

# TRANSFORMATIVE CONSTITUTIONALISM IN A DEMOCRATIC DEVELOPMENTAL STATE

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## 1 Introduction

Mass poverty in South Africa continues to present a considerable challenge in various forms. Notwithstanding ongoing debates about how best to describe and measure poverty, while poverty remains very widespread, the available data point to a reduction in extreme destitution in recent years. This is to a large extent due to the redistributive targeting and successful impact of a number of laws, policies and programmes aimed at addressing poverty and inequality implemented in the country since the demise of apartheid. The transformation from a racially-based, resource-biased society to an egalitarian one where all enjoy the aims, values and rights upheld in the Constitution of the Republic of South Africa, 1996 (“the Constitution” or “the South African Constitution”), requires a concerted effort by all institutional players to redress the material as well as the psycho-socio-political deficiencies that continue to inhibit the full enjoyment of our new democracy for approximately half the population.

This article commences with a discussion of the origin and evolution of the concept of transformative constitutionalism in South Africa and what it means for addressing poverty and inequality. The Constitution, and in particular the Bill of Rights, has a critical role to play in advancing poverty reduction through the courts, the legislature and the executive. The rights to life, equality, dignity, administrative justice and socio-economic rights are all instruments that can be sharpened further to tackle poverty and inequality and thereby transform our society.

The next part will discuss Amartya Sen’s analysis of the links between public reasoning, democracy and justice. Sen argues that the attainment of social justice, without public reasoning based on participatory and deliberative democratic models, is not possible. It will then examine the participatory and deliberative dimensions of democracy in the South African Constitution that support the transformation project.

In the final part I outline the political-economy underpinnings of the South African government’s historical and current policy responses to poverty reduction and inequality. The South African government’s discourse has

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shifted in the last five years from a welfare state approach to a democratic developmental state approach. Both welfare and developmental states aim at a more equitable redistribution of resources in society, but developmental states differ from welfare states mostly in the free market alliances between government and business, soft authoritarianism and a strong public sector bureaucracy. I argue that a shift to a *democratic* developmental state – as a transitional state – is necessary in order to achieve equitable socio-economic transformation in South Africa. The democratic developmental state emphasises the collaborative role of all players in society and the empowerment of the poor in the development project. Participation and empowerment are central means and ends in our transformative Constitution. There is a limit to what lawyers can say about models of the developmental state; however, lawyers can contribute to an understanding of the type of state that we need in order to realise the rights in the Constitution. Participatory democracy is the most powerful guarantee for the poor that their interests will not be disregarded.

## 2 Transformative constitutionalism and poverty

It is widely acknowledged that the South African Constitution is a progressive and transformative legal instrument.<sup>1</sup> As the supreme law, its purpose is to regulate public power and to frame “an objective, normative value system”<sup>2</sup> in a post-apartheid society. All law and conduct must conform to its provisions, failing which it is invalid.<sup>3</sup> This system of normative values seeks to fulfil a constitutional imperative to remedy South Africa’s past and “transform our society into one in which there will be human dignity, freedom and equality”.<sup>4</sup> This is vividly expressed in the Preamble to the Constitution, and then in section 7(1),<sup>5</sup> in the Bill of Rights (Chapter 2), and throughout the Constitution. The Bill of Rights binds the legislature, the executive, the judiciary, all organs of state, and, where applicable, a natural or juristic person.<sup>6</sup>

<sup>1</sup> KE Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146, where the term “transformative constitutionalism” was first coined. See discussion of the “transformative” vision of the Constitution in C Albertyn & B Goldblatt “Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 *SAJHR* 248; AJ van der Walt “Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in the Social Transformation Decisions of the Constitutional Court” (2001) 16 *SAPL* 1 1-27; D Moseneke “The Fourth Bram Fischer Memorial Lecture: Transforming Adjudication” (2002) 18 *SAJHR* 309; H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003); H Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 2)” (2003) *TSAR* 20 20-36; M Pieterse “What Do We Mean When We Talk about Transformative Constitutionalism?” (2005) 20 *SAPL* 155 155-166; AJ van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” (2006) 12 *Fundamina* 1 1-47; S Liebenberg “Needs, Rights and Transformation: Adjudicating Social Rights” (2006) 17 *Stell LR* 5 5-36; P Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351 351-360; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 23-78

<sup>2</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54

<sup>3</sup> S 2 of the Constitution

<sup>4</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8. See also Liebenberg *Socio-Economic Rights* 25-28

<sup>5</sup> S 7(1) of the Constitution states:

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

<sup>6</sup> S 8 of the Constitution

The South African Constitution embraces notions of participatory democracy, social, and economic equality, protection of culture, openness, and transparency. As Karl Klare points out in his seminal article:

“[T]he South African Constitution, in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.”<sup>7</sup>

His was the first explicit characterisation of the South African Constitution as transformative, from a political, economic and social perspective. This view of the Constitution took hold firmly and has been quoted many times in academic literature<sup>8</sup> and court judgments.<sup>9</sup> The transformative nature of the Constitution provides a legal normative framework, which will guide “the redress of the injustices of the past as well as to facilitate the creation of a more just society in the future”.<sup>10</sup>

Klare described the South African Constitution as a “transformative” project in the following terms:

“[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. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”<sup>11</sup>

Marius Pieterse describes the South African Constitution as an essentially social-democratic model, quite distinct from the traditional, liberal model of constitutionalism, and links this understanding to at least three critical aspects, which make the Constitution transformative.<sup>12</sup>

Firstly, the South African Constitution mandates the achievement of substantive equality and social justice through the provisions of sections 9, 26, 27, 28 and 29. Section 9 of the Constitution incorporates the concept of substantive equality, which involves a contextual, group-based approach to discrimination and domination and requires remedial measures designed to rectify the destructive effects of entrenched structures of past oppression. The achievement of substantive equality also necessitates that the material consequences of social and economic subjugation be addressed.<sup>13</sup> These ends are further supported by the inclusion of justiciable civil, political *and* socio-

<sup>7</sup> Klare (1998) *SAJHR* 153 (footnotes omitted)

<sup>8</sup> See Liebenberg *Socio-Economic Rights* 23-78

<sup>9</sup> See *S v Makwanyane* 1995 3 SA 391 (CC) para 262; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 73-74; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 51-52; *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C) para 100; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 343-344, 360; and *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 77

<sup>10</sup> Liebenberg *Socio-Economic Rights* 25

<sup>11</sup> Klare (1998) *SAJHR* 150

<sup>12</sup> For a summary of the literature on the meaning of “transformative constitutionalism” see Pieterse (2005) *SAPL* 156

<sup>13</sup> Pieterse (2005) *SAPL* 160; Albertyn & Goldblatt (1998) *SAJHR* 250-251, 253; Moseneke (2002) *SAJHR* 318-319; S Liebenberg & M O’Sullivan “South Africa’s New Equality Legislation: A Tool for Advancing Women’s Socio-Economic Equality?” (2001) *Acta Juridica* 73 81

economic rights in the Bill of Rights.<sup>14</sup> This embodies recognition that full transformation from an apartheid society requires both a reconfiguration of the legal-political structures that upheld it, as well as the transformation of the devastating social and economic consequences of its policies and laws. The overwhelming levels of poverty still felt to a disproportionate extent by those discriminated against during apartheid, will undermine the transformation project if not addressed.

Socio-economic rights have been increasingly used as a tool in litigation and in monitoring and advocacy related to the government's obligations to secure for all members of society a set of social goods – education, social security, health care, food, water, shelter, access to land and housing. Justiciable socio-economic rights assist in monitoring the state's progressive realisation of its constitutional obligations to the poor, and ultimately holding the state accountable to these obligations.

Secondly, the achievement of political and socio-economic transformation requires a “collaborative enterprise”. The legislature, the executive, the judiciary and all organs of state are all bound by the Bill of Rights and are obliged to “respect, protect, promote and fulfil” its mandates.<sup>15</sup> This collaborative enterprise is not only an obligation upon the state, but also upon non-state actors.<sup>16</sup>

Finally, linked to this is the fostering of a “culture of justification”<sup>17</sup> for every exercise of public power, where public power is kept in check for compliance with human rights standards as essential for the transformative project.<sup>18</sup> Pieterse argues that this is starkly provided for in section 36 of the Constitution,<sup>19</sup> which determines that rights may only be limited by laws that are reasonable and justifiable in “an open and democratic society based on human dignity, equality and freedom”. It can also be derived from reasonableness review in sections 26(2) and 27(2), which requires an “exercise in proportionality informed by a proper analysis of the normative commitments of the relevant rights and the impact of the deprivation of the particular resource or service at issue on the claimant group”.<sup>20</sup> The rights of access to information (section 32) and just administrative action (section 33) similarly play a critical role in societal transformation in that they seek to keep a check on public power by providing citizens with the information and procedural and substantive protection required for empowerment and autonomy of the poor and vulnerable in our society. The right to just administrative action is an increasingly constructive and transformative tool, for the assessment and enforcement of efforts to address poverty and

<sup>14</sup> Ss 26-29 of the Constitution protect the rights to housing, health care, food, water, social security and education, as well as the rights of children to “basic nutrition, shelter, basic health care services and social services” (s 28(1)(c))

<sup>15</sup> Ss 7(2) and 8(1) of the Constitution

<sup>16</sup> S 8(3) and (4) S 39(2)

<sup>17</sup> See E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31 32

<sup>18</sup> Pieterse (2005) *SAPL* 161, 163

<sup>19</sup> 163

<sup>20</sup> Liebenberg *Socio-Economic Rights* 198

inequality. It focuses on the implementation of legislation<sup>21</sup> based on the broad, overarching requirements of lawfulness, procedural fairness and reasonableness – elements which require a “culture of justification” when rights are at risk.<sup>22</sup> The reasonableness component of administrative justice, in particular, insists on *substantive justification* for all public action.<sup>23</sup>

Finally, Danie Brand<sup>24</sup> draws a distinction between two understandings of transformative constitutionalism among legal commentators: the first explains transformation as the “achievement of certain tangible results or outcomes”<sup>25</sup> such as the reduction of poverty, through adjudication; the second “refers to the radical change of the institutions and systems that produce results themselves”.<sup>26</sup>

In this article, I embrace both of the above understandings of transformative constitutionalism. I assert that the courts should aspire to contribute to a reduction in poverty in material terms, while at the same time using its adjudicatory powers and powers of judicial review to examine and influence “the systems and institutions themselves” in terms of “their processes” and “modes of reasoning”. The participatory and empowerment elements of achieving social justice require a more modest and less quantifiable – but no less important – account of the role of institutions in facilitating socio-economic transformation.

### 3 Participatory democracy and social justice

Sen asserts that the attainment of social justice, without public reasoning based on participatory and deliberative democratic models, is not possible.<sup>27</sup> Democracy in the South African Constitution can be characterised as representative, participatory and direct.<sup>28</sup> The *participatory* provisions that support the transformation project are: public participation in legislative

<sup>21</sup> Administrative justice deals with implementation of legislation rather than policy directly – ie only implementation of the legislature’s translation of policy into law. See the exclusion of s 85(2)(b) of the Constitution from the definition of administrative action in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

<sup>22</sup> Note that s 33(2) of the Constitution includes the right to be given reasons for administrative action, in circumstances where rights have been adversely affected.

<sup>23</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 44-45; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) paras 187-188.

<sup>24</sup> D Brand *Courts, Socio-Economic Rights and Transformative Politics* LLD thesis Stellenbosch (2009) 2-3.

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<sup>26</sup> 4 and n 12-15. See Nancy Fraser’s distinction between “affirmative” and “transformative” redistribution in N Fraser “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation” in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 7 45-46.

<sup>27</sup> See generally A Sen *The Idea of Justice* (2009).

<sup>28</sup> For a discussion of the conceptions of democracy in the South African Constitution, see I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 13; T Roux “Democracy” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 10-1-10-77. See also G Quinot “Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right” (2009) 25 *SAJHR* 392, 397-399 on participatory democracy; and Liebenberg *Socio-Economic Rights* 28-34 on deliberative democracy.

processes,<sup>29</sup> in the public administration,<sup>30</sup> just administrative action,<sup>31</sup> and socio-economic rights.<sup>32</sup> I argue here, that the vision of participatory democracy laid down in our Constitution is necessary to facilitate the transformation of South African society into one “based on democratic values, social justice and fundamental human rights”,<sup>33</sup> and thus to holistically ameliorate the lives of the poor and marginalised members of our society. This model requires vigorous discussion, debate and activism in the process of transformation and responsiveness “to the inequalities and material deprivation that prevent certain groups from participating as equals in the creation of a new society”.<sup>34</sup> I argue that this theory explains the work that rights in a transformative constitution are able to do for the poor and marginalised, alongside the conception of the role of the state and its citizens in a *democratic* developmental state.

### 3 1 Theoretical dimensions of participatory democracy

In Sen’s *The Idea of Justice*, he states that the institutional structure of the contemporary practice of democracy hails largely from the experience of Europe and America over the last few centuries.<sup>35</sup> He remarks that these institutional forms have been ultimately effective. However, he is at pains to point out that while democracy in its current institutionally elaborate form may be quite new and Western-centred, *participatory governance* in practice has a much wider and longer history in the world.<sup>36</sup> He states that in fact the practice of elections has a long history in non-Western societies, as does “the broader view of democracy in terms of *public reasoning* that makes it abundantly clear that the cultural critique of democracy as a purely regional phenomenon fails altogether”.<sup>37</sup>

He goes on to give the example of Nelson Mandela’s autobiography, *Long Walk to Freedom*, where Mandela describes how impressed and influenced he was, as a young boy, by seeing the democratic nature of the proceedings of the local meetings that were held in the regent’s house in Mqhekezweni:

“Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and

<sup>29</sup> Ss 57, 59, 70, 72, 74, 116, 118, 160 of the Constitution

<sup>30</sup> S 195(1)(e)

<sup>31</sup> S 33

<sup>32</sup> Ss 25-29 The Constitutional Court has interpreted particular socio-economic rights to include participatory elements, most notably in eviction cases where “meaningful engagement” with affected parties has been read into s 26 See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 39, 42; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 9-18; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 167, 237-244; *Abahlali Basemjondolo Movement SA v Premier, KwaZulu-Natal* 2010 2 BCLR 99 (CC) paras 113-114

<sup>33</sup> Preamble to the Constitution

<sup>34</sup> Liebenberg *Socio-Economic Rights* 34

<sup>35</sup> Sen *Idea of Justice* 322-354 On the institutional history of democracy, see also generally J Dunn *Democracy: A History* (2005)

<sup>36</sup> Sen *Idea of Justice* 323

<sup>37</sup> 330-331 (emphasis added)

medicine man, shopkeeper and farmer, landowner and labourer ... The foundation of self-government was that all men were free to voice their opinions and equal in their value as citizens.”<sup>38</sup>

As Sen highlights, Mandela’s understanding of democracy was not rooted in the political practice that he saw around him during the reign of apartheid based on a European system, but on his general ideas about political and social equality, which had global roots, and from his observations of the practice of participatory public discussion that he found in his local town.<sup>39</sup>

This recognition, argues Sen, points to a connection between the idea of justice and the practice of democracy. In contemporary political philosophy the view that democracy is best seen as “government by discussion” has gained widespread support.<sup>40</sup> This contemporary view of democracy has broadened considerably, so that democracy is no longer seen just in terms of public balloting, but in terms of what John Rawls calls the “exercise of public reason”.<sup>41</sup>

While there are differences among contemporary democracy theorists about the role of public reasoning in politics, these distinctions are not critical to the argument here. What is important to note, is that these contributions have elevated the central issues in a broader understanding of democracy as being political participation, dialogue and public interaction. Sen argues that the vital role of public reasoning in the practice of democracy makes the entire subject of democracy relate closely with notions of justice. He thus reasons that since the “demands of justice” must be assessed with the help of public reasoning, and public reasoning is constitutively related to the idea of democracy, there is a direct connection between justice and democracy.<sup>42</sup> The value of this broadened form of democracy, he explains, is firstly the ability to make people take an interest, through public discussion, in each other’s predicaments, and to have a better understanding of the lives of others. The second concerns the informational role of democracy which goes beyond its incentive functions, to improved policy-making.

His argument, based on global evidence, is that democracy and political and civil rights tend to enhance freedoms of other kinds (such as human security) through giving a voice to the marginalised and vulnerable on important policy

<sup>38</sup> 330-331; N Mandela *Long Walk to Freedom* (1994) 21 See the concept of “participatory parity” in Fraser “Social Justice in the Age of Identity Politics” in *Redistribution or Recognition?* 730-731 She posits that a prerequisite for justice are social conditions that enable people to engage with one another as peers. For “participatory parity” to exist, “it is necessary but not sufficient to establish standard forms of formal legal equality” (31) She highlights two additional conditions that must be satisfied: the first requires that material resources be distributed across society in such a way as “to ensure participants” independence and “voice”; the second requires that “institutionalised cultural patterns of interpretation and evaluation express equal respect for all participants and ensure equal opportunity for achieving social esteem” (26)

<sup>39</sup> Sen *Idea of Justice* 332

<sup>40</sup> 324

<sup>41</sup> 324 See J Rawls *A Theory of Justice* (1971); J Rawls *Political Liberalism* (1993); J Rawls *Collected Papers* (1999) 579-580 See also proponents of deliberative democracy referred to in Sen *Idea of Justice* 324-326, in particular J Habermas “Three Normative Models of Democracy” in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 21 21-30 See further the discussion in Liebenberg *Socio-Economic Rights* 28-34 on deliberative democracy

<sup>42</sup> Sen *Idea of Justice* 324

issues, and thereby influencing greatly their developmental outcomes.<sup>43</sup> He provides examples of areas where social change has been brought about as a result of a “determined use of political and social voice”,<sup>44</sup> such as the feminist revolution and achievement of gender equality in certain instances. This mounting action in organised movements is based broadly on demands for human rights, such as the right to education, food, basic healthcare, environmental preservation and employment. Sen says that these movements raise awareness of particular societal failures, in addition to public debates in the media, by providing “a politically harder edge to socially important demands”.<sup>45</sup>

Democratic freedom can thus be used to improve social justice and a better and fairer politics. However, the process is not ingrained and requires engagement and activism both by those affected by injustice, poverty and marginalisation, as well as those who contribute intellectually to the transformation of society, such as the legal fraternity, academics and the media.<sup>46</sup>

This leads us to the distinction between participatory democracy<sup>47</sup> and deliberative democracy.<sup>48</sup> As explained by the chief theoretical exponent of participatory democracy, Carole Pateman:

“The existence of representative institutions at national level is not sufficient for democracy; for maximum participation by all the people at the level socialisation, or ‘social training’, for democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed. This development takes place through the process of participation itself. The major function of participation in the theory of participatory democracy is therefore an educative

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<sup>43</sup> 348

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<sup>46</sup> 351 For example, the current sweep of protest action against financial greed and corruption under the banner of “Occupy Wall Street” (“OWS”) that began in New York City and has spread around the world. See *Occupy Wall Street* <<http://www.occupywallstreet.org>> (accessed 14-10-2011). Their web-site states that the OWS demonstrations are emulating the tactics of the revolutionary “Arab Spring”, which is an example of participatory democracy overturning authoritarianism in African states.

<sup>47</sup> See Roux “Democracy” in *CLOSA* 10-14 - 10-15; Quinot (2009) *SAJHR* 397-399. For a more detailed examination of participatory democracy, see C Pateman *Participation and Democratic Theory* (1970) 22-44; D Held *Models of Democracy* 3 ed (2006) 209-216; F Cunningham *Theories of Democracy: A Critical Introduction* (2002) 123-141.

<sup>48</sup> Roux “Democracy” in *CLOSA* 10-15 - 10-18 elaborates further on the contemporary accounts of democracy found in the Constitution and distinguishes between deliberative democracy and participatory democracy, although they are both closely aligned to the model of direct democracy. He explains that “deliberative democracy and participatory democracy are superficially similar since both can be seen as a reaction against the tendency of modern representative democracies to produce passive citizens, whose power to control their elected representatives is reduced to their right to participate in periodic elections” (10-17).

He goes on to explain that the difference between these two forms of democracy, however, is that for theorists of deliberative democracy “a particular form of participation – deliberation – may legitimate collective decisions even in the presence of fundamental moral disagreement” (10-17) while participatory democracy in contrast, assumes “that sufficient, or the right kind of, participation, will eventually produce agreement between citizens on a single right decision most conformable with the public interest” (10-17).

one, educative in the very widest sense, including both the psychological aspect and the gaining of practice in democratic skills and procedures.”<sup>49</sup>

David Held describes participatory democracy as part of the same model as direct democracy, since they both stress the value of citizen participation in the making of collective decisions.<sup>50</sup> In contemporary terms, Theunis Roux explains participatory democracy as “an attempt to re-inject elements of direct democracy into modern systems of representative democracy”.<sup>51</sup> Participatory democracy is thus, in this sense, “essentially about the question whether, and if so, how, citizens should be given the right to participate in the making of decisions that affect them, notwithstanding the fact that the basic form of political organisation in the modern nation-state is, and is likely to remain, representative democracy”.<sup>52</sup> As Held also notes, proponents of these models “often emphasise ... as vital for the transformation of politics [that] ... the state must be democratised by making parliament, state bureaucracies and political parties more open and accountable”.<sup>53</sup>

### 3.2 Participatory democracy in the South African Constitution

The South African Constitution is said to recognise three forms of democracy: representative democracy, participatory democracy and direct democracy. There are minimal manifestations of direct democracy in the Constitution: the right to freedom of assembly (section 17), the provision for the holding of referenda and a greater degree of citizen participation in local government (section 152(1)(e)). All formal legislative and policy-making bodies are representative. I argue here that at the heart of South Africa’s transformative Constitution lies a *participatory* democratic culture that is integral to the achievement of social justice and development for all. This is evident both in the legal text of the Constitution and the judgments of the

<sup>49</sup> Pateman *Participation and Democratic Theory* 42. According to CB Macpherson, the “circular” problem with the approach of participatory democracy is that the two “virtues” of participation, that of promoting a more active citizenry and reducing poverty and inequality, “are also its prerequisites”. See CB Macpherson *The Life and Times of Liberal Democracy* (1977) 99-100, quoted in Roux “Democracy” in *CLOSA* 10-15. In relation to the well-known “circularity problem” of justice as democratic participation also see Liebenberg *Socio-Economic Rights* 32 (and sources cited by her in n 40-42). Fraser “Social Justice in the Age of Identity Politics” in *Redistribution or Recognition?* 44, argues that this circularity is not vicious but reflects the nature of justice from a democratic perspective, and that the solution to the problem is rather to focus on “changing social reality”.

<sup>50</sup> Held *Models of Democracy* 210; Pateman *Participation and Democratic Theory* 42; Quinot (2009) *SAJHR* 397. Roux “Democracy” in *CLOSA* 10-9 defines direct democracy as:

“a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives ... [S]uch a system has only ever existed in its pure form in the ancient city-state of Athens and certain other isolated and relatively short-lived polities ... It is also possible for direct democracy to be implemented in subsidiary institutions within an over-arching system of representative democracy”

<sup>51</sup> Roux “Democracy” in *CLOSA* 10-14

<sup>52</sup> 10-14

<sup>53</sup> Held *Models of Democracy* 211, quoted in Quinot (2009) *SAJHR* 397

Constitutional Court over the past fifteen years,<sup>54</sup> as well as in the culture of social, economic and political activism and debate that has emerged out of democracy in South Africa.

The realm of public debate and activism around issues of poverty, inequality and development in South Africa spans the work of research organisations, trade unions, civil society organisations, the media, and academia; and is vividly expressed in the service delivery protests of poor communities and demonstrations of mass movements. All of this exchange has contributed to an ongoing policy debate in the country concerning government's macro-economic and distributional policies.<sup>55</sup> As Sandra Liebenberg writes:

“Active debate and contestation concerning the nature of social change, and the political and legal reforms necessary for achieving it, should not be viewed as antithetical to transformation, but rather as integral to its achievement.”<sup>56</sup>

This is the notion of participatory democracy of which deliberative democracy is a significant component, discussed by Sen above, that will aid in the transformation of the current *status quo* and achievement of a more just society. Deliberative democracy can contribute to making participatory democracy more meaningful, where all actors/participants are open to changing their views and there are no fixed or pre-conceived policy positions.

Besides the value of general discussion and debate in the public arena, public participation in the processes of government is also an integral part of our Constitutional democracy. One of the founding constitutional values is a multi-party system of democratic government based on accountability, responsiveness and openness.<sup>57</sup> The Constitution expressly provides for public access to and participation in legislative processes,<sup>58</sup> as well as the executive processes by providing that among the “basic values and principles governing public administration”<sup>59</sup> is that “people’s needs must be responded to, and the public must be encouraged to participate in policy-making”.<sup>60</sup> The Constitutional Court has in several cases underscored the centrality of participatory democracy to the achievement of constitutional goals and

<sup>54</sup> Cases dealing with participatory democracy that have come before the courts include: *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC); *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC); *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC)

<sup>55</sup> See part 4 below on the conception of the South African democratic developmental state

<sup>56</sup> Liebenberg *Socio-Economic Rights* 29

<sup>57</sup> S 1(d) of the Constitution

<sup>58</sup> Ss 57, 59, 70, 72, 74, 116, 118, 160

<sup>59</sup> S 195

<sup>60</sup> S 195(1)(e) Ss 50 and 51 of the Municipal Systems Act No 32 of 2000 affirm the application of the constitutional principles governing public administration to the provision of municipal services

values,<sup>61</sup> the necessity of this participation for purposes of informed decision-making<sup>62</sup> and affirmed the duty of the state to take positive measures to ensure that the public has the effective capacity and opportunity to participate in decision-making processes.<sup>63</sup> In particular, it has highlighted the need to listen to the voices of the poor and marginalised in society.<sup>64</sup>

The Constitutional Court has affirmed that the participation of the poor in the determination of their access to benefits and services serves the values of dignity and freedom as well as gives substance to the deliberative and participatory democracy envisaged in the Constitution.<sup>65</sup> As Liebenberg states:

“A major factor contributing to a sense of powerlessness and lack of autonomy is the absence of the opportunity to voice our concerns in relation to decisions which have a major impact on our lives. Meaningful participation in decisions that affect our lives affirms the close relationship between freedom and human dignity ... It not only gives people a sense of control over their lives, but it affirms their equal worth as members of a political society ... Participation in public and private processes of decision-making is not only an affirmation of individual dignity and freedom, but gives substance to a participatory and deliberative concept of democracy. This is the best reading of the value of accountable, responsive and open democracy in the Constitution.”<sup>66</sup>

Most recently, a number of cases have gone before the courts in relation to administrative justice<sup>67</sup> and access to material benefits, which have asserted the importance of the participation of those affected by the decisions. These cases have affirmed the importance of administrative justice rights of affected persons in relation to the rights of access to housing,<sup>68</sup> water,<sup>69</sup> education,<sup>70</sup>

<sup>61</sup> In *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 181, the Constitutional Court elaborated upon the goals and values of the Constitution in relation to democracy and participation:

“[I]t is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making”

See also *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 121; *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 40

<sup>62</sup> *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 33

<sup>63</sup> See *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 108, 112-117

<sup>64</sup> Para 115

<sup>65</sup> See paras 115, 234; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 627

<sup>66</sup> Liebenberg *Socio-Economic Rights* 167-168

<sup>67</sup> In cases where a determination of what constitutes “administrative action” has had to be made, and where executive public power falls outside the strict definition of “administrative action”, the courts have still insisted that the executive must abide by the values of accountability, responsiveness and openness in a participatory constitutional democracy. See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC)

<sup>68</sup> See *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (right to procedural fairness when electricity supply disconnected by municipality); and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) (right to sanitation).

<sup>69</sup> See *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* 2010 4 SA 1 (CC) (right to sufficient water and legality of pre-paid water meters)

<sup>70</sup> See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) (exclusive language policy set by school governing body thwarts right to education)

and social security.<sup>71</sup> For instance, in *Joseph v City of Johannesburg*, the Constitutional Court stressed the importance of participation within the executive branch of government, at the level of local government.<sup>72</sup> The Court asserted the right to procedural fairness of tenants whose electricity was disconnected by the municipality due to non-payment by the landlord as crucial “not only for the protection of citizens’ rights, but also to facilitate trust in the public administration and in our participatory democracy”.<sup>73</sup>

The courts have also begun to develop a body of jurisprudence on “meaningful engagement” with communities potentially affected by evictions, based on an interpretation of section 26(3). “Meaningful engagement” refers to the requirement on the part of municipalities to hold consultations with communities potentially affected by evictions. The Court’s reading of this requirement from section 26(3) also has the potential to be extended to policy-making in relation to other socio-economic rights.

The Constitutional Court has thus repeatedly affirmed that deliberative and participatory democracy seeks to enhance and deepen representative democracy and the values of freedom and dignity, by expanding the opportunities for people’s active participation in decision-making processes, including in cases dealing with their access to public goods (socio-economic rights). It is about more than merely “participating in periodic elections and in the formal mechanisms created for allowing citizens input in the institutions of representative democracy”,<sup>74</sup> but also going beyond to creating numerous fora for dialogue and mechanisms for participation. The aim is to promote greater participation in the public and private institutions, which affect diverse aspects of people’s lives.<sup>75</sup> Those particularly disadvantaged groups who are not easily able to participate in deliberative processes as peers or political equals, must be given real and *meaningful* opportunities for participation.<sup>76</sup>

In this part I have argued that the combination of opportunities for participatory democracy to thrive in policy and law-making, administrative decision-making and adjudication of rights, will enhance the responsiveness of the state to conditions of poverty and inequality in South Africa and move us closer to the constitutional ideal of social justice.

I will now locate this discussion in the growing discourse in South Africa on the role of a *developmental state* in achieving higher rates of growth and development to address the challenges of eradication of poverty,

<sup>71</sup> See a number of successful court challenges that were brought under administrative law by indigent individuals affected by the withdrawal of social security benefits amidst the ongoing systemic problems in the administration of social grants in the Eastern Cape: *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 2 SA 849 (E); *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 9 BCLR 899 (SE); *Mbanga v Member of the Executive Council for Welfare* 2002 1 SA 359 (SA); *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxusa*; *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 4 SA 385 (T)

<sup>72</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46

<sup>73</sup> Para 46

<sup>74</sup> Liebenberg *Socio-Economic Rights* 30

<sup>75</sup> 30

<sup>76</sup> 32

underdevelopment and inequality. Though located in a constitutional framework of justiciable socio-economic rights, the conceptualisation of anti-poverty policies, laws and programmes and the way in which the state sees its role in delivering services to people in order to address poverty and inequality, is still highly influenced, in design, by the model of the state and its guiding ideology for socio-economic transformation.

#### 4 The emerging South African democratic developmental state: Implications for socio-economic transformation

Since 2002, there has been a shift by the South African government, away from a market-oriented economic-policy approach towards a more “developmental state” approach.<sup>77</sup> This is primarily driven by a focus on the need for public-sector action to remove binding constraints to growth through a range of strategic public-sector interventions.<sup>78</sup> The concept of the “developmental state” emerged out of East Asia and is generally used to mean a state that drives development, in a centralised manner in contrast to a more *laissez faire*, decentralised free-market approach.<sup>79</sup> It embodies particular economic and political connotations for policies and institutional make-up of states, and is transitional by its very nature.<sup>80</sup> It applies to lesser developed or transitional states that are striving to achieve greater economic and social success.

The concept of a developmental state has evolved from the traditional notion into the 21st century so-called *democratic* developmental state. This implies that the latter types of developmental states also require “effective and efficient bureaucracies, resilient leadership, sustainable organisational structure, strong state and national building initiatives, democracy, rule of law, sustainable economic growth and redistribution, social capital and social equity”.<sup>81</sup>

<sup>77</sup> See F Cloete & C Auriacombe *Measuring Empowerment in Democratic Developmental States* (2011) unpublished conference paper presented at the Centre for International Policy Exchanges Conference on *Improving the Quality of Public Services* in Moscow, Russia, 27-06-2011 – 29-06-2011 (on file with author)

<sup>78</sup> See national macro-economic policy documents: National Treasury *Growth, Employment and Redistribution (“GEAR”)* (1996) <<http://www.treasury.gov.za/publications/other/gear/default.aspx>> (accessed 27-11-2011) and Presidency *Accelerated and Shared Growth Initiative for South Africa (“ASGI-SA”)* (2006) <<http://www.info.gov.za/asgisa>> (accessed 27-11-2011)

<sup>79</sup> See discussions on the evolution of the concept of a “developmental state” from East Asia in C Johnson *MITI and the Japanese Miracle: The Growth of Industrial Policy 1925-1975* (1982); A Amsden *Asia's Next Giant: South Korea and Late Industrialisation* (1989); R Wade *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialisation* (1990); Z Onis “The Logic of the Developmental State” (1991) 24 *Comparative Politics* 109 109-126; M Woo-Cumings (ed) *The Developmental State* (1999), and in particular C Johnson “The Development State: Odyssey of a Concept” in M Woo-Cumings (ed) *The Developmental State* (1999) 32; P Evans *Embedded Autonomy: States and Industrial Transformation* (1995); PB Evans *What Will the 21st Century Developmental State Look Like?* (2006) unpublished paper presented at conference on *The Role of Government in Hong Kong* organized by the Central Policy Unit of HKSAR Government, Public Policy Research Centre of The Chinese University of Hong Kong and the Hong Kong Sociological Association in Hong Kong (SAR, China), 03-11-2006 (on file with the author); and United Nations Conference on Trade and Development (“UNCTAD”) *Economic Development in Africa: Domestic Resource Mobilization and Developmental States* (2007) <[http://www.unctad.org/en/docs/aldcafrica2007\\_en.pdf](http://www.unctad.org/en/docs/aldcafrica2007_en.pdf)> (accessed 27-11-2011)

<sup>80</sup> Cloete & Auriacombe *Measuring Empowerment in Democratic Developmental States 2*

<sup>81</sup> 2

Scholars have recently begun to describe the South African state as a “democratic developmental state”.<sup>82</sup> Broadly speaking, the discourse in South Africa is captured by a state that is determined to influence the direction and pace of economic development by directly intervening in the development process with the co-option of selected business and social elites, rather than relying on the uncoordinated influence of market forces to allocate resources. This is achieved through collaboratively establishing substantive social and economic goals to guide the long-term process of development and placing responsibility on all actors to collectively strive towards those goals.<sup>83</sup>

The main proposition of this part is that South Africa can at least be said to be an emerging democratic developmental state due to its developmentalist approach, the increasingly interventionist role of the state in the economy, the emergent institutional support for the state’s capacity to realise its developmental objectives, and the acknowledgement that participatory democracy lies at the heart of the transformation project. However, the undemocratic impulses of the state are severely limiting its achievements thus far, as witnessed for example in the limitations on freedom of information, the corruption and culture of impunity that is rife and the impact that will have on the poor.

#### 4 1 The origins and characteristics of the “developmental state”

The concept of a “developmental state” arose from an endeavour by Chalmers Johnson to generalise about the model pursued by many of the East Asian nations post the Second World War, in order to rapidly modernise their economies. In his well-known study of Japan’s modernisation, Johnson characterised the basic framework of the East Asian developmental state as one where the state sets specific development goals and then mobilises society to achieve industrial modernisation.<sup>84</sup> The idea of “a centralised state interacting with the private sector from a position of pre-eminence so as to secure development objectives”<sup>85</sup> is generally called the “developmental

<sup>82</sup> See W Gumede *Delivering the Democratic Developmental State in South Africa* DBSA Development Planning Division Working Paper Series No 9 (2009); and various chapters in O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010)

<sup>83</sup> For discussions on South Africa’s evolution from a welfare state to a “developmental state” see: M Pieterse “Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa” (2003) 14 *Stell LR* 1 1-28; G Rapholo “Towards Becoming a Developmental State: A Focus on Poverty Alleviation” (2003) 2 *Service Delivery Review* 24 24-27; R Levin “Building Service Effectiveness” (2004) 3 *Service Delivery Review* 25 25-28; O Edigheji *A Democratic Developmental State in Africa?* Research Report 105, Centre for Policy Studies (2005) <<http://www.cps.org.za/cps%20pdf/RR105.pdf>> (accessed 31-03-2010); R Southall “Introduction: Can South Africa be a Developmental State?” in S Buhlungu, J Daniel, R Southall & J Lutchman (eds) *State of the Nation: South Africa 2005-2006* (2006) xvii xvii-viv; Congress of the South African Trade Unions (COSATU) *A Developmental State for South Africa?* (2005) unpublished (on file with author); S Gelb *A South African Developmental State: What is Possible?* (2006) unpublished paper presented at the Harold Wolpe Memorial Trusts’ Tenth Anniversary Colloquium *Engaging Silences and Unresolved Issues in the Political Economy of South Africa* in Cape Town, South Africa, 21-09-2006 – 23-09-2006 (on file with author); and B Fine *The Curious Incidence of the Developmental State in the Night-Time* (2007) paper presented at the *SANPAD Poverty Conference* held in Durban, South Africa, 26-06-2007 – 30-06-2007 <<http://eprints.soas.ac.uk/5611/>> (accessed 27-11-2011)

<sup>84</sup> See generally Johnson *MITI and the Japanese Miracle*

<sup>85</sup> Gumede *Delivering the Democratic Developmental State in SA* 4

state” theory. Analysing these processes, Johnson pointed out four critical elements in the Japanese developmental state: firstly the bureaucracy was assigned the tasks of planning, constructing and supervising industry; secondly a political system was established to support the bureaucracy; thirdly when the government wanted to intervene in the market, it left plenty of scope for activities of private enterprises; and lastly, political direction was given by the Ministry of International Trade and Industry.<sup>86</sup> Co-opted elites, soft authoritarianism and a submissive population are all constitutive elements of the original developmental state.

Since Johnson, the developmental state has been defined differently by scholars and development agencies alike. Some scholars tend to emphasise the role of the state. In this category are scholars like Manuel Castells, who defines a developmental state “as one which establishes – as its principle of legitimacy – its ability to promote and sustain development, understood as the combination of steady high rates of economic growth and structural change in the productive system, both domestically and in its relationship with the international economy”.<sup>87</sup>

Other scholars have stressed the organisational features of the developmental state. They identify that a developmental state must also have the capacity to *formulate* and *implement* its developmental agenda. Key structural characteristics are “autonomy” of state institutions, which enables it to define and promote its strategic developmental goals, and its “embeddedness” – that is, “a concrete set of social ties that binds the state to society and provides institutionalised channels for the continual negotiation and renegotiation of goals and policies”.<sup>88</sup> In this perspective, autonomy implies the presence or high degrees of coherent state agencies that are able to formulate and implement coherent developmental goals. A significant feature of the autonomous state is greater coordination of industrial change and economic adjustment.

Though not widely acknowledged in the literature, developmental states at the same time also implemented social policies, focusing on non-state entities such as families and firms, with the state implementing social welfare programmes.<sup>89</sup> They made substantial efforts to ensure more equitable development through land reform, relevant education and training, support for small enterprise and provision of housing and infrastructure.<sup>90</sup> Improvements in social protection focused on measures that would reduce the cost of employment and raise productivity. Increasing employment was supported by restrictions on retrenchment and elevated spending on skills development.<sup>91</sup>

<sup>86</sup> See generally Johnson *MITI and the Japanese Miracle*

<sup>87</sup> M Castells “Four Asian Tigers with a Dragon Head: A Comparative Analysis of the State, Economy and Society in the Asian Pacific Rim” in R Appelbaum & J Henderson (eds) *States and Development in the Asia Pacific Rim* (1992) 33 56 See also Gumedé *Delivering the Democratic Developmental State in SA* 4-6, who provides a useful summary of the common characteristics of East Asian developmental states

<sup>88</sup> Evans *Embedded Autonomy* 12

<sup>89</sup> O Edigheji “Constructing a Democratic Developmental State in South Africa: Potentials and Challenges” in Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010) 1 9-10

<sup>90</sup> Gumedé *Delivering the Democratic Developmental State in SA* 6

<sup>91</sup> 6

In summary, the concept of a developmental state has a particular intellectual history, grounded primarily in the experience of industrialisation in East Asian states. It emphasises the ability of the state to drive development by guiding capital toward new activities – achieved under largely authoritarian and centralised governance. East Asian developmental states reached their developmental goals under authoritarian conditions and dominant party democratic systems.

## 4.2 The evolution of the democratic developmental state

Peter Evans provides the theoretical grounding for the *democratic* developmental state – what he terms the 21st century developmental state.<sup>92</sup> The 21st century democratic developmental state that Evans depicts is grounded in three strands of development theory: the “new growth theory”; “institutional approaches”; and the “capability approach”.<sup>93</sup> These theories converge into Evan’s main proposition that “enhancing human capabilities” is the central goal of the 21st century developmental state. He states thus:

“Enhancement of human capabilities is not, however, just a welfare goal but is also an important foundation for sustained economic growth: investment in human capital has the potential to lead to social inclusion and economic growth. From this premise, human capability is both a means and an end.”<sup>94</sup>

Furthermore, this latter approach places great importance on equity concerns. Similar to the Asian developmental states, equity is a focal goal and institutional architectures must be designed and policies promoted to attain that goal.<sup>95</sup> The state capacities required for the enhancement of human capabilities and the attainment of equity, Evans argues, are the efficient provision of collective goods. This in turn depends on both administrative capacity and political foundations that are anchored on “active democratic structures”.<sup>96</sup> The latter is also a foundation for effective economic management. Effective provision of public goods, including health, education, social welfare and the like, is a manifestation of social citizenship, enhancing the well-being of ordinary citizens; and public goods are themselves major economic infrastructure required by market agents.<sup>97</sup>

Based on development theory, in particular Sen’s work, Evans notes that because development is about human well-being, “development strategies and policy cannot be formulated by technocrats, but must be derived from

<sup>92</sup> P Evans “Constructing the 21st Century Developmental State: Potentialities and Pitfalls” in O Edigheji (ed) *Constructing a Democratic Developmental State in South Africa* (2010) 37-58

<sup>93</sup> 37-58 His three strands of development theory are largely based on A Sen *Development as Freedom* (1999), the initiator of the “capability approach” in development theory

<sup>94</sup> Edigheji “Constructing a Democratic Developmental State” in *Constructing a Democratic Developmental State in SA* 13

<sup>95</sup> 13 Edigheji defines “equitable growth” as:

“[A] high rate of economic growth combined with equitable distribution of income and wealth, with egalitarianism meaning that all segments of society are able to share in the benefits of growth”

<sup>96</sup> Evans “Constructing the 21st Century Developmental State” in *Constructing a Democratic Developmental State in SA* 38

<sup>97</sup> 38

democratically organised public deliberation”.<sup>98</sup> Deliberative and participatory democratic institutions are thus essential to 21st century development.<sup>99</sup> In light of this theoretical foundation, Evans presents the 21st century model as fundamentally different to the Asian developmental state and rather more similar to the Nordic democratic developmental state where “human welfare and public policy were driven by deliberative mechanisms that are more broad-based than those made up of government and capital”.<sup>100</sup>

This understanding leads me to the discussion of the evolution of a democratic developmental South African state, and how this notion can be adapted to suit our constitutional democracy in support of broad-based socio-economic transformation.

### 4 3 An emerging South African democratic developmental state

There is no definitive conception of the developmental state in South Africa in the academic literature and policy documents of government, the ruling African National Congress (“ANC”) party and its alliance partners, the South African Communist Party (“SACP”) and the Congress of South African Trade Unions (“COSATU”). The literature and policy documents are filled with rhetoric and ideology with reference to the developmental state. Nevertheless, it is argued that the concept is useful as an evolving and transitional political framework to guide South Africa’s socio-economic transformation.

South Africa’s transition to democracy took place under changing global conditions. These were characterised by the collapse of the communist bloc and the ascendancy of neo-liberal market ideology. A key element of this ideology argued for the primacy of the market over the state. This was in stark contrast to the newly elected ANC government’s Reconstruction and Development Programme (“RDP”),<sup>101</sup> which called for a strong interventionist and redistributive state. The RDP focused on meeting basic needs, developing the country’s human resources, building the economy and democratising the state and society. The RDP document defines development in terms of a growing economy in which redistribution is a critical element. It includes the preservation and development of human resources in the form of skills-training, job-creation and the provision of education, health services, services, infrastructure and an adequate social security system. It also strongly embeds the notions of representative and participatory democracy.<sup>102</sup>

During the first decade of freedom, some progress was achieved in addressing RDP priorities, but global pressure saw government adopt the Growth, Employment and Redistribution (“GEAR”) policy framework. Left-orientated social movements, trade unions and commentators saw this framework as a shift towards identifying the market as the supreme agent for

<sup>98</sup> 43

<sup>99</sup> Edigheji “Constructing a Democratic Developmental State” in *Constructing a Democratic Developmental State in SA* 14

<sup>100</sup> 14

<sup>101</sup> Office of the Presidency *White Paper on Reconstruction and Development (15-11-1994)* <<http://www.info.gov.za/view/DownloadFileAction?id=70427>> (accessed 28-11-2011)

<sup>102</sup> 9.

resource allocation and an acknowledgement that the inherited formal economy would be the determinant of growth and development. One consequence of the adoption of GEAR was that development priorities, including the provision of social services and economic infrastructure, were subject to fiscal discipline, cost recovery and financial sustainability.<sup>103</sup> GEAR is widely acknowledged to have succeeded in bringing about macro-economic stability, but critiqued for its limited ability to equitably distribute the economic benefits of stability and substantially reduce poverty and inequality in the country.<sup>104</sup>

In a context of resource scarcity, growing inequality and ongoing widespread poverty, the making of strategic choices on where and how to invest scarce resources to maximise social and economic return became imperative in South Africa. Since GEAR, market failure in addressing the above-mentioned developmental challenges provided a strong rationale for government intervention. This position was reinforced by a resurgent belief in the role of the state as a driver of economic development, where government leads growth creation and identifies the major beneficiaries of growth through active interventions, such as infrastructure investment, job creation, State-Owned Enterprise (“SOE”) initiatives, sector and small enterprise support, industrial policy, targeted procurement and spatial development.<sup>105</sup> In fulfilling its developmental role, government recognised its position as a key facilitating, partnering and collaborative economic agent through planning, fixed investment and developmental spending. Public investment has therefore become a key mechanism for the achievement of higher GDP growth, as this guides private investment decisions and facilitates social and economic spin-offs.<sup>106</sup> The Accelerated and Shared Growth Initiative for South Africa (“ASGI-SA”) economic policy framework announced by the government in late 2005 confirmed the return into policy discourse of the role of the state, as compared with the mid-1990s.

Increasingly, over the past five years, the state has thus asserted the objective to build and consolidate a strong developmental state in South Africa – a developmental state that excels in the basics of public administration and intervenes strategically in the economy to promote socio-economic transformation.<sup>107</sup>

Fine divides the discourse on the developmental state in South Africa into two schools, the economic and the political.<sup>108</sup> The economic school focuses on the economic policies that the state needs to adopt in order to bring about development, namely through the array of interventions associated with

<sup>103</sup> Edigheji “Constructing a Democratic Developmental State” in *Constructing a Democratic Developmental State in SA* 12-13

<sup>104</sup> 12-13

<sup>105</sup> 12-13

<sup>106</sup> 12-13

<sup>107</sup> T Manuel *Budgeting Challenges in the Developmental State* (2004) speech by the Minister of Finance at the *Senior Management Service Conference* held in Cape Town, South Africa, 20-09-2004 <[http://www.treasury.gov.za/comm\\_media/speeches/2004/2004092001.pdf](http://www.treasury.gov.za/comm_media/speeches/2004/2004092001.pdf)> (accessed 31-03-2010); T Mbeki *Address of the President of the Republic of South Africa* on the occasion of the *Budget Vote of the Presidency: National Assembly* held in Cape Town (07-06-2006) <<http://www.dfa.gov.za/docs/speeches/2006/mbek0607.htm>> (accessed 28-11-2011)

<sup>108</sup> Fine *The Curious Incidence of the Developmental State in the Night-Time 2*

the East Asian model, especially protection, export promotion, targeted investment and finance, and so on. The political school, on the other hand, is more or less entirely concerned with addressing the issue of whether the state has the capacity and motivation to adopt and implement developmental policies. In particular, the focus is upon whether the state has the autonomy, in some sense, both to adopt policy independent of special interests and to deploy that independence for broader developmental aims.<sup>109</sup>

The reason for the lack of clarity on the definition of a developmental state in the literature appears to be that the developmental state has sprung into South African discourse from the political arena and has, until recently, largely been rhetorical and unexamined. The concept first began appearing in policy documents of the ANC, COSATU and the SACP.<sup>110</sup>

In 2005 the previous Minister of Finance, Trevor Manuel introduced the concept and trajectory:

“A developmental state is one that is determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence of market forces to allocate resources.”<sup>111</sup>

Manuel, in quoting Sen’s book *Development as Freedom*, stated:

“The task of a developmental state is to fight poverty and expand economic opportunities for the poor”.<sup>112</sup>

Manuel’s text is then heavily quoted *verbatim* in President Mbeki’s *Budget Speech* for 2006.<sup>113</sup> The developmental state has since appeared in the speeches of a range of Ministers over the last five years, both during the Mbeki era and under President Jacob Zuma.<sup>114</sup>

The State President has over the past couple of years elaborated on the commitment to build a developmental state, which among other things entails the improvement of public services and strengthening of democratic institutions.<sup>115</sup> Two Ministries in the Presidency have been established to enhance strategic planning and performance monitoring and evaluation. The inclusion of State-Owned Enterprises and Development Finance Institutions in government planning processes and enhanced administration of service delivery, are some of the ways in which the government is attempting to create

<sup>109</sup> 3

<sup>110</sup> See eg: ANC *The State, Property Relations and Social Transformation* (1998) <<http://amadlandawonye.wikispaces.com/1998,+ANC,+State,+Property+Relations,+Social+Transformation>> (accessed 28-11-2011); ANC *National Policy Conference Report* (2007); South African Communist Party *African Communist* (1998) <<http://www.sacp.org.za/list.php?type=African%20Communist&year=1998>> (accessed 28-11-2011); COSATU *A Developmental State for South Africa?*

<sup>111</sup> Manuel *Budgeting Challenges in the Developmental State*

<sup>112</sup> Manuel *Budgeting Challenges in the Developmental State*

<sup>113</sup> President Mbeki *Budget Speech* (2006)

<sup>114</sup> Presidency *State of the Nation* addresses available at <<http://www.info.gov.za/speeches/son/index.html>> (accessed 28-11-2011)

<sup>115</sup> President JG Zuma *State of the Nation Address 2009* (2009) delivered at the *Joint Sitting of Parliament* held in Cape Town, South Africa (03-06-2009) <<http://www.thepresidency.gov.za/pebble.asp?relid=310>> (accessed 01-11-2011)

a developmental state.<sup>116</sup> In his *State of the Nation Address 2010*,<sup>117</sup> President Jacob Zuma also committed to five priorities: education, health, rural development and land reform, creating decent work, and fighting crime, with education and skills development at the centre of the government's policies.

It is clear that the indigenous South African model of the developmental state, as distinct from the Asian or any other model, at least in theory and rhetoric, means that intervention in the economy to generate higher rates of "shared" growth and employment is a means to an end to poverty and participatory democracy where the poor can "act as their own liberators"<sup>118</sup> is central to that enterprise.

Gumede and others identify a number of essential conditions for a successful ongoing project of establishing a South African democratic developmental state.<sup>119</sup>

First, it requires the political will and a long-term developmental vision based on broad national consensus among political parties, civil society, business and organised labour, to industrialise and modernise.<sup>120</sup> This requires mature, quality leadership and determination on the part of the country's political elite. All stakeholders must then collaboratively implement an integrated long-term development plan based on a holistic vision. Successful long-term development plans integrate action for the short term, medium term and long term. A long-term development plan is crucial for the identification of the core priorities of a nation. But these development plans must have public and stakeholder legitimacy.<sup>121</sup>

Second, a fundamental feature of the South African democratic developmental state is that it must allow for participation and be capable of addressing the socio-economic needs of its entire population, especially the poor, marginalised and historically disadvantaged. The conception of the South African democratic developmental state is the kind of state that fosters the empowerment of people. It is vital that ordinary people are involved in the process of development and as they get more involved, they must also own the process. Whenever policies are developed, which are aimed at addressing existing socio-economic imbalances, ordinary people should be involved.

<sup>116</sup> Zuma *State of the Nation Address 2009*

<sup>117</sup> President JG Zuma *State of the Nation Address 2010* (2010) delivered at the *Joint Sitting of Parliament* held in Cape Town, South Africa (11-02-2010) <<http://www.info.gov.za/speeches/2010/10021119051001.htm>> (accessed 01-11-2011)

<sup>118</sup> Commonly used phrase in various speeches and documents of the ANC

<sup>119</sup> See Gumede *Delivering the Democratic Developmental State in SA* 2-4; and generally Edigheji (ed) *Constructing a Democratic Developmental State in SA*; Cloete & Auriacombe *Measuring Empowerment in Democratic Developmental States*.

<sup>120</sup> See Anonymous "Mont Fleur Scenarios" (July 1992) <<http://www.generonconsulting.com/publications/papers/pdfs/Mont%20Fleur.pdf>> (accessed 28-11-2011); Presidency "SA Scenarios 2025: The Future We Chose?" (September 2008) <<http://www.info.gov.za/view/DownloadFileAction?id=89109>> (accessed 28-11-2011); and Anonymous "Dinokeng Scenarios" (2009) <<http://www.dinokengscenarios.co.za/>> (accessed 28-11-2011) These scenario exercises were developed at different points in South Africa's recent history, with the participation of a wide spectrum of society for purposes of identifying a long-term vision for the country, which would then be translated into a plan

<sup>121</sup> Gumede *Delivering the Democratic Developmental State in SA* 11 explains that although most of the East Asian developmental states were autocratic, their development plans had wider legitimacy among the key stakeholders in society. In Malaysia for example, the New Economic Policy – its long-term development plan – became the official "ideology"

The most critical aspect of this kind of developmental state is participatory democracy.<sup>122</sup>

Third, at the core of the developmental effort is an efficient, well-coordinated state, staffed with skilled employees. The state must have the administrative, technical and political capacity and competency to facilitate the setting of national goals, develop the right policies to deliver on those goals, and implement these policies. This also means that widespread corruption and the policy of cadre deployment must be systematically abolished. Furthermore, the most successful developmental states had a central coordinating centre driving socio-economic transformation.<sup>123</sup> This centre not only determinedly pushes the economy's vulnerabilities, and makes it competitive, by diversifying and identifying new niche manufacturing, but directly coordinates industrial investment, actively directs macro-economic policy towards developmental goals and protects and promotes the national interest.<sup>124</sup> It facilitates the setting of national goals, makes use of the market, and monitors whether policies are implemented and are having the desired effect. This is not compatible with more advanced economies that necessitate less state intervention and more transparency and accountability. A successful democratic developmental state therefore leads to its own demise as a developmental state, and is forced to accept the empowerment of its people and democratise increasingly. A developmental state is therefore a transitional state form and is not sustainable in the long term if its developmental goals are increasingly achieved.

I will now briefly assess the current state of South Africa's development in practice, as opposed to in theory and rhetoric, applying Gumede's pre-conditions for a democratic developmental state.

Firstly, the National Planning Commission ("NPC") was established in 2009, to support Cabinet in long-term planning and coordination. The NPC is chaired by the Minister in the Presidency: National Planning Commission Trevor Manuel, with ANC heavyweight and business leader Cyril Ramaphosa as his deputy. Also on the team are ANC national executive committee member Joel Netshitenzhe and Business Unity South Africa chief executive officer Jerry Vilakazi. The 24 people on the commission come from a cross-sector of society and have expertise in areas including finance, industry, telecommunications, biotechnology, energy, education, food security and climate change. The NPC is responsible for developing a draft long-term vision and strategic plan for South Africa. They have thus far delivered a diagnostic report of all the critical issues facing the country and engaged in a process of discussion with people across the country. This led to the first draft of South Africa's long-term plan, which was released on 11 November

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<sup>123</sup> In 2001, the Policy, Coordination and Advisory Services Unit ("PCAS") was established to coordinate policy formulation and monitoring and evaluation of policy implementation

<sup>124</sup> See R Davies (Minister of Trade and Industry) *2010/11 – 2012/13 Industrial Policy Action Plan (IPAP2)* (18-02-2010) <[http://www.dti.gov.za/parliament/022310\\_Min\\_briefing\\_revised\\_ipap.pdf](http://www.dti.gov.za/parliament/022310_Min_briefing_revised_ipap.pdf)> (accessed 23-11-2011)

2011.<sup>125</sup> This is evidence, in part, of the political will to develop a long-term developmental vision for South Africa, based on broad national consensus and to allow for participation in addressing the socio-economic needs of the poor. Other examples of participation include the Constitutional Court cases requiring the state to “meaningfully engage” with citizens on their needs and solutions to socio-economic problems, before they implement housing programmes.<sup>126</sup>

However, the recent attempts by the Executive and the Legislature to introduce and pass the Protection of State Information Bill B6 of 2010,<sup>127</sup> which allows state information to be categorised as secret and does not allow for a public interest defence for whistleblowers and journalists who expose state wrongdoing, is contrary to the spirit of participatory democracy. The introduction of the Bill met with strong opposition from civil society and opposition parties. It is seen as a return to the apartheid-era repression, and as a severe curtailment of the right of access to information and the principles of transparency and accountability.<sup>128</sup>

Secondly, in relation to an efficient, well-coordinated state, staffed with skilled employees, the state still has a long way to go. The efficiency of the state leaves a lot to be desired, and is constantly mired by widespread corruption among officials and politicians alike. This situation will be made worse with the adoption of the Information Bill.

Thirdly, the Industrial Policy Action Plan (“IPAP2”)<sup>129</sup> builds on the National Industrial Policy Framework (“NIPF”)<sup>130</sup> and the 2007/08 IPAP<sup>131</sup> and represents a scaling up of the government’s efforts to promote long term industrialisation and industrial diversification beyond the reliance on traditional commodities and non-tradable services. Its purpose is to expand production in value-added sectors with high employment and growth multipliers that compete in export markets as well as compete in the domestic market against imports. In so doing, the action plan also places emphasis on more labour absorbing production and services sectors, the increased participation of historically disadvantaged people and regions in the economy and seeks to facilitate, in the medium term, South Africa’s contribution to

<sup>125</sup> National Planning Commission “National Development Plan” (11-11-2011) <<http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>> (accessed 28-11-2011) See also SAPA “Ramaphosa, Godsell on National Planning Commission” (30-04-2010) *Mail & Guardian* <<http://mg.co.za/article/2010-04-30-ramaphosa-godsell-on-national-planning-commission>> (accessed 24-11-2011)

<sup>126</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (“PE Municipality”); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (“Olivia Road”); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) (“Joe Slovo”)

<sup>127</sup> The Bill was passed by the National Assembly on 22-11-2011

<sup>128</sup> See SAPA “Info Bill Will Hide Corruption” (12-10-2011) *News24* <<http://www.news24.com/SouthAfrica/Politics/Info-bill-will-hide-corruption-20111012>> (accessed 24-11-2011)

<sup>129</sup> Department of Trade and Industry *Industrial Policy Action Plan II*

<sup>130</sup> Department of Trade and Industry *National Industrial Policy Framework* (2010) <<http://www.info.gov.za/view/DownloadFileAction?id=108831>> (accessed 28-11-2011)

<sup>131</sup> Department of Trade and Industry *Industrial Policy Action Plan* (2007) <<http://www.tips.org.za/node/1402>> (accessed 28-11-2011)

industrial development in the African region. The government's New Growth Path<sup>132</sup> reiterates these elements.

In conclusion, whereas developmental states in East Asia were authoritarian; in the South African context, the developmental state has to be democratic. While this is different to Johnson's conceptualisation of the developmental state as a soft authoritarian state, it is closer to Evan's broader definition of "state embeddedness". As Gumede suggests:

"South Africa is a constitutional democracy, and the constitution provides for both a representative and a participatory democracy. This means that ordinary citizens will not only have to be consulted but also to be involved and participate in the decisions, whether economic, political or social, that affect them. This makes the challenge of building a developmental state very different in South Africa from elsewhere: the state must deliver development in both the economic and democratic spheres."<sup>133</sup>

South Africa's prospects of overcoming its historic legacy of poverty and inequality and to offer a way ahead for a transformed society rests on a vision of a *democratic developmental state*. But this vision remains somewhat undefined, its implications have only just begun to be thought out and the undemocratic tendencies of the state have to be overcome.

## 5 Conclusion

The South African Constitution is a legal framework underpinning the socio-economic transformation of South African society from its unequal and unjust past. It lays the foundation for participatory and deliberative processes and forums to imagine and conceive what is required to transform this society. These processes and forums must be sufficiently inclusive of a diversity of voices, and enable all groups, including those affected by poverty and marginalisation, to participate meaningfully as equals. This requires positive measures to remedy various manifestations of widespread socio-economic deprivation and disempowerment in South Africa.

The analysis has pointed to a number of conclusions. The first is that the developmentalist re-orientation of the South African state has been tempered by the globalisation imperatives, which give primacy to the needs of the market, as well as by the non-participatory tendencies of the state. While the government continues to stress the relevance of the people in its policy, in actual practice citizens and people are frequently passive clients, users and customers. With respect to the structural features of the state, South Africa is gradually establishing institutional features of a transitional democratic developmental state, notably collaborative centralised leadership with a collective vision and plan, to promote a process of accumulation whose fruits would be shared by all. The key challenges remain the inclusion of the non-elites – the ordinary people – in the preparation and implementation of a democratic developmental state, and the elimination of corruption. Once these goals are eventually achieved, the state also has to change its character

<sup>132</sup> Department of Economic Development "New Growth Path" (2011) <<http://www.info.gov.za/view/DownloadFileAction?id=135748>> (accessed 24-11-2011)

<sup>133</sup> Gumede *Delivering the Democratic Developmental State in SA* 11-12

to a more traditional democracy in order to acknowledge the successful empowerment of its citizens.

However, as Chief Justice Langa elaborates, the view of transformation envisaged by the Constitution is a process of constant dialogue and contestation in the pursuit of a more just society as follows:

“[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”<sup>134</sup>

### SUMMARY

In order for socio-economic transformation to have a real impact on the lives of the poor and marginalised, meaningful participation in the development of law and policy as well as administrative decision-making, is required. Opportunities for informed participation can lead to transparent, accountable dialogue and debate on key policy choices to address the impact of poverty and inequality. This resonates with a participatory constitutional democracy, which requires decisions to be considered in the light of certain fundamental norms and values. The policy discourse in South Africa around solutions to poverty eradication has evolved over the past five years from a “welfare state” approach to a “developmental state” approach which must have the strategic capacity to mobilise society around the developmental agenda and bring technical and organisational capacity to bear in order to create fundamental change. The developmental state theory in South Africa is being grounded in principles of representative democracy, participatory democracy and accountability of the state.

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<sup>134</sup> Langa (2006) *Stell LR* 354