

# TOWARD AN EQUALITY-PROMOTING INTERPRETATION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: INSIGHTS FROM THE EGALITARIAN LIBERAL TRADITION\*

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*Theorists within the egalitarian liberal tradition have grappled with the question of how to achieve an alignment between the attribution of equal worth and citizenship to each person and the distribution of material resources in democratic societies. Their insights are relevant to devising constitutionally grounded strategies for redressing the intertwined challenges of poverty and inequality in post-apartheid South Africa. This article examines the implications of these theories for integrating the value of equality in the interpretation of socio-economic rights by the courts. It concludes that Nancy Fraser's principle of parity of participation offers rich possibilities for rendering both reasonableness review and the application of socio-economic rights to contractual relations more responsive to systemic social and economic inequalities.*

## I INTRODUCTION

Just over twenty years have elapsed since the transition to democracy in South Africa, yet poverty and inequality remain deeply inscribed in our post-apartheid landscape. The proportion of people living below a rough poverty line of US\$2 per day or R525 a month per person hovers around 50 per cent.<sup>1</sup> Moreover, South Africa is also a country scarred by deep inequalities based on race, gender, disability, class and other grounds. A stark indicator of class-based inequality is the steep gap in income distribution. According to the Gini coefficient, which measures the gap between the richest and poorest, South Africa is one of the most unequal countries in the

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<sup>1</sup> National Planning Commission Diagnostic Overview, 'Human Conditions Diagnostic' The Presidency, RSA at 2, available at [http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Diagnostic\\_Human\\_conditions.pdf](http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Diagnostic_Human_conditions.pdf), accessed on 11 March 2014 (hereafter 'NPC Diagnostic Overview'). The figure of R525 a month per person is based on 2008 prices, updated to 2010.

world.<sup>2</sup> Despite rising per capita income since 1994, approximately 50 per cent of national income continues to go to the richest 10 per cent of households, while the poorest 40 per cent of households receive just over 5 per cent of income.<sup>3</sup> Whilst there has been a decline in racial disparities in the top 20 per cent of income earners, the average income gaps between racial groups remain high and there is growing inequality within the African population.<sup>4</sup> Jeremy Seekings & Nicoli Nattrass argue that extreme inequality has persisted since 1994 primarily because 'the distributional regime of the late apartheid period has been reformed (primarily through deracialisation) rather than transformed or rejected in favour of a more egalitarian one'.<sup>5</sup> A lived sense of unfairness at gross socio-economic inequalities of South African society is at least a partial explanation for the wave of service delivery protests throughout the country.<sup>6</sup>

The National Development Plan ('NDP') adopted by the National Planning Commission incorporates a range of strategic policy objectives for redressing the twin scourges of poverty and inequality.<sup>7</sup> Poverty and inequality are thus central political and policy objectives in South Africa. However, what is less clear from the NDP is the nature of the relationship between poverty and inequality. Moreover, the NDP pays scant attention to the implications of the legal norms and framework contained in the 1996 Constitution for responding to these challenges. This is surprising given the prominent place in the Constitution of a set of fundamental rights and values of direct relevance to the objectives of poverty reduction and the achievement of a more egalitarian society. The inclusion of equality as a fundamental right<sup>8</sup> and foundational value in the Constitution<sup>9</sup> together with a range of

<sup>2</sup> The NPC Diagnostic Overview *ibid* at 3 records South Africa's Gini-coefficient to be 0.67 (where 0 indicates no inequality and 1 complete inequality). See also 29.

<sup>3</sup> 'Development Indicators' (2012), Minister in the Presidency for Performance, Monitoring and Evaluation as well as Administration at 26, available at <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/DPMEIndicators2013/DPME%20Indicators%202013.pdf>, accessed on 16 July 2014.

<sup>4</sup> The NPC Diagnostic Overview *op cit* note 1 at 3–4; Development Indicators 2012 *ibid* at 26–7, citing a study by M Leibbrandt, I Woolard, A Finn & J Argent *Trends in South African Income Distribution and Poverty Since the Fall of Apartheid* (2010).

<sup>5</sup> Jeremy Seekings & Nicoli Nattrass *Class, Race and Inequality in South Africa* (2006) 6.

<sup>6</sup> See Karl von Holdt 'Insurgent citizenship and collective violence: Analysis of case studies' in Karl von Holdt, Malose Langa, Sepetla Molapo, Nomfundo Mogapi, Kindiza Ngubeni, Jacob Dlamini & Adele Kirsten *The Smoke that Calls: Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa: Eight Case Studies of Community Protest and Xenophobic Violence* (2011) 24.

<sup>7</sup> National Planning Commission *National Development Plan: Vision for 2030* (2011), available at <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>, accessed on 11 March 2014.

<sup>8</sup> Section 9.

<sup>9</sup> Sections 1(a) and 7(1).

justiciable socio-economic rights invites consideration of how the interpretation of these norms can support and guide the political project of achieving a more egalitarian distribution of resources in South Africa.

This article seeks to contribute to this project through focusing on the relevance of equality as a value in the interpretation of the socio-economic rights provisions of the Bill of Rights with reference to the insights that can be gained from major political and legal philosophers working within the broad egalitarian liberal tradition.

The first part of the article focuses on the question why equality is relevant to the question of interpreting socio-economic rights by considering the nature of the interrelationship between inequality and poverty. The second part assesses the arguments of leading egalitarian liberal theorists — Ronald Dworkin, Amartya Sen and John Rawls — on the questions of the appropriate metric of equality (what must be equalised), and the nature and degree of equalisation that meet the requirements of justice (how must equalisation occur). I conclude this part by examining the principle of parity of participation developed by the critical theorist Nancy Fraser, and argue that it provides an optimal frame for integrating the values of equality in our socio-economic rights jurisprudence. The final part of the article illustrates how parity of participation can be applied in practice in two major areas of socio-economic rights jurisprudence.

## II THE RELEVANCE OF EQUALITY TO SOCIO-ECONOMIC RIGHTS

Sections 26(1) and 27(1) of the Constitution entrench the right of people to have access to a certain substantive standard of socio-economic rights — ‘adequate’ housing, ‘sufficient’ food and water, and ‘appropriate’ social security. Achievement of this standard is qualified by reference to the three concepts of ‘progressive realisation’, ‘within available resources’ and ‘reasonable legislative and other measures’ encountered in ss 26(2) and (3). In assessing the constitutionality of the state’s positive duties in terms of ss 26 and 27, the Constitutional Court has adopted a model of reasonableness review which is designed to assist the courts in negotiating the challenges of institutional legitimacy and competency in enforcing socio-economic rights.<sup>10</sup> Reasonableness review thus aims at encouraging the legislature and executive to select and adopt legislation, policies and programmes to give effect to the relevant rights, allowing the state an ample sphere of policy choice and flexibility.<sup>11</sup> At the same time, the court has carved out a distinct,

<sup>10</sup> For an analysis of this jurisprudence, see Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) ch 4; Stuart Wilson & Jackie Dugard ‘Constitutional jurisprudence: The first and second waves’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 35.

<sup>11</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 41 (hereafter ‘*Grootboom*’). See generally on weak forms of judicial review in the

but limited, role for itself by identifying certain factors that are indicative of unreasonable state conduct or omissions. Key factors in this regard are: a failure by government to take steps to realise the rights; a lack of provision within a government programme for those most desperately in need; a lack of flexibility and responsiveness to relevant scientific and social impact evidence; the absence of meaningful engagement with the beneficiaries of the rights; or the adoption of a policy with unreasonable limitations or exclusions.<sup>12</sup>

The last-mentioned factor bears the most obvious overlap with the right and value of equality in that it designates under-inclusive social policies as suspect. In the *Mazibuko* case,<sup>13</sup> the Constitutional Court characterised its prior decision in the *Treatment Action Campaign* case as an example of policy containing unreasonable exclusions. The Nevirapine programme to reduce mother-to-child transmission of HIV was restricted to two pilot sites per province, excluding the remaining 90 per cent of women who gave birth in the public health sector.<sup>14</sup> According to the court, all it did in *Treatment Action Campaign* was 'to render the existing government policy available to all'.<sup>15</sup>

The relationship between this factor in the reasonableness inquiry and equality is also evident where government policy unfairly excludes a particular group from accessing a socio-economic right on a prohibited ground of discrimination. The primary example of the latter is the *Khosa* case, which found the eligibility criteria in the Social Assistance Act 59 of 1992 unconstitutional on the basis that it unfairly and unreasonably restricted access to social grants to citizens thereby excluding permanent residents. The fact that the legislative distinction in the delivery of social grants reinforced broader social patterns of privilege and marginalisation against non-citizens was a significant factor in concluding that the distinction was both unfair in terms of s 9(3), and unreasonable in terms of s 27. In her judgment, Mokgoro J alludes to the responsibility of the political community to ensure that decisions concerning the distribution of social and economic resources reflect the equal citizenship of its poorest members:

context of social rights, Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); Rosalind Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International J of Constitutional Law* 391.

<sup>12</sup> This represents a synthesis of the factors developed in *Grootboom* *ibid*; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (hereafter '*Treatment Action Campaign*'); *Khosa v Minister of Social Development*; *Mahlauli v Minister of Social Development* 2004 (6) SA 505 (CC) (hereafter '*Khosa*'); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC) (hereafter '*Olivia Road*'); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (hereafter '*Joe Slovo*'); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter '*Mazibuko* (CC)').

<sup>13</sup> *Mazibuko* (CC) *ibid* para 67.

<sup>14</sup> *Treatment Action Campaign* *supra* note 12 para 62.

<sup>15</sup> *Mazibuko* (CC) *supra* note 12 para 64.

‘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 represent the extent to which poor people are treated as equal members of society.’<sup>16</sup>

However, the equality-based reasoning in both *Treatment Action Campaign* and *Khosa* is based on the exclusion of certain groups from social programmes. It does not relate to the content (quantity and quality) of the social goods and services that must be provided — albeit progressively over time and within the state’s available resources. This lack of attribution by the Constitutional Court of normative content to the socio-economic rights in ss 26 and 27 has been a major source of academic criticism.<sup>17</sup> The two main substantive elements in the reasonableness inquiry are the threshold requirement that a reasonable government programme must provide some form of short-term relief for those in desperate need or living in intolerable conditions,<sup>18</sup> and the requirement discussed above that the policy be inclusive and comprehensive. The remaining criteria speak to the process and manner in which the state goes about adopting and implementing a programme to give effect to socio-economic rights.<sup>19</sup> The question which arises then is how can the value of equality help inform not only who is included within the scope of a reasonable government programme but also the nature and quality of goods and services that must be secured.

By focusing on the value of equality, I do not suggest that other values and human interests such as survival,<sup>20</sup> human dignity,<sup>21</sup> and autonomy<sup>22</sup> are not

<sup>16</sup> Ibid para 74.

<sup>17</sup> See Danie Brand ‘The proceduralisation of South African socio-economic rights jurisprudence or “What are socio-economic rights for?”’ in H Botha, A J van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33; David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) ch 5; Marius Pieterse ‘Eating socioeconomic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Human Rights Quarterly* 796. Liebenberg op cit note 10 at ch 4.

<sup>18</sup> *Grootboom* supra note 11 paras 44, 95 and 99.

<sup>19</sup> Brand op cit note 17 at 43–51 describes the criteria of reasonableness review as structural good governance as opposed to substantive needs-based standards.

<sup>20</sup> For example, David Bilchitz has argued for the recognition of a minimum core obligation in respect of socio-economic rights on the basis of the urgent interest which people have in being free from general threats to their survival ‘as the inability to survive wipes out all possibility for realising the sources of value in the life of a being.’ Bilchitz op cit note 17 at 187.

<sup>21</sup> For example, Sandra Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21 *SAJHR* 1.

<sup>22</sup> Bilchitz justifies a second threshold of interests (beyond the first minimum core threshold) protected by socio-economic rights as the general conditions that are necessary to enable the fulfilment of a wide range of purposes. Bilchitz op cit note 17 at 188. In this sense socio-economic rights help secure individual autonomy and agency to meaningfully choose and pursue various life paths.

relevant to this question. Rather, I argue that equality as a value should also constitute a significant part of our understanding of the purposes and values of socio-economic rights. However, this relationship between socio-economic rights and equality is less obvious and more controversial. There have been a number of attempts to explicate the relationship between equality and socio-economic rights,<sup>23</sup> but significant scholarship also exists arguing that the interpretation of socio-economic rights should be developed independently of the value of equality.

For example, in the context of United States constitutional jurisprudence, Frank Michelman has argued forcefully that welfare rights (in his terminology) are better understood as providing protection against egregious forms of deprivation rather than relative inequalities in the level of social goods and services enjoyed by different sections of society.<sup>24</sup> The remedy for deprivation is adequate provision, whereas the remedy for discrimination in social provisioning is equalisation. He argued that courts are institutionally better suited to protect against a deprivation of basic needs than to engage in an ill-fated effort to compensate for pervasive market-based inequalities in social provisioning.<sup>25</sup> However, Michelman's argument should be understood in its context as an exposition of the strategic possibilities of the judicial recognition of welfare rights given the lack of explicit constitutional recognition of such rights in the United States Federal Constitution. He argued that the non-discrimination lens of the Fourteenth Amendment was not the optimal route to achieving the judicial protection of welfare-related interests. He did not dispute the broader proposition that poverty and inequality are inter-related, nor did he argue that equality was irrelevant in developing the content of socio-economic rights.

In the context of South Africa, the text and ethos of the Constitution strongly suggests a mutually constitutive relationship<sup>26</sup> between equality and socio-economic rights.<sup>27</sup> Equality is not only a foundational value to be

<sup>23</sup> See Pierre de Vos 'Grootboom, the right of access to adequate housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258; Sandra Liebenberg & Beth Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution (2007) 23 *SAJHR* 335; Sandra Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 22 *Stellenbosch LR* 566. For a set of essays examining various socio-economic rights from a gender equality perspective, see Beth Goldblatt & Kirsty McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011).

<sup>24</sup> Frank Michelman 'The Supreme Court, 1968 term – Foreword: On protecting the poor through the Fourteenth Amendment' (1969) 83 *Harvard LR* 7.

<sup>25</sup> He argued that the US Supreme Court should be seen, 'not as nine (or seven or five) Canutes railing against tides of economic inequality which they have no apparent means of stemming, but as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of . . . free enterprise.' *Ibid* at 33.

<sup>26</sup> I am grateful to an anonymous referee for suggesting this terminology.

<sup>27</sup> Section 1(a) of the Constitution refers to 'human dignity, the achievement of equality, and the advancement of human rights and freedoms' as amongst South

promoted, along with human dignity and freedom, in the interpretation of all rights in the Bill of Rights;<sup>28</sup> it is also a fundamental right expressly defined to include ‘the full and equal enjoyment of all rights and freedoms’.<sup>29</sup> Moreover, the fact that the reasonableness model of review is essentially a flexible multi-factor standard for assessing socio-economic rights compliance makes it well-suited to considering and weighing a range of fundamental human interests and values — including relevant dimensions of equality — that may be implicated by different kinds of socio-economic rights violations.<sup>30</sup>

Before turning to examine what light egalitarian liberal theorists can shed on the question of how equality can be incorporated in the interpretation of socio-economic rights, I consider recent empirical evidence demonstrating how equality and poverty are intertwined in contemporary democracies.

First, empirical evidence demonstrates that socio-economic inequalities continue to generate continuous cycles of poverty and social exclusion. In other words, inequality can undermine well-intentioned policies designed to realise socio-economic rights. Richard Wilkinson & Kate Pickett have demonstrated that countries with the highest levels of inequality fare worst in terms of almost every quality of life indicator from life expectancy, crime levels, literacy to health.<sup>31</sup> They demonstrate how steep income differentials and relatively rigid class stratifications contribute to the intergenerational transmission of poverty and a lack of social mobility in almost every sphere relevant to socio-economic rights. Their research illustrates how poverty is not a static condition of deprivation of needs, but a product of relationships of political, economic, social and even personal power. Steep disparities of wealth enable people to accumulate greater economic power, which in turn enables them to exclude others from accessing the goods and services which are subject to the market’s mechanisms of exchange.<sup>32</sup> As Amartya Sen has

Africa’s foundational constitutional values. International human rights law also affirms a close association between equality, non-discrimination and socio-economic rights. According to the UN Committee on Economic, Social and Cultural Rights, non-discrimination and equality ‘are . . . essential to the exercise and enjoyment of economic, social and cultural rights.’ General Comment No 20 (*Non-discrimination in economic, social and cultural rights (art 2 (2))*) UN doc E/C.12/GC/20 para 2.

<sup>28</sup> Section 39(2).

<sup>29</sup> Section 9(2). This provision proceeds to mandate affirmation action measures ‘to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’. On the substantive nature of the equality guarantee, see *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 27; Catherine Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 253.

<sup>30</sup> The Constitutional Court has observed that the realisation of socio-economic rights ‘is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential’. *Grootboom* supra note 11 para 23.

<sup>31</sup> Richard Wilkinson & Kate Pickett *The Spirit Level: Why Equality is Better for Everyone* (2010).

<sup>32</sup> On the distorting impact of inequality on the functioning of markets, see Joseph E Stiglitz *The Price of Inequality* (2012) 52–82.

also pointed out in the context of his capabilities theory,<sup>33</sup> relative income deprivations can yield absolute capability deprivation:

‘Being relatively poor in a rich country can be a great capability handicap even when one’s absolute income is high in terms of world standards. In a generally opulent country, more income is needed to buy enough commodities to achieve the same social functioning.’<sup>34</sup>

In other words, inequality has a disparate impact on people’s ability to convert resources such as income into valued personal functionings and social circumstances.<sup>35</sup>

Secondly, income and resource disparities result in the unequal enjoyment, not only of socio-economic rights, but also civil and political rights.<sup>36</sup> Both sets of rights play a crucial role in enabling people to access and exert influence in the various forums where distributive decisions are made affecting socio-economic rights. The wealthy have superior opportunities to access quality education, political decision-making processes, the media and legal representation — all crucial mechanisms for protecting and advancing people’s material interests in a democracy. This can result in vicious spiral of inequality as disparities in political power perpetuate unequal access to socio-economic rights which in turn deepen political inequalities.<sup>37</sup> Creating accessible channels for public participation in policy and law-making processes can mitigate the political marginalisation of the poor by requiring those in power to hear their voices.<sup>38</sup> However, providing opportunities for public participation in both law-making and rights-enforcement processes cannot on its own overcome the systemic disadvantages of poverty and inequality. Resource disparities will continue to have a significant impact on people’s ability to access and enjoy equal voice in such participatory processes. Paying attention to resource inequalities is thus essential to giving

<sup>33</sup> See further, part III(b) below.

<sup>34</sup> Amartya Sen *The Idea of Justice* (2010) 256. For a more detailed argument, see Amartya Sen ‘Poor, relatively speaking’ 35 *Oxford Economic Papers* (1983) 153–69.

<sup>35</sup> See Sen’s discussion of other contingencies that can affect people’s ability to convert income into sources of value in their lives. Sen (2010) *ibid* at 255–7.

<sup>36</sup> As John Rawls has pointed out, when economic and social inequalities are large, they tend to support political inequality and domination of one group by another: John Rawls *Justice as Fairness: A Restatement* (2001) 130–1.

<sup>37</sup> For comparative accounts of the influence of poverty and inequality on political participation, see Martha Jackman ‘Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law’ (1994) 2 *Review of Constitutional Studies* 76 at 95–100; Stiglitz *op cit* note 32 at 118–45; Martin Gilens & Benjamin I Page ‘Testing theories of American politics: Elites, interest groups and average citizens’ (2014) 12 *Perspectives on Politics* 564.

<sup>38</sup> See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 115. For a critical analysis of the courts’ jurisprudence on participation in legislative processes and its ability to overcome the political marginalisation of the poor, see Henk Botha ‘Representing the poor: Law, poverty and democracy’ (2011) 22 *Stellenbosch LR* 521.

poor people meaningful access to the political processes which determine the budgetary priorities and programmes for delivering socio-economic rights.

However, as Sen and others argue, acknowledging the close interrelation between inequality and poverty does not imply that poverty can or should be reduced to a metric of inequality.<sup>39</sup> This would imply that poverty is reduced as greater equality is achieved in a society, even though large swathes of the population may not enjoy a minimally adequate standard of living. Conversely, it would imply that great strides in improving living standards overall would not count as a poverty reduction achievement without an equivalent reduction in social inequalities. As David Bilchitz has emphasised, in order to be meaningful, socio-economic rights must be accorded an independent substantive content which is not reducible to the relative benefits enjoyed by others.<sup>40</sup>

Providing access to a basic set of social safety nets through public provision of a range of social goods and services of a decent quality can help to alleviate the worst ravages of poverty. However, the argument that I have sought to advance in this part of the article is that measures designed to achieve the fulfilment of socio-economic rights must take into account the broader patterns of inequality in society. Steep inequalities in income and resources not only enable the rich to accumulate greater economic and political power, but also undermine the ability of people to participate as equals in all spheres of society. The result is a vicious spiral generating entrenched structural patterns of poverty and inequality. While the content of socio-economic rights cannot be developed solely by reference to the ideals and values associated with equality, the empirical evidence demonstrates that the two are intertwined and the goals associated with each will not be achieved without paying attention to the other.

The time has now come to explore the dimensions of equality most salient in advancing a just distribution of socio-economic resources, and how they should inform the design of just institutional arrangements for a democratic society.

### III DISTRIBUTIVE EQUALITY WITHIN THE EGALITARIAN LIBERAL TRADITION

A number of philosophers within the broad egalitarian liberal tradition have grappled with the question of the appropriate metric of equalisation ('equality of what?'), and the principles which should govern a just distribution of resources. In this part, I consider three internationally influential approaches to these questions — those of Ronald Dworkin, Amartya Sen and John Rawls — and evaluate the suitability of the respective theories for the adjudication of the socio-economic rights in the South African Constitution. I conclude by noting the synergies between Rawls's concept of a 'social

<sup>39</sup> Sen (1983) *op cit* note 34 at 156–7.

<sup>40</sup> Bilchitz *op cit* note 17 at 166–70.

minimum' and the concept of 'parity of participation' developed by the critical political theorist, Nancy Fraser. I argue that the latter concept is the most promising in developing an equality-promoting interpretation of socio-economic rights in the South African context.

(a) *Ronald Dworkin*

Ronald Dworkin regards a commitment to egalitarianism, understood as an obligation of government to treat each citizen with equal concern, as a precondition of political legitimacy:

'Equal concern is the sovereign virtue of political community — without it government is only tyranny — and when a nation's wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect.'<sup>41</sup>

For Dworkin the appropriate metric for distributive equality is equality of resources. These are broadly resources such as property, income and the rights which people enjoy under the prevailing legal system to utilise this property.<sup>42</sup> But what does it mean to treat people with equal concern in the context of the distribution of resources? According to Dworkin, this requires the complex reconciliation of two primary ethical principles. The first is the principle that government should be concerned that the lives of people go well, and that it is equally important that each person's life goes well. The second is the principle of individual responsibility — that we each have a special, personal responsibility to decide what kind of life is best suited to us, and to decide how best to use our resources to achieve our life goals. Public policy in the sphere of distributive justice must respect both the principle of equal importance of people's lives and be sensitive to personal responsibility and choice.<sup>43</sup>

The mechanism that he argues would best give effect to these principles is based on a scenario of a distribution of resources determined according to a hypothetical auction where people bargain with an equal stock of counters (equal economic baseline) for a share of available community resources.<sup>44</sup> However, it is evident that after the auction, the state where everyone enjoys an equal share of community resources will not endure for long. The resources which people accumulate or lose over time will be affected fundamentally by their choices as well as contingencies over which they may have no control, such as living with a disability or a particular talent and skills set ('brute luck', in Dworkin's terminology). According to Dworkin, the way that brute luck in life is distributed is essentially arbitrary and should not be allowed to undermine equality of resources. However, resource distributions

<sup>41</sup> Ronald Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 1. See also Ronald Dworkin *Justice for Hedgehogs* (2011) ch 16.

<sup>42</sup> Dworkin (2000) *ibid* at 65 and 321.

<sup>43</sup> *Ibid* at 324.

<sup>44</sup> For a full description of this hypothetical auction, and the considerations underlying it, see *ibid* at 67–71.

should be sensitive to people's choices to live in a certain way, for example, to value hard work and saving over a more relaxed and consumerist lifestyle).<sup>45</sup> The redistributive model he develops to compensate for brute luck is based on a hypothetical insurance market.<sup>46</sup> The premiums paid toward such insurance are estimated and collected as a tax which can be used to compensate people who are disadvantaged by brute luck.<sup>47</sup> Dworkin provides practical examples of how such a hypothetical insurance scheme could serve as a model for a new public health care scheme as well as unemployment insurance and other welfare policies in the US context.<sup>48</sup>

The notion that the distribution of social and economic resources must show respect for the principle of equal concern requires responsiveness to individual circumstances and needs. Some, owing to their vulnerability and special needs, may require more resources to compensate for 'brute luck' in personal endowments and circumstances. The principle of equal concern is reflected in the context-sensitive nature of the test for unfair discrimination developed by the Constitutional Court which eschews an equal treatment model in favour of one that is sensitive to the disparate impact of the measures complained of on groups in their particular social and historical context.<sup>49</sup> The principle of equal concern also finds expression within the reasonableness model of review in the context of socio-economic rights. As Yacoob J held in *Grootboom*:

'To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. . . . [T]he Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.'<sup>50</sup>

However, the central distinction drawn by Dworkin between choices for which an individual must bear personal responsibility, and those that are beyond her control (for which she must be compensated) can be criticised. As David Bilchitz observes, the capacity to choose and the range of choices in fact available to an individual are also in some senses the consequence of brute luck. They are largely dependent on the social, economic and cultural environment into which they were born. Thus, 'attempting to distinguish between chosen and unchosen features of the self seems to be like attempting to divide what is fundamentally intertwined'.<sup>51</sup> The empirical evidence

<sup>45</sup> Ibid at 323

<sup>46</sup> Ibid at 73–99.

<sup>47</sup> Ibid at 99–109. See also Dworkin (2011) op cit note 41 at 360–1.

<sup>48</sup> Dworkin (2000) op cit note 41 at chs 8 and 9.

<sup>49</sup> See for example, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>50</sup> *Grootboom* supra note 11 para 44.

<sup>51</sup> David Bilchitz 'Egalitarian liberalism, distributive justice and the new constitutionalism' (2014) 140 *Theoria* 47. For a similar criticism, see Sen (2010) op cit note 34 at 266–7.

discussed above supports this critique by demonstrating how the circumstance of being born into a society with high levels of inequality negatively affects social mobility, restricting the nature and range of choices available to succeeding generations.<sup>52</sup>

Moreover, the impact of South Africa's colonial and apartheid history makes it an impossible task to disentangle inequalities of resources resulting from people's ostensibly free choices and those generated by a history of systemic discrimination and dispossession. For this reason, requiring state policy to display equal concern for an individual's unique circumstances and needs would seem to be the more contextually appropriate application of Dworkin's theory of equality of resources for South Africa's socio-economic rights jurisprudence.

(b) *Amartya Sen*

For Sen, the capabilities which people have to lead the kind of life they have reason to value is the appropriate focus for distributive justice.<sup>53</sup> Sen's major concern is to focus attention on the actual substantive freedoms that people are able to enjoy, rather than simply on the index of resources or even Rawlsian 'primary goods' which can be accessed. Focusing simply on the resources which people have does not take into consideration the range of factors that can impact on people's abilities to convert these resources into effective combinations of human functionings. These factors range from personal characteristics, the impact of physical and social environments, and (as already noted) inequality. As Sen notes,

'[t]he variations in conversion opportunities are not just matters of what can be seen as "special needs", but reflect pervasive variations — large, small and medium — in the human condition and in relevant social circumstances'.<sup>54</sup>

However, Sen does not contend that the central goal of justice should be the equalising of capabilities.<sup>55</sup> He reasons that equality of capability is only one dimension or space of equality, and demanding capability equality may conflict with other weighty considerations of procedural justice or even equality in other spheres. He gives the example of the well-established fact that given symmetric care, women tend to live longer than men, with lower mortality rates in each age group. However, an exclusive focus on equalising men's capability to live as long as women 'would flagrantly violate a significant requirement of process equity (in particular, treating different people similarly in matters of life and death)'.<sup>56</sup>

<sup>52</sup> Wilkinson & Pickett op cit note 31 at ch 12.

<sup>53</sup> Sen *Development as Freedom* (1999) 74–5; Sen (2010) op cit note 34 at 231–5.

<sup>54</sup> Sen (2010) *ibid* at 261.

<sup>55</sup> *Ibid* at 295.

<sup>56</sup> *Ibid* at 269.

Sen cautions against a 'unifocal view of equality' and calls attention to the multiple dimensions in which equality matters.<sup>57</sup> He observes that other considerations — in addition to capabilities — may be relevant to distributional judgments such as the appropriate weight to be accorded to rewarding personal efforts and labour and advancing aggregate welfare.<sup>58</sup> Moreover, a focus on capability equality would not yield definitive judgments in all cases, given the reasonable variations in the choice of relative weights to be attached to different types of capabilities giving rise to partial orderings.

In the context of development policy and the realisation of socio-economic rights,<sup>59</sup> a focus on capabilities highlights how unequal social structures can undermine people's abilities to convert access to resources and services into valuable functionings even where absolute poverty has been eliminated. Unlike Dworkin and Rawls, whose projects are to specify the principles for designing and evaluating just institutions and distributions, Sen's focus on capabilities is intended rather to function as a sphere for comparative judgments and public reasoning regarding the social arrangements which best advance human capability freedom.<sup>60</sup> For this reason, Sen has resisted attempts to specify a central list of capabilities which must be guaranteed as fundamental human rights.<sup>61</sup>

The capabilities approach can provide a basis for evaluating how the absence of social programmes or inadequate social provision lead to disparities in what various groups in society are able to be or to do. However, Sen provides little guidance regarding what capabilities should be subject to an equalising imperative.<sup>62</sup> It may be that over time, greater clarity and consensus would emerge through public deliberation on the nature of the capabilities which should be subject to equalisation in the South African context. In these circumstances, it is conceivable that a broader scope would exist for integrating capability inequality as a factor in assessing the reasonableness of the state's social programmes.

(c) *John Rawls*

John Rawls sought to develop principles to designate the basic features of a just society,<sup>63</sup> which could form the basis of an 'overlapping consensus'

<sup>57</sup> Ibid at 297.

<sup>58</sup> Ibid at 297.

<sup>59</sup> Ibid at 381. For Sen's rebuttal of the institutional and feasibility critiques of social and economic rights, see *ibid* at 382–5.

<sup>60</sup> Ibid at 232–3 and 241–3; Sen (1999) *op cit* note 53 at 30–4.

<sup>61</sup> Compare for example, Martha Nussbaum *Women and Human Development* (2000) 96–101. For Sen's response, see Amartya Sen 'Elements of a theory of human rights' (2004) 32 *Philosophy & Public Affairs* 315.

<sup>62</sup> For a critique of the lack of a theory of value in Sen's capabilities theory, see Bilchitz *op cit* note 17 at 10–12.

<sup>63</sup> John Rawls *A Theory of Justice* (1999). This work was originally published in 1971 and revised in 1999. All references herein are to the revised edition.

between members of diverse democratic societies.<sup>64</sup> Rawls's principles of justice apply to a set of 'primary goods' conceived as those goods citizens need to function as free and equal persons in society. These comprise basic rights and liberties, opportunities to occupy offices and positions of responsibilities in political and economic institutions, income and wealth, and the social bases of self-respect.<sup>65</sup> According to Rawls, the distribution of primary goods in society must reflect fair terms of social co-operation between free and equal citizens. They do so when they conform to two principles of justice.<sup>66</sup> These two principles are intended to inform the design of the basic structure and political and economic institutions of a democratic society.<sup>67</sup> The first principle, which enjoys lexical priority in relation to the second principle, holds that '[e]ach person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all'.<sup>68</sup> This basic scheme of civil and political liberties is a 'constitutional essential' for Rawls.

The second principle of justice concerns the basis for distributing income and wealth in a just society. It regards social and economic inequalities as justifiable only when they satisfy the following two conditions: 'First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to the greatest benefit of the least-advantaged members of society (the difference principle).'<sup>69</sup>

Fair equality of opportunity is a prior commitment to the difference principle.<sup>70</sup> A just society is not one that simply guarantees formal equality of opportunity leading to a meritocratic society.<sup>71</sup> This implies, according to Rawls, that a free market system must be regulated by political and legal institutions so as to prevent 'excessive concentrations of property and wealth, especially those likely to lead to political domination'.<sup>72</sup> It also implies 'equal opportunities of education for all regardless of family income'.<sup>73</sup> The second part of the second principle holds that the economic and political system must be structured in such a way that those who are poorer derive greater benefit from the system than they would under a more strictly equal

<sup>64</sup> See John Rawls *Political Liberalism* (2005). This work was originally published in 1993. All references herein are to the expanded edition published in 2005.

<sup>65</sup> Rawls *ibid* at 180–1.

<sup>66</sup> Rawls argued that these are principles that would be chosen by participants in a hypothetical social contract behind a veil of ignorance — the so-called 'original position'. See Rawls (1999) *op cit* note 63 at ch 3.

<sup>67</sup> On the 'basic structure' of society, see Rawls (2001) *op cit* note 36 at 10–12.

<sup>68</sup> Rawls (2001) *ibid* at 42. For the original formulation of this principle see Rawls (1999) *op cit* note 63 at 52–4.

<sup>69</sup> Rawls (2001) *ibid* at 42–3. For the original formulation of the second principle, see Rawls (1999) *ibid* at 72.

<sup>70</sup> Rawls (2001) *ibid* at 43.

<sup>71</sup> Rawls (1999) *op cit* note 63 at 91; Rawls (2001) *ibid* at 43–4.

<sup>72</sup> Rawls (2001) *ibid* at 44.

<sup>73</sup> *Ibid*.

system.<sup>74</sup> Rawls contends we are led to the difference principle ‘if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return’.<sup>75</sup> The idea behind the difference principle ‘is to redress the bias of contingencies in the direction of equality’,<sup>76</sup> and expresses a concept of reciprocity in which the distribution of talents is seen as a common asset to be put to work for the benefit of society as a whole, particularly the most disadvantaged.<sup>77</sup>

However, the principle of fair equality of opportunity and the difference principle do not constitute ‘constitutional essentials’ for Rawls.<sup>78</sup> His reasons derive from the difficulty of making legitimate — in the sense of predictable and transparent — judgments regarding compliance with the equalising commitments of the second principle.<sup>79</sup> As Frank Michelman observes, this creates a gap in liberal theory between the demands of justice and the criteria for assessing the legitimacy of a political order.<sup>80</sup> The ostensible lack of transparent standards for assessing compliance lies at the heart of the general resistance in liberal theory to recognising the justiciability of rights which impact on the distribution of the social and economic resources of a political community.

Leaving aside the question whether it is possible to derive legitimate standards for adjudicating the more far-reaching egalitarian commitments of Rawls’s principle of justice, it is significant that, subsequent to the original publication in 1971 of *A Theory of Justice*, Rawls came to recognise the principle of a ‘social minimum’ as a constitutional essential which courts ‘should be reasonably competent to assess’.<sup>81</sup> The social minimum should ensure that the strains on people’s commitment are not excessive in the sense that, while regarding themselves as free and equal citizens, they can no longer affirm the principles of justice as the public conception of justice for the basic

<sup>74</sup> Rawls (1999) op cit note 63 at 56.

<sup>75</sup> Ibid at 87.

<sup>76</sup> Ibid at 86.

<sup>77</sup> Ibid at 87–8. See also the linkages that Rawls draws between the difference principle and the concept of fraternity ibid at 90–1.

<sup>78</sup> Rawls (2005) op cit note 64 at 228–9.

<sup>79</sup> In order to be legitimate, a political system which requires citizens to comply on a regular basis with its laws must contain clear and predictable standards for judging such compliance. On the incompatibility of the second principle of justice with the standard of constitutional legitimacy, see Rawls (2001) op cit note 36 at 48–50; Rawls (2005) ibid at 227–30.

<sup>80</sup> See Frank Michelman ‘Poverty in liberalism: A comment on the constitutional essentials’ (2012) 60 *Drake LR* 1001 at 1014–17; Frank I Michelman ‘Constitutionally binding social and economic rights as a compelling idea: Reciprocating perturbations in liberal and democratic constitutional visions’ in Helena Aliviari García, Karl Klare & Lucy A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015) 277.

<sup>81</sup> Rawls (2001) op cit note 36 at 162, citing Michelman op cit note 24 and Michelman ‘Welfare rights in a constitutional democracy’ (1979) *Washington Univ Law Quarterly* 659. See also Rawls (2005) op cit note 64 at 7 and 166.

structure of society.<sup>82</sup> This occurs, in the first instance, when people become resentful and are led to take violent action to protest against their social conditions. But even in a milder sense, the strains of commitment should not be such that people become cynical, alienated and withdrawn from political society.<sup>83</sup> The meeting of people's basic material needs that enable them to lead decent lives may prevent strains on commitment in the first sense. However, Rawls argues that this may not be sufficient to prevent political alienation in the second sense. The latter 'requires that the least advantaged feel that they are a part of political society, and view the public culture with its ideals and principles as of significance to themselves'.<sup>84</sup> Thus he argues that the difference principle specifies a social minimum based on bonds of reciprocity between individuals and society.<sup>85</sup> It encompasses a social safety net to meet the basic needs essential for a 'decent life'. However, in a property-owning democracy it should also be extensive enough so that people feel that they have a meaningful stake in the political and economic life of the nation thus preventing alienation in both senses described above.<sup>86</sup> Thus the content of the social minimum must be informed by inquiring 'what is required to give due weight to the idea of society as a fair system of co-operation between free and equal citizens, and not to regard it, in practice if not in speech, as so much rhetoric'.<sup>87</sup>

A comprehensive evaluation of Rawls's theory of justice is beyond the scope of this article, except to note that certain aspects of his theory are not consonant with the ethos and structure of the South African Bill of Rights. This is particularly the case with regard to the separation of political and economic principles within the structure of Rawls's theory of justice, and according lexical priority to civil and political liberties over the principles governing the distribution of material resources. In *Grootboom*, the Constitutional Court emphasised that all the rights in the Bill of Rights 'are inter-related and mutually supporting'.<sup>88</sup> The specific concept of the social minimum would appear to be the most useful in developing equality as a value in the interpretation of socio-economic rights. It could serve not as a minimum core concept forming an independent cause of action (which the court has repeatedly rejected), but as a factor in the overall reasonableness

<sup>82</sup> Rawls (2001) *ibid* at 128.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* at 129.

<sup>85</sup> Rawls views non-fulfilment of the social minimum as an obvious indicator that the difference principle is being blatantly violated. *Ibid* at 162.

<sup>86</sup> *Ibid* at 130. See also *ibid* at 132.

<sup>87</sup> Rawls (2005) *op cit* note 64 at 166. He also notes (*ibid*) that 'below a certain level of material and social well-being, and of training and education, people simply cannot take part in society as citizens, much less equal citizens.'

<sup>88</sup> *Grootboom* *supra* note 11 para 23. For an analysis of the broader difficulty of seeking to apply moral principles derived deductively from a hypothetical choice situation to the adjudication of constitutional rights in a democracy, see Goodwin Liu 'Rethinking constitutional welfare rights' (2008) 61 *Stanford LR* 203 at 224–7.

inquiry.<sup>89</sup> However, in order to flesh out the potential of the material preconditions for equal citizenship implicit in the Rawlsian social minimum, I conclude this part by considering the principle of ‘participatory parity’ in the work of the critical theorist, Nancy Fraser.

(d) *From social minimum to participatory parity*

The concept of ‘parity of participation’ in political, economic and social spheres lies at the heart of the Nancy Fraser’s conception of justice.<sup>90</sup> It is thus worthwhile to examine how this concept elaborates on the interconnection between social provisioning and equal citizenship suggested by Rawls’s social minimum. Fraser argues that the principle, central to the liberal tradition of the equal moral worth of citizens, requires ‘parity of participation’ across multiple discursive arenas in society where political, economic and social decision-making occurs.<sup>91</sup>

The standard of participatory parity is thus more demanding than formal equality as it requires the creation of the necessary substantive conditions for people to participate in society as peers or equals. Fraser identifies at least two conditions that must be satisfied for participatory parity to be satisfied. The first, the objective condition of participatory parity, concerns the economic and social arrangements of a society. It would preclude, in Fraser’s words,

‘social arrangements that institutionalize deprivation, exploitation, and gross disparities in wealth, income, and leisure time, thereby denying some people the means and opportunities to interact with others as peers’.<sup>92</sup>

A necessary condition for parity of participation is thus the elimination of systemic economic inequalities. This does not mean, according to Fraser, ‘that everyone must have exactly the same income, but it does require the sort of rough equality that is inconsistent with systemically generated relations of dominance and subordination’.<sup>93</sup> In Rawlsian terms, such relations would strain the bonds of people’s social commitment and undermine social co-operation based on free and equal individuals.

The second condition of participatory parity concerns the intersubjective conditions for social relations, entailing cultural patterns of value that

<sup>89</sup> On the window left open by the court for some notion of minimum standards to play a role in the reasonableness assessment, see *Grootboom* supra note 11 para 33; *Treatment Action Campaign* supra note 12 para 34.

<sup>90</sup> See Nancy Fraser ‘Rethinking the public sphere: A contribution to the critique of actually existing democracy’ in C Calhoun (ed) *Habermas and the Public Sphere* (1992) 109–42; Nancy Fraser ‘Rethinking recognition’ (2000) 3 *New Left Review* 107–20; Nancy Fraser ‘Social justice in the age of identity politics: Redistribution, recognition, and participation’ in N Fraser & A Honneth (eds) *Redistribution or Recognition: A Political-Philosophical Exchange* (2003) 7.

<sup>91</sup> In contrast to Habermas, Fraser argues for a plurality of public deliberative arenas instead of a single overarching public sphere. See Fraser (1992) *ibid* at 121–8. On the linkage between parity of participation and the equal moral worth attributed to human beings, see Fraser (2003) *ibid* at 229–33.

<sup>92</sup> Fraser (2003) *ibid* at 36.

<sup>93</sup> Fraser (1992) *op cit* note 90 at 121.

systematically 'deny some people the status of full partners in interaction — whether by burdening them with excessive ascribed "difference" or by failing to acknowledge their distinctiveness'.<sup>94</sup> The first-mentioned barrier to participatory parity is associated with the politics of redistribution, whilst the latter is associated with the politics of recognition involving the struggle to affirm the identities and equal status of groups on the basis of their race, gender, sexual orientation and similar grounds. Fraser proceeds to develop a sophisticated account of how the two barriers to participatory parity interrelate in particular contexts so as to reinforce the disadvantages associated with each, and the complex strategies required to pursue transformative social change.<sup>95</sup> The history of the interrelationship between racial and class discrimination in South Africa illustrates the complexities of this interaction.

Fraser's account of democratic justice based on the right of all to participate as equals in society resonates with many features of South African constitutionalism. It is based on a substantive account of equal participation which is sensitive to both the economic and socio-cultural barriers to effective participation. This resonates with the South African jurisprudence and scholarship on the plural dimensions of substantive equality.<sup>96</sup> Secondly, participatory parity is premised on a deep concept of participatory democracy which recognises that decisions impacting on people's rights and well-being are not confined to formal electoral politics and political institutions. Such decisions extend across society, including institutions and organisations located within the broader economy and labour market. For example, the institutions and normative frameworks of labour, consumer and contract law play a significant role in shaping the extent to which people can participate as peers in the economy and gain effective access to resources and services. This is consonant with the endorsement of participatory democracy by the Constitutional Court as an important dimension of South Africa's constitutional democracy, complementing representative democracy.<sup>97</sup> It also accords with the application of the Bill of Rights to both the public and private spheres as indicated by ss 8(2) and (3) as well as s 39(2) of the Constitution.<sup>98</sup>

A potential drawback which participatory parity shares with other theories of democratic justice is its circularity. It requires parity of participation for

<sup>94</sup> Fraser (2003) op cit note 90 at 36.

<sup>95</sup> Ibid.

<sup>96</sup> For accounts of the application of complex equality in the South African context incorporating recognition, redistribution and democratic participation, see H Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1; S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *SAJHR* 214.

<sup>97</sup> On the significance of participatory democracy to South African constitutionalism, see *Schubart Park Resident's Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) paras 43–8 and the jurisprudence cited in footnotes 30–5.

<sup>98</sup> On the application of socio-economic rights in South Africa to private law, see S Liebenberg 'Socio-economic rights beyond the public-private law divide' in M Langford, B Cousins, J Dugard & T Madlingozi (eds) op cit note 10 at 63.

decision-making which impacts on people's rights, but in order for there to be parity participants must be accorded the rights that secure them the material and socio-cultural preconditions for fair participation. However, Fraser argues that this circularity is not vicious. The circle is broken through practical strategies to transform the social conditions that constitute a barrier to participatory parity.<sup>99</sup> Participatory parity entails making both first order claims for recognition and redistribution as well as 'second-order or meta-level claims about the conditions in which first-order claims are adjudicated'.<sup>100</sup> The advantage of raising meta-level claims is that it enables a critique of existing institutional processes of deliberation which fail to live up to the ideal of participatory parity. It would thus provide a frame for evaluating to what extent political, economic and legal institutions in South Africa enable economically marginalised groups to participate as peers or equals and, where required, could support calls for structural reforms of the relevant institutions.

In part IV below I consider how the significant concepts in egalitarian liberal theory discussed in this part could be applied in practice to South Africa's socio-economic rights jurisprudence. Particular attention will be paid to the principle of participatory parity as the optimal method of integrating the value of equality in South Africa's socio-economic rights jurisprudence.

#### IV INTEGRATING EQUALITY IN SOUTH AFRICA'S SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

##### (a) *Introduction*

The structure and normative foundations of market economies enable the wealthy to enjoy a superior quality of the goods and services associated with socio-economic rights. The ideological hold of this form of economic organisation in contemporary democracies such as South Africa, coupled with the institutional constraints associated with the adjudication of socio-economic rights, imposes distinct limits on what can be achieved in seeking to advance a broader project of egalitarianism through litigation. Nevertheless, I contend that courts can play a modest, but not insignificant role in nudging social policy and economic relationships in the direction of a more egalitarian distribution of valued social resources and services. It is this role I explore in this part.

I turn now to consider how the principles and concepts developed by egalitarian liberal theorists could be applied in practice to two aspects of South Africa's socio-economic rights jurisprudence — reviewing the reasonableness of state social programmes and applying socio-economic rights to contractual relations. I focus primarily on the principle of participatory parity, given its synergies with many aspects of South African constitutionalism.

<sup>99</sup> Fraser (2003) op cit note 90 at 42–5.

<sup>100</sup> Ibid at 44.

Furthermore, it directs our attention to the kinds of social relationships which the distribution of material resources should seek to foster in a constitutional democracy based on the equal citizenship of all.

*(b) Incorporating participatory parity in reasonableness review*

The first area I consider is how the courts could draw on the concept of participatory parity to nudge the state to improve the quantity and quality of social services delivered to impoverished communities. Through improving both the scope and quality of social programmes, the state will simultaneously achieve the dual objectives of responding to the basic material needs of impoverished communities and reducing the vast disparities in the enjoyment of socio-economic rights existing between the rich and the poor in South Africa.

In the leading judgment of the Constitutional Court on the sufficiency of basic services being delivered to the poor, *Mazibuko v City of Johannesburg*,<sup>101</sup> O'Regan J commences her judgment by observing that 'the achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor'.<sup>102</sup> However, the judgment has been criticised (amongst other reasons)<sup>103</sup> for an insufficient consideration of the impacts on the impoverished Phiri community of the water programme instituted by the City of Johannesburg, Operation Gcin'amanzi (to save water). The programme limited the amount of free basic water to 6 kilolitres per household<sup>104</sup> and required the installation of pre-paid water meters as a condition for residents receiving a water supply in their homes.<sup>105</sup> The latter resulted in the automatic termination of a household's water supply unless additional water credits were purchased.

Much weight is attached in the Constitutional Court's judgment to the constraints faced by the local authority in achieving the pragmatic management of water resources for the benefit of the Johannesburg community as a

<sup>101</sup> *Supra* note 12.

<sup>102</sup> *Ibid* para 2.

<sup>103</sup> See Liebenberg *op cit* note 10 at 466–80; Geo Quinot 'Substantive reasoning in administrative-law adjudication' (2010) 3 *Constitutional Court Review* 111; Lucy A Williams 'The role of courts in the quantitative implementation of social and economic rights: A comparative study' (2010) 3 *Constitutional Court Review* 141; Paul O'Connell 'The death of socio-economic rights' (2011) 74 *Modern LR* 532 at 550–2. For a defence of the judgment, see Edwin Cameron *Justice: A Personal Account* (2014) 267–70.

<sup>104</sup> The 6 kilolitres per household was calculated on the national prescribed minimum basic water supply of 25 litres per person per day for a household of eight persons: Regulations relating to compulsory national standards and measures to conserve water, GG 22355, reg 3 (published in terms of s 9 of the National Water Services Act 108 of 1997).

<sup>105</sup> The alternative was outdoor delivery of water through a yard standpipe. The option of a credit system available to other households in Johannesburg, including wealthier areas, was thus precluded.

whole.<sup>106</sup> While the latter are certainly valid considerations within the overall reasonableness assessment, the court did not engage in a systematic manner with the impact of the scheme on the ability of residents with very low incomes and large households<sup>107</sup> to sustain life without serious health risks. This is despite the expert international evidence presented on the greater quantity of water required for the latter purposes, as well as to cater for the particular needs of a community in which a number of households are headed by women and there is a high prevalence of people living with HIV/AIDS.<sup>108</sup> Furthermore, the evidence suggested that the cumulative effect of Operation Gcin'amanzi was to create disparate burdens in accessing water by the impoverished residents of Phiri compared to residents in the wealthier, former white group areas of Johannesburg. These burdens ranged from the inequality created between larger and smaller households; the procedural and planning advantages of having water delivered on the credit water payment system available to wealthy Johannesburg as opposed to the pre-paid water meter system;<sup>109</sup> and the City's Indigent Registration Policy which was under-inclusive and experienced by residents as stigmatising.<sup>110</sup>

Applying some of the insights from the egalitarian theories discussed above, it could be argued that the water scheme introduced by the City of Johannesburg failed to display equal concern for the Phiri residents by not taking into account how a limited free basic water supply combined with the pre-paid water meter impacted particularly harshly on them, given their social and economic realities. This included the prevalence of larger households than the average on which the free basic supply was calculated,

<sup>106</sup> See, for example, *Mazibuko* (CC) supra note 12 paras 84, 89, 101 122–24 and 154.

<sup>107</sup> Household incomes amongst the Phiri applicants were approximately R1100 per month, with many relying on government grants: *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) (hereafter '*Mazibuko* (HC)') para 5. The average size of households in Phiri was a minimum of sixteen persons: *Mazibuko HC* para 169; The household of the first applicant, Mrs Mazibuko, consisted of three different households with a total of twenty residents: *Mazibuko* (CC) ibid para 87.

<sup>108</sup> See *Mazibuko* (HC) ibid paras 159, 168–79; *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) (hereafter '*Mazibuko* (SCA)') paras 16–24.

<sup>109</sup> The unfair discrimination challenge in respect of the pre-paid water meters was rejected by the Constitutional Court on the basis that it was not necessarily disadvantageous to the Phiri community given that they received compensatory advantages such as cheaper tariffs, avoiding interest on outstanding accounts and not being listed with a credit bureau as a defaulter: See *Mazibuko* (CC) supra note 12 paras 148–58. However, it is arguable that the economic burdens on residents of the former white areas of Johannesburg could easily be absorbed by wealthy households and that the advantages of the credit system (such as notice and an opportunity for representations) would have alleviated the poverty-related burdens on the poorer households of Phiri. It would also help alleviate the health and life-threatening harms associated with the cutting off of the water supply to households which could not afford to purchase additional water credits.

<sup>110</sup> *Mazibuko* (CC) supra note 12 paras 98–102.

the depth of poverty in the community, and the high HIV/AIDS burden it carried. Viewed through Sen's capabilities lens, the court could also have considered how the scheme as a whole impacted on the ability of the community to develop a range of valuable capabilities such as the ability to sustain life, health and human dignity (for example, by having enough water to ensure personal hygiene and clean clothing).

But beyond these biological and psychological impacts, there is also the question of how a lack of access to sufficient water impacts on people's abilities to participate as equals in society. Rawls's principle of the social minimum would invite consideration of how unequal access to water between rich and poor areas strained the bonds of commitment to society experienced by impoverished residents of Phiri. These strains are likely to be intense given the fact that the communities that bore the brunt of apartheid injustice continue to bear the disproportionate burden of poverty and inequality. Finally, Fraser's principle of participatory parity would require close attention to how the intersecting harms of economic marginalisation and racial and gender disadvantage impeded parity of participation in society for Phiri residents.

The South Gauteng High Court engaged in some depth in its judgment with the evidence regarding the particular impacts of having insufficient water on impoverished black women in the community. As Tsoka J observed, South Africa is a patriarchal society.<sup>111</sup> The burden of domestic chores and caring for the young, ill and elderly falls disproportionately on impoverished black women. This burden is aggravated when public services such as water provision are inadequate as it is the women who must walk long distances to collect the water and attempt to meet the cleaning, cooking and hygiene needs of the household with limited water. In his affidavit, the President of the Southern African HIV Clinicians Society, Desmond Martin, described how these burdens are aggravated in a community with a high HIV/AIDS prevalence such as Phiri:

'In general terms in South Africa women carry a disproportionate HIV-related burden. This is because women are more susceptible to HIV-infection, more vulnerable to sexual pressure and they are often the primary care-givers to PLWHA [people living with AIDS]. Five of the second applicants in this case are women representing female-headed households. One of these women, Grace Munyai, was a care-giver to her HIV-infected niece. As testified in Mrs Munyai's affidavit, the additional water required to take care of her HIV-infected niece, Sizile, necessitated a 3 km walk to fetch water as the free basic amount was insufficient to ensure hygienic conditions and adequate drinking water. Given the gendered nature of the HIV-pandemic it is particularly important for women's health, standard of living, equality and dignity to have access to sufficient water.'<sup>112</sup>

<sup>111</sup> *Mazibuko* (HC) supra note 107 para 159.

<sup>112</sup> Cited in *Mazibuko* (HC) ibid para 173.

These circumstances would create multiple barriers to women like Mrs Munyai being able to participate in political, economic and social activities at all, let alone as an equal with more privileged citizens. Being unable to access sufficient water as a consequence of being poor clearly served to deepen the multiple layers of exclusion and disadvantage experienced by women living in Phiri.

In arriving at an overall assessment of the reasonableness of Operation Gcin'amanzi, these lived realities of Phiri residents, and their implications for the foundational constitutional value of equality, should have received more sustained consideration. As I have noted above, such an assessment would also require weighing the capacity and other constraints faced by local government in achieving a fair and sustainable system of water distribution within its jurisdiction. However, if reasonableness review is intended to be a weighing of all factors relevant to the realisation of social rights, then a context-sensitive evaluation of the impacts of social programmes on affected parties, including on their ability to participate as equals in society, should feature prominently in the overall assessment by courts of the reasonableness of the relevant programmes.<sup>113</sup> Including parity of participation as a factor in the reasonableness inquiry would serve the further purpose of requiring organs of state to consider how social programmes can be designed not only to meet basic survival needs, but also to foster the ability of people to participate as equals in society.

In Part IV(c) I consider how parity of participation could inform the application of socio-economic rights to contractual relationships.

*(c) Participatory parity in assessing contractual fairness*

Even with generous social programmes in place, the rules governing property and contract will remain significant mechanisms for distributing many valued social goods and services in market economies such as South Africa. The legal rules of private law play a crucial role in structuring and regulating exchanges of the goods and services which are the subject of socio-economic rights. However, disparities in bargaining power between economically more powerful and the economically weaker parties generate profound inequalities in access to these goods and services in quantitative and qualitative terms. The legal system can either reduce these inequalities in bargaining power (through, for example, protective rules in favour of the weaker party) or perpetuate unequal outcomes. Unless equalising measures are put in place, doctrines that appear neutral in their operation (such as *pacta sunt servanda*), enable more powerful parties to economic transactions to

<sup>113</sup> It is beyond the scope of this article to consider how the different factors in the reasonableness inquiry should be weighed. My primary objective here is to argue for a more systematic consideration of the impacts of social programmes on their beneficiaries, including how they either foster or impede their ability to participate as equals in society.

control access to socio-economic goods and services on terms favourable to themselves.

The Constitutional Court has affirmed that doctrines such as good faith and public policy in contractual relations must be developed and applied with reference to the normative value system created by the Constitution, particularly human dignity, equality, freedom and ubuntu.<sup>114</sup> It is an object of our Constitution that ‘contracting parties are treated with equal worth and concern’.<sup>115</sup> The relative position of the contracting parties is, for example, a relevant factor in assessing whether the operation of a contractual term is contrary to public policy and should therefore not be enforced. As Ngcobo J (as he then was) observed in *Barkhuizen*, this principle is important ‘in a society as unequal as ours’<sup>116</sup> in which many people conclude contracts ‘without any bargaining power and without understanding what they are agreeing to’.<sup>117</sup> This focus on unequal bargaining power in contractual relations provides an important conduit for the value of equality to be incorporated in contract law, particularly where the relevant contract impacts on constitutionally protected socio-economic rights. Correcting for disparities in bargaining power is one way in which Fraser’s principle of parity of participation can be applied to promote equality for economically weaker parties in contractual relationships.

The Constitutional Court has provided protection against bargaining disparities in contexts which affect people’s access to socio-economic rights in various ways. Thus, for example, in *Gundwana v Steko Development CC*,<sup>118</sup> the Constitutional Court held that when ordering default judgment, it is unconstitutional for a registrar of a high court to declare immovable property specially executable to the extent that this permits the sale in execution of a person’s home. A court order with judicial oversight is required. In elaborating on the nature of the judicial oversight to be exercised in these circumstances, Froneman J held as follows:

‘[C]onstitutional considerations not in existence earlier . . . caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.’<sup>119</sup>

This introduces a proportionality assessment into the process for executing a mortgage bond, thereby strengthening the protection of weaker parties

<sup>114</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (hereafter ‘*Barkhuizen*’) paras 28–30; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 71–2; *Botha & another v Rich* NO 2014 (4) SA 124 (CC) para 46.

<sup>115</sup> *Botha v Rich* NO *ibid* para 40.

<sup>116</sup> *Barkhuizen* *supra* note 114 para 59.

<sup>117</sup> *Ibid* para 65.

<sup>118</sup> 2011 (3) SA 608 (CC).

<sup>119</sup> *Ibid* para 53.

when security of tenure in their homes is threatened.<sup>120</sup> The Constitutional Court rejected the argument upheld by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson*<sup>121</sup> that a mortgagor voluntarily places her home at risk of execution when agreeing to the registration of a mortgage bond over her property. This agreement does not imply that she has waived her right of access to adequate housing, including the right not to be evicted without a court order in terms of s 26(3). Nor does it imply an acceptance of the mortgagee's right to execution when it occurs in bad faith.<sup>122</sup> In essence, the agreement to register a mortgage bond as security for financing a home loan does not entail an agreement by the mortgagor to forfeit her protection under s 26 of the Constitution. By insisting that the values and interests underlying s 26 are relevant in legal proceedings to execute a mortgage bond, the judgment helps create a more equitable legal regime for the housing finance market. In this way, the court promotes greater parity between ordinary people seeking to acquire ownership of a home and the powerful banks upon which they depend for finance.

In the sphere of lease agreements, the Constitutional Court held in *Maphango v Aengus Lifestyle Properties Ltd*<sup>123</sup> that a landlord's conduct in exercising the bare power of terminating leases for the sole purpose of securing higher rentals was subject to scrutiny by the Gauteng Rental Housing Tribunal as a potential 'unfair practice' in terms of the Rental Housing Act 50 of 1999. The court held that one of the significant ways in which socio-economic rights such as housing can 'ripple out' to private relationships is when the state takes legislative and other measures to fulfil the relevant right. The Rental Housing Act was a prime instance of such a measure.<sup>124</sup> The Constitutional Court interpreted the Act in a way which increases the protection of the housing rights of tenants who, in terms of the pre-existing common law, were subject to the unrestrained power of the landlord to terminate a lease of indefinite duration on notice.<sup>125</sup> Cameron J held that the determination of whether an unfair practice in terms of the Act has occurred requires that the common-law legal rights of a tenant or landlord and their contractually agreed provisions must be subject 'to scrutiny for unfairness in the light of both parties' rights and interests'.<sup>126</sup>

The court declined to express any view on the landlord's common-law entitlement to cancel the leases, nor on whether, if it was so entitled, 'the

<sup>120</sup> André van der Walt & Reghard Brits 'Judicial oversight over the sale in execution of mortgaged property: *Gundwana v Steko Development* 2011 (3) SA 608 (CC); *Nedbank Ltd v Fraser and Four other cases* 2011 (4) SA 363 (GSJ)' (2012) 75 *THRHR* 322; L Steyn '“Safe as houses?” — Balancing a mortgagee's security interest with a homeowner's security of tenure' (2007) 11 *Law, Democracy and Development* 101.

<sup>121</sup> 2006 (2) SA 264 (SCA).

<sup>122</sup> *Gundwana v Steko Development* supra note 118 paras 42–4.

<sup>123</sup> 2012 (3) SA 531 (CC) (hereafter '*Maphango*').

<sup>124</sup> *Ibid* para 34.

<sup>125</sup> *Ibid* para 29 and sources cited at footnote 21.

<sup>126</sup> *Ibid* para 53.

common law should be constitutionally developed to inhibit that power'.<sup>127</sup> This may be justifiable under subsidiarity principles.<sup>128</sup> On the other hand, it may be viewed as a missed opportunity by the highest court to align the background common-law rules of lease with the values and purposes of s 26.<sup>129</sup> Nevertheless, *Maphango* illustrates how the principles of fairness (in this case statutorily derived) can help promote greater contractual parity between economically disadvantaged tenants and lessors in the rental housing market.

These cases represent two examples of how courts can facilitate greater equality in contractual relations in the sphere of socio-economic rights. Despite these positive precedents, coupled with the enactment of protective legislation in a range of areas,<sup>130</sup> the common-law tradition is likely to exert a powerful restraining influence on both the development of the common law and the interpretation of protective legislation.<sup>131</sup> This tradition is strongly influenced by classic liberal notions of individual autonomy and is generally averse to interventions aimed at mitigating the harsh consequences of contracts on the basis of unequal economic power. Sustained attention to the impacts of economic inequality on the ability of people to participate as equals in transactions which affect their access to socio-economic rights thus remains a critical challenge.

## V CONCLUSION

Inequality in the distribution of resources in society is a formidable obstacle to the sustainable realisation of socio-economic rights. It produces patterns of power and privilege that are incompatible with a deep commitment to the equal worth of each person and prevents people from participating as equals in the political, economic and social arenas where distributive decisions are made. The Constitution and relevant jurisprudence supports an understanding of equality and socio-economic rights as mutually constitutive.

This article considered what light major theorists within the egalitarian liberal tradition can shed on the nature of this interrelationship. The potential and drawbacks of Dworkin's theory of displaying equal concern for persons

<sup>127</sup> Ibid para 55. See also ibid para 4.

<sup>128</sup> See André van der Walt *Property and Constitution* (2012) 57–60.

<sup>129</sup> See Frank Michelman 'Expropriation, eviction and the gravity of the common law' (2013) 2 *Stellenbosch LR* 245; Brian Ray 'Eviction, aspiration and avoidance' (2014) 5 *Constitutional Court Review* 173 at 200–10.

<sup>130</sup> See for example, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008.

<sup>131</sup> Marius Pieterse 'Indirect horizontal application of the right to have access to health care services' (2007) 23 *SAJHR* 157; Deeksha Bhana 'The role of judicial method in the relinquishing of constitutional rights through contracts' (2008) 24 *SAJHR* 300; Dennis M Davis & Karl Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 468–81; Dennis M Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' (2011) 22 *Stellenbosch LR* 845.

in the distribution of resources, Sen's capabilities theory, and Rawls's two principles of justice were weighed. I found that Rawls's concept of the 'social minimum' displays the most promise in drawing an important link between people's access to a decent level of social provisioning and their perception of themselves as free and equal participants in society. I concluded by considering how Nancy Fraser's concept of participatory parity extends the idea of equal citizenship underlying the social minimum. I argued that participatory parity provides an optimal frame for evaluating the intersecting impacts of unequal resource distributions and hierarchies of status on grounds such as race and gender.

The final part examined how participatory parity could be applied in practice to two major areas of South African socio-economic rights jurisprudence: the assessment of the reasonableness of government socio-economic programmes and contractual relations affecting access to socio-economic rights. In so doing, I sought to demonstrate how the value of equality — understood as the ability of people to participate as equals in all spheres of South African political and economic life — can enrich our socio-economic rights jurisprudence and nudge social policy and legal doctrine in a more egalitarian direction.