discussion of this convergence, see De Vos "Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 *SAJHR* 258.

¹⁷³ *PE Municipality* case par 38.

¹⁷⁴ *Grootboom* case par 45: "It means that accessibility should be progressively facilitated: legal, administrative, operational and financial burdens should be examined and, where possible, lowered over time."

¹⁷⁵ Par 45 citing with approval General Comment No 3 of the UN Committee on Economic, Social and Cultural Rights par 9 (emphasis added).

those formally employed through social insurance schemes,¹⁷⁶ and for the payment, from public funds, of social grants to certain targeted groups (children, the aged and those living with disabilities).¹⁷⁷ However, no social assistance is provided for children of fourteen years and older¹⁷⁸ and adults under 60 years (for women) and 65 years (for men) who live in poverty and are affected by long-term structural unemployment.¹⁷⁹ For this group (approximately 8.4 million people),¹⁸⁰ the right protected in section 27(1)(c) of the Constitution¹⁸¹ is largely illusory.¹⁸² It remains to 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.¹⁸³ 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

Secondly, 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. In this context, the court should overcome its reluctance to grant

¹⁷⁶ These include the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1992, the Unemployment Insurance Act 63 of 2001 and a large number of workplace pension fund schemes.

¹⁷⁷ These social grants are paid in terms of the Social Assistance Act 59 of 1992 which has recently been replaced by the Social Assistance Act 13 of 2004 (in force yet?).

¹⁷⁸ The definition of “a child” in s 28(3) of the Constitution is “a person under the age of 18 years”.

¹⁷⁹ See Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 2001 17 *SAJHR* 232.

¹⁸⁰ See 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.

¹⁸¹ S 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”.

¹⁸² 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 Social Assistance Act 13 of 2004, GN R162 in GG 27316 of 2005-02-22 items 9 14 15 and 23.

¹⁸³ General Comment No 14 par 43(f); General Comment No 15 par 37(f).

supervisory remedies in order to facilitate the long-term structural reforms required to realise socio-economic rights.¹⁸⁴ 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 the *Grootboom* case 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”¹⁸⁵

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.¹⁸⁶

5 3 A transformative discourse

Thirdly, 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 the *PE Municipality* case 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.¹⁸⁷ 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.

¹⁸⁴ On supervisory remedies in the context of socio-economic rights litigation, see 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 Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence” 2003 *SAJHR* 1 23-24; Pillay 2002 *LDD* 275-276; Heywood 2003 *SAJHR* 311-312.

¹⁸⁵ Par 44.

¹⁸⁶ In commenting on Michelman’s needs-based theories, Van der Walt *Frank Michelman’s Theory of Social Justice* 163 193 and also 198-199 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. On Michelman’s needs-based theory, see 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.

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 the *Khosa* case 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.¹⁸⁸ 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 public benefits present the extent to which poor people are treated as equal members of society.”¹⁸⁹

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 the *Modderklip* case:

“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.”¹⁹⁰

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 Brand¹⁹¹ 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.”

As the cases relating to the evictions and homelessness illustrate, social rights have contributed to deconstructing hierarchical and absolute notions

¹⁸⁷ Pars 8-23.

¹⁸⁸ Par 76.

¹⁸⁹ Par 74 (footnotes omitted).

¹⁹⁰ Par 36 (footnotes omitted).

¹⁹¹ *Introduction to Socio-economic Rights in the South African Constitution* (2005) 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, eg, the PIE. See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA) par 16: “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.” See also 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.

of property rights.¹⁹² 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.¹⁹³ In other areas, the courts have been less willing to transform common law rules in the light of socio-economic rights commitments.¹⁹⁴

Although, it is beyond the scope of this paper, the transformative 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.¹⁹⁵ 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.¹⁹⁶

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 "non-reformist 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.

¹⁹² See the following observation in *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) par 16 in relation to the provisions of the 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."

¹⁹³ Van der Walt "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Critical Evaluation of Recent Case Law" 2002 18 *SAJHR* 371.

¹⁹⁴ See, eg. *Brisley v Drotosky* 2002 4 SA 1 (SCA); *Afrox Healthcare (Pty) Ltd v Strydom* 2002 6 SA 21 (SCA); Brand *Introduction to Socio-economic Rights in the South African Constitution* in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1 41-42.

¹⁹⁵ Thus Fraser *Unruly Practices* 182 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." See also 164.

¹⁹⁶ For a discussion of the problems of judicial ideology and culture in the context of socio-economic rights adjudication, see Pieterse 2004 *SAJHR* 396-399.