

Courts, socio-economic rights and transformative politics

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Declaration

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JFD Brand, 31 March 2009, Pretoria

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Summary

The point of departure of this dissertation is that transformation in South Africa depends on transformative politics – extra-institutional, substantive, oppositional, transformation-oriented politics. One challenge South Africa's constitution therefore poses to courts is to take account of the impact of adjudication on transformative politics. The purpose of this dissertation is to investigate the relationship between adjudication and transformative politics within a specific context – adjudication of socio-economic rights cases.

This relationship is commonly described in a positive light – either that adjudication of socio-economic rights cases promotes transformative politics by giving impoverished people access to the basic resources required for political participation; or that adjudication of such cases is in itself a space for transformative politics. Although there is much truth in both these descriptions, both under-estimate the extent to which adjudication also limits transformative politics. This dissertation focuses on the extent to which adjudication limits transformative politics – it comprises an analysis of socio-economic rights cases with the aim of showing how adjudication of these cases, despite positive results, also limited transformative politics.

The theoretical aspects of this problem are outlined in the first chapter. After a description of the body of case law on which the analysis focuses two chapters follow in which two ways in which adjudication limits transformative politics are investigated. The first traces how courts in socio-economic rights cases participate in discourses about impoverishment that tend to describe the problem as non-political – specifically how courts tend to describe impoverishment as technical rather than political in nature; and how courts implicitly legitimise in their judgments liberal-capitalist views of impoverishment that insist that impoverishment is best addressed through the unregulated market. Then follows a chapter investigating how views of legal interpretation in terms of which legal materials have a certain and determinable meaning that can be mechanically found by courts limit transformative politics by insulating adjudication from critique and emphasising finality in adjudication. Throughout it is shown how courts can mitigate the limiting effects of adjudication, by legitimating the political agency

of impoverished people, by using remedies requiring political engagement between opponents and postponing closure in adjudication, and by adopting a different approach to interpretation, that emphasises the pliability and relative indeterminacy of legal materials. Despite this, the conclusion of the dissertation is that courts can never wholly avoid the limiting impact of adjudication on transformative politics, but should rather aim to remain continually aware of it.

Opsomming

Die uitgangspunt van hierdie proefskrif is dat transformasie in Suid-Afrika afhang van transformatiewe politiek – buite-institusionele, substantiewe, opposisionele, transformasie-gerigte politiek. Een eis wat Suid-Afrika se grondwet daarom aan houe stel, is om ag te slaan op die impak van beregting op transformatiewe politiek. Die doel van hierdie proefskrif is om die verhouding tussen beregting en transformatiewe politiek binne 'n spesifieke konteks – beregting van sake oor sosio-ekonomiese regte – te ondersoek. Meeste beskouinge van hierdie verhouding beskryf dit in 'n positiewe lig - óf dat die beregting van sake oor sosio-ekonomiese regte transformatiewe politiek bevorder deur vir verarmde mense toegang tot basiese lewensmiddele te bewerkstellig sodat hulle aan politieke optrede kan deelneem; óf dat beregting van sulke sake opsigself 'n spasie is vir transformatiewe politiek. Hoewel daar waarheid steek in beide beskrywings, onderskat hulle die mate waartoe beregting ook transformatiewe politiek kan beperk. Hierdie proefskrif fokus op hoe beregting transformatiewe politiek beperk - dit behels 'n analise van sake oor sosio-ekonomiese regte met die doel om te wys hoe beregting van hierdie sake, ten spyte van kennelik positiewe gevolge ook transformatiewe politiek beperk het.

Die teoretiese vergestaltung van hierdie probleem word in die eerste hoofstuk beskou. Na 'n beskrywing van die liggaam van regspraak waarop die analise fokus volg twee hoofstukke waarin twee maniere waarop beregting transformatiewe politiek beperk ondersoek word. Die eerste beskou hoe houe in sake oor sosio-ekonomiese regte deelneem aan diskoerse oor verarming wat neig om hierdie probleem as non-polities te beskryf - spesifiek hoe houe neig om hierdie problem as tegnies eerder as polities van aard te beskryf; en hoe houe liberaal-kapitalistiese sieninge van verarming, ingevolge waarvan verarming deur die ongereguleerde mark aangespreek behoort te word, implisiet in hul uitsprake legitimeer. Dan volg 'n hoofstuk wat naspour hoe sieninge van regsinterpretasie ingevolge waarvan regsmateriaal 'n sekere en vasstelbare betekenis het wat meganies deur houe gevind word, transformatiewe politieke optrede beperk deur die openheid van beregting vir kritiek te beperk en finaliteit in beregting in die hand te werk. Deurgaans word

gewys hoe howe die beperkende effek van beregting kan teëwerk, deur die politieke agentskap van verarmde mense te legitimeer, deur remedies te gebruik wat politieke onderhandeling tussen opponente bewerkstellig en finale oplossings uitstel, en deur 'n ander benadering tot interpretasie, wat die buigzaamheid en relatiewe onbepaalbaarheid van regs materiaal erken, te omarm. Tog is die gevolgtrekking van die proefskrif dat howe nooit die beperkende effek van beregting op transformatiewe politiek geheel kan vermy nie, maar eerder deurgaans daarop bedag moet wees.

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Introduction

I have always been interested in two things about South Africa's new constitutional order. The first of these is the socio-economic rights in the 1996 constitution¹ and in particular the way in which our courts have dealt with these rights.² The second is the constitution's 'transformative' orientation – the fact that it explicitly and indeed emphatically requires the large-scale transformation of South African society – and again in particular the ways in which our courts have responded to this orientation.³ This dissertation is about these two things. In broad terms, I examine in it to what extent and how our courts, in deciding socio-economic rights claims, have managed to align themselves with the constitution's transformative orientation.

This is by no means a novel undertaking. Most legal scholars who have written about the socio-economic rights case law in South Africa so far have, implicitly or explicitly, analysed and evaluated the cases precisely for the extent to which they can be squared with the constitution's transformative mandate. So, for example, scholars such as Sandra Liebenberg and Marius Pieterse have asked to what extent the general approach of our courts to socio-economic rights cases succeeds in effecting transformation in the lives of poor people, by providing to them access to housing, or health care, or food and water – to what extent, that is, socio-economic rights case law has

¹ Constitution of the Republic of South Africa, 1996 ('the constitution').

² With socio-economic rights I mean rights to the basic material things people need to survive and live well – in the constitution these are the rights to a safe and healthy environment and to the preservation of the environment (sec 24); to have equitable access to land (sec 25(5)); to have access to adequate housing (sec 26 – including the right to be protected against arbitrary eviction); to have access to health care services (including reproductive health care), sufficient food and water and social security and assistance (sec 27(1)(a) - (c)); the right not to be refused emergency medical treatment (sec 27(3)); the right to basic and to further education (sec 29); children's right to parental, family or alternative care and to basic nutrition, shelter, basic health care service and social service (sec 28(1)(b) & (c)); and the right of detained persons to conditions of detention consonant with human dignity, including at least exercise and the provision, a state expense, of adequate accommodation, nutrition, reading material and medical care (sec 35(2)(e)).

³ See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 for the original description and elaboration of the theme of transformative constitutionalism in South Africa.

operated as an ‘... effective tool[] in challenging poverty’.⁴ More recently, Sandra Liebenberg has explored to what extent socio-economic rights case law has promoted other broad transformative goals, such as human dignity and social inclusion.⁵ In the same vein Pierre de Vos, writing about the Constitutional Court’s first two socio-economic rights judgments, has explained and attempted to justify some of the more puzzling aspects of these cases as contributing to the broad transformative goal of achieving a substantively equal society.⁶

I distinguish my focus from the different accounts related above in two ways. First, my own analysis proceeds, I believe, from an understanding of transformation that differs importantly from the understanding of transformation informing other accounts of the transformative performance of courts in socio-economic rights cases; and second, I focus on an aspect of transformation – transformative politics – that has not been prominently addressed in other accounts.

The different examples of writing about the transformative performance of our courts in socio-economic rights cases mentioned above have in common a certain understanding of what transformation entails and, as a result, a certain understanding of what the constitution’s transformative orientation requires of courts.

This understanding equates transformation with the achievement of certain tangible results or outcomes – be it the concrete alleviation of impoverishment;⁷ the achievement of substantive equality;⁸ or the protection

⁴ S Liebenberg ‘South Africa’s evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?’ (2002) 6 *Law, Democracy and Development* 159; M Pieterse ‘Resuscitating socio-economic rights: constitutional entitlements to health care services’ (2006) 22 *South African Journal on Human Rights* 473.

⁵ S Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ in AJ Van der Walt (ed) *Theories of social and economic justice* (2005) 141 (Liebenberg ‘Dignity’) and ‘Needs, rights and transformation: adjudicating social rights’ (2006) 17 *Stellenbosch Law Review* 5.

⁶ P De Vos ‘*Grootboom*, the right of access to housing and substantive equality as contextual fairness’ (2001) 17 *South African Journal on Human Rights* 258.

⁷ Pieterse (n 4 above) 477. See also Liebenberg (n 4 above) 160.

⁸ De Vos (n 6 above).

of human dignity.⁹ The work of courts in enforcing socio-economic rights is assessed on this view for the extent to which it contributes to the achievement of these transformative goals. The relationship between the work of courts in enforcing socio-economic rights and transformation is therefore sketched in positive terms. Courts are seen as one set of instruments through which transformative goals can be achieved and the point of scholarly engagement with the socio-economic rights work of courts is to show how courts can shape their *modus operandi* so as better to achieve transformative results.¹⁰

I have an affinity with this outcomes-oriented manner in which to evaluate the contribution of courts to transformation. Just as the proponents of this approach do, I believe that law and adjudication can contribute meaningfully to the achievement of transformation. In addition, I have no doubt that, given the acute deprivation, inequality and social exclusion that most South Africans face every day, scholars should devote their energies to the achievement of concrete transformative goals. In short, I do not discount in any way the importance and virtue of a results-focussed understanding of transformation and of an analysis of the work of courts in enforcing socio-economic rights that asks to what extent courts contribute to the achievement of transformative results. However, my approach here is a different one.

In the face of a pervasive constitutional optimism¹¹ – a belief in the power of a constitution, law generally and adjudication specifically to achieve meaningful transformation - a small group of scholars (Henk Botha, Karl Klare, Wessel le Roux, André van der Walt, Karin van Marle) have over the last several years warned that the choice to ground South Africa's transformation in a constitution guarded over by courts is not without adverse consequences. These scholars have argued that, in different ways, a constitution and constitutional adjudication are both limited and limiting instruments of transformation. Whilst recognising the transformative potential of constitutional

⁹ Liebenberg 'Dignity' (n 5 above) 158.

¹⁰ See eg Liebenberg (n 4 above) 160.

¹¹ I borrow the term 'constitutional optimism' from Emiliios Christodoulidis ('Constitutional irresolution: law and the framing of civil society' (2003) 9 *European Law Journal* 401 403 and what follows).

adjudication, they have focussed their energies on identifying the different ways in which adjudication can work in a counter-transformative fashion. Karl Klare, for example, has pointed to the fact that the belief in legal determinacy evident in a number of early Constitutional Court judgments resulted in the Court denying the politically imbued nature of its work and so worked against the maintenance of a transformative politics;¹² Henk Botha has similarly pointed out that our courts' reliance on traditional conceptions of legal meaning as self-evident potentially works in a counter-transformative fashion;¹³ and André van der Walt – reacting specifically to the kind of results-oriented view of transformation outlined above – has argued that the search for finality inherent in such a view and central to the process of adjudication, limits transformation.¹⁴

The work of this group of scholars - with which I align myself – is informed by an understanding of transformation quite different from the results-oriented understanding related above. In this view of the matter transformation, more importantly than that it indicates the achievement of certain tangible goals, refers to the radical change of the institutions and systems that produce results themselves. In the words of Drucilla Cornell, transformation in this view is 'change radical enough to so dramatically restructure any system – political, legal, or social – that the "identity" of the system is itself altered.'¹⁵

¹² Klare (n 3 above) 172 - 188.

¹³ H Botha 'Metaphoric reasoning and transformative constitutionalism (part 2)' 2003 *Tydskrif vir Suid-Afrikaanse Reg* 20 34 (Botha 'Metaphoric 2'). See also his 'Metaphoric reasoning and transformative constitutionalism (part 1)' 2002 *Tydskrif vir Suid-Afrikaanse Reg* 612, 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249 and 'Democracy and rights. Constitutional interpretation in a postrealist world' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561.

¹⁴ AJ van der Walt 'Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law' (2002) 17 *SA Publikereg/Public Law* 258. See also his 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258 and 'Tentative urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court' (2001) 16 *SA Publikereg/Public Law* 1. For other examples of scholarly work engaging with these themes, see H Botha & JWG van der Walt 'Democracy and rights in South Africa: beyond a constitutional culture of justification' 2000 *Constellations* 341; WB le Roux 'From Acropolis to metropolis: the new Constitutional Court building and South African street democracy' (2001) 16 *SA Publikereg/Public Law* 139; and K van Marle 'Revisiting the politics of post-apartheid constitutional interpretation' 2003 *Tydskrif vir Suid-Afrikaanse Reg* 549.

¹⁵ D Cornell *Transformations: recollective imagination and sexual difference* (1993) 1. See also Nancy Fraser's description of 'transformative strategies' as aiming 'to correct unjust outcomes precisely by restructuring the underlying generative framework' (my emphasis) (N

To view transformation in this, rather than the results-oriented way has two important consequences for my purposes. First, it heralds a change in focus of analysis. Whereas the results-oriented view of transformation requires a focus on the outcomes generated by systems and institutions, this second view of transformation requires one to focus on the systems and institutions themselves – their processes, manner of operation, modes of reasoning and ways of doing things. If one studies the transformative role of courts, as I propose to do here that means that one studies and critiques the way in which decisions are reached, rather than simply the decisions themselves. Second, such a view of transformation necessarily eschews the positive mould in which the relationship between adjudication and transformation is cast in the results-oriented view. The point of departure here is much rather negative - that the way in which institutions are currently structured and how they currently operate limits transformation and that, for meaningful transformation to be possible, institutions and systems have to be transformed radically. In a study of the transformative work of courts as I engage in, that means that the point of departure is that the work of courts necessarily, *even whilst promoting transformation*, also limits transformation in important respects and that the focus in studying the transformative performance of courts should be on those respects in which adjudication limits transformation.

The second way in which my analysis of the transformative role of courts in enforcing socio-economic rights differs from the other accounts is in the particular aspect of transformation that I focus on.

The limiting effect that adjudication exercises on transformation that I focus on is in the literature most often presented in a specific form – as the limiting effect of adjudication on democracy, or, more correctly, on transformative politics.¹⁶ When Karl Klare examines the early jurisprudence of the Constitutional Court for its transformative fit, he asks in particular to what

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) 74.

¹⁶ I explain what I mean with the term 'transformative politics' in Chapter 1 15 - 26.

extent the way in which the Court reaches its decisions leaves space for continuing political contestation about the issues in question – to what extent the Court’s reasoning processes ‘empower [] publics to examine, discuss and criticize the now often hidden political and moral assumptions that steer adjudication’.¹⁷ When Henk Botha explores the role of metaphors in constitutional adjudication to assess our courts’ transformative performance, he urges us to re-conceive ‘rights as relationships and fundamental rights litigation as dialogue’, because to do so would offer ‘far more scope for a *critical debate* about the meaning of constitutional norms than the idea of rights as boundaries’.¹⁸ The links between transformation and the possibility of a vibrant, contested transformative politics are obvious. The existence of such a politics is in the first place a goal of transformation – part of the new society that the constitution envisages.¹⁹ At the same time, more importantly, real transformation can only occur if a space and capacity for progressive politics already exist where current orthodoxies can be contested and new possibilities imagined – transformative politics is a prerequisite for, a way of doing, transformation. In my analysis here I consequently also focus on this one particular aspect of transformation: the need, both as a goal of and a prerequisite for transformation, to foster and maintain a vibrant transformative politics. I ask what the effect of the manner in which courts decide socio-economic rights cases is in particular on the fostering and maintenance of such transformative politics. To what extent and in which ways does the work of courts in socio-economic rights cases, despite its emancipating effects (despite it generating transformative outcomes such as access to housing, health care, food, water, education or social assistance, or enhancing substantive equality or human dignity), operate simultaneously in a repressive fashion in that it limits the potential for transformative political action, closes down politics? And, finally, how and to what extent is it possible to counteract this erosion of the potential for transformative politics?

¹⁷ Klare (n 3 above) 164.

¹⁸ Botha ‘Metaphoric 2’ (n 13 above) 34 & 33 respectively (my emphasis).

¹⁹ Klare (n 3 above) 150 (describing the transformative constitution as ‘committed ... to transforming [South Africa’s] political and social institutions and power relationships in a *democratic, participatory, and egalitarian* direction’ (my emphasis)).

A professed concern with the extent to which ordinary people, through democratic participation, can determine their own and their collective destinies has of course – in one form - been central to the debate about the judicial enforcement of socio-economic rights in South Africa. This debate and indeed the development of a socio-economic rights jurisprudence has been dominated so far by what can best be described as separation of powers concerns – concerns that courts deciding socio-economic rights cases, because of the particular subject matter at stake, will exceed the sensible scope of their powers and unduly interfere in the powers of the other branches of government.²⁰ Most clearly these kinds of concerns have been related to the effectiveness of courts, as opposed to the legislature and executive, to act as agents for social transformation and in particular the extent to which they can do so effectively without antagonising the other branches of government and so jeopardising their institutional integrity. In this respect the focus has in other words been on the institutional capacity of courts, relative to the other branches of government, to analyse and decide the kinds of policy-laden questions that most often arise in socio-economic rights cases and on their capacity effectively to enforce whatever findings they are able to make, without their confronting the other branches of government too directly.²¹ But a certain concern with politics has also informed separation of powers arguments in this context. Scholars writing about socio-economic rights and judges deciding socio-economic rights cases have shown themselves also to be particularly sensitive to the perceived problem that, when courts decide socio-economic rights cases and issue orders to enforce their findings, they, who are not democratically mandated, place themselves in opposition to the political will of the electorate as expressed in the conduct of the legislature and executive.²² This expression of the familiar ‘counter-majoritarian dilemma’ is given added poignancy in the South African context, where it is recognised both that the other two branches in government are engaged in a constitutionally and politically mandated process of social transformation, and

²⁰ With respect to the currency that separation of powers concerns have enjoyed in the socio-economic rights debate in South Africa, see M Pieterse ‘Coming to terms with the judicial enforcement of socio-economic rights’ (2004) 20 *South African Journal on Human Rights* 383.

²¹ As above 392 - 396.

²² As above 390 - 392.

that they, at least under current circumstances, enjoy an extraordinary level of political legitimacy in doing so. In this sense then the debate about the judicial enforcement of socio-economic rights in South Africa has indeed been shaped by a concern, similar to the one I propose to explore here, for the friction between the work of courts in enforcing these rights and the democratic process.

But again, my examination of the relationship between the judicial enforcement of socio-economic rights and transformative politics comes from a different angle than such separation of powers concerns. Although I do not discount the importance – and indeed the intractability – of this question, my concern is not with the extent to which the adjudication of socio-economic rights claims counteracts or pre-empts the general political will as it is expressed in the conduct of the legislature or executive. To explore the relationship between socio-economic rights adjudication and politics solely as a problem of institutional relations between the different branches of government reflects, to my mind, a peculiarly limited ‘institutional’ or ‘dependent’ understanding of politics and democracy in terms of which politics legitimately takes place only in formally constituted democratic structures, where political questions of, for example, distribution of resources are decided for and the results presented to ordinary people. My analysis, by contrast, proceeds from a broader and more flexible conception of transformative politics – one in terms of which the concern is precisely with the extent to which ordinary people *mostly outside of the formally constituted democratic structures and processes* are able to engage in critical, transformative political action. Indeed, a major part of the concern driving my examination is the question how the work of courts in socio-economic rights cases curtails the capacity of ordinary people to engage in an oppositional political sense with the very conduct of the formal democratic structures (eg parliament and the executive) that, in the separation of powers conception, is seen as expressions of the general political will that should not be curtailed by courts.

To recapitulate: in this dissertation I explore the extent to which our courts, in deciding socio-economic rights cases, give effect to the constitution’s

transformative orientation. In particular I am interested in the relationship between the work of courts in these cases and transformative politics – the capacity of ordinary people outside the formally constituted structures of government to engage in transformative political action. I investigate the extent to which the work of courts deciding socio-economic rights cases, even when manifestly achieving transformative direct results, erodes, delegitimizes, discourages or displaces transformative politics.

Apart from this introduction and a short conclusion, my dissertation consists of four chapters. The first of these, Chapter 1, provides the background to the rest of the work – the framework of analysis that will later be employed. In it, drawing on, amongst others, the work of Drucilla Cornell, Nancy Fraser, Karl Klare, André van der Walt and Antie Krog, I outline my conception of the kind of transformation that the constitution demands – transformation as a change in the essence or identity of a system or institution, rather than only evolutionary change. With reference in particular to Chantal Mouffe, I also describe the kind of transformative politics as an aspect of transformation that my further analysis will focus on – a conception of such politics that emphasises the non-institutional sphere and that focuses on the capacity of and space for marginalised and oppressed publics to engage in an oppositional political sense with more mainstream, powerful publics to ensure their individual and collective self-determination. Following on that, the bulk of the Chapter is devoted to a discussion of the different ways in which the process of adjudication can have an anti-transformative impact by limiting transformative politics. I focus on two such ways. First, drawing primarily on Nancy Fraser, Thomas Ross and Lucy Williams, I describe how courts can confirm and legitimise a variety of depoliticising rhetorical strategies employed by dominant participants in the political debate about impoverishment to depoliticise issues of need and deprivation and so immunise them from political contestation. Second, drawing on Karl Klare, Henk Botha, Duncan Kennedy, Robert Cover and André van der Walt, I describe how a denial by courts of the intractable tension between freedom and constraint in adjudication – whether through a belief in the self-evidence of legal meaning or through a depiction of adjudication as operating free of all constraint –

discourages transformative political action by de-emphasising judicial responsibility for adjudicative results and inviting normative closure.

In Chapter 2 I describe the existing body of socio-economic rights case law in South Africa as background to the analysis of that case law that follows in Chapters 3 and 4 - in the manner of an overview, the whole body of extant case law that can in a broad sense be described as 'socio-economic rights case law'. My focus in this Chapter is on doctrinal description – in particular I describe the standard of review that our courts have adopted in these cases and their remedial approach.

In Chapters 3 and 4 I explore to what extent the two ways in which adjudication can work to limit transformative political action that I describe in Chapter 1 has operated in the case law.

In Chapter 3 I ask to what extent our courts have in their socio-economic rights decisions sought to de-politicise their subject matter by participating in prevalent discourses of de-politicisation. In particular, I explore to what extent our courts have related their adjudication of socio-economic rights claims to discourses of proceduralisation and technicisation of debates around impoverishment.

Chapter 4 focuses on the legal ideal of certainty as it manifests both in the drive to finality or conclusion that is inherent in adjudication and indeed law more generally and in the tendency for courts to regard legal materials as determinative of legal meaning. I trace the operation of a belief in the self-evidence of legal meaning in the cases, but also point to ways in which our courts, through the manner in which they deployed the reasonableness standard in deciding socio-economic rights cases, have been more candid about the extent to which they, rather than the materials alone generate legal meaning and adjudicative outcomes. I also consider to what extent the search for finality or closure characterises our courts' socio-economic rights jurisprudence and point to ways – the use of a flexible, context sensitive

standard of scrutiny and the employment of open-ended remedies – through which our courts have managed to postpone normative closure.

At the end of this dissertation I reach no firm conclusions and present no final solutions. Indeed, my only real conclusion is equivocation: I point out first that the limiting effect that the adjudication of socio-economic rights claims exerts on transformative politics is inevitable, and second that every attempt to avoid or overcome that limiting effect has inherent in itself the potential to limit politics again. My only proposal is then that judges should be aware that their work inevitably exerts a limiting effect on transformative politics, often precisely in those instances where they seek to advance transformation. In the final, concluding section of the dissertation I make this latent point explicit.

1 *Courts and transformative politics*

We do not have a say ... That's how our grandparents found themselves oppressed just as we are.¹

1.1 Introduction

My purpose is to explore the relationship between the adjudication by courts of constitutional socio-economic rights claims and the capacity and space for political action intended to advance the interests of impoverished people – what I call a transformative politics.² To the extent that this relationship has so far been considered in the literature, it has mostly been cast in a positive light. That is, socio-economic rights litigation has in the main been seen as, in different ways, supportive of the political struggles of and on behalf of impoverished people.

I do not deny that the work of courts in enforcing socio-economic rights can importantly support transformative political action. Even so, this positive account of the relationship between socio-economic rights adjudication and transformative political action is not the one I adopt. Instead, I am interested in the negative aspects of the relationship. My purpose is to take stock of the inevitable limiting effect that the work of courts adjudicating socio-economic rights claims has on the space and capacity for a transformative politics. I refer here to the variety of arguments emanating from critical views on rights, rights talk and rights adjudication, which hold forth that, at the same time as the process of rights adjudication attempts to advance freedom and participation in political life, it also limits and erodes political capacity. I

¹ Comment of participant in workshop presented by the Association for Rural Advancement (AFRA) investigating perceptions of farm dwellers about the nature and causes of their impoverishment and vulnerability, in response to the question: 'Why are you a farm dweller?' reproduced in AFRA *This is our home – our land, our history and our right. Consolidated verbatim report – farm dweller workshops May 2005* 33, available at <http://www.afra.co.za/upload/files/AP24.pdf>, visited on 24 August 2008. For a discussion see L del Grande '“Farms came to the people”: Where have all the farm dwellers gone?' Paper presented at the *Living on the Margins Conference*, Stellenbosch, 26 - 28 March 2006, available at <http://www.plaas.org.za/events/conference/2007%20LOM/papers/delgrande>, visited on 24 August 2008.

² I describe what I mean with this term more fully in 1.2 below.

investigate the different ways in which this limiting effect operates in the socio-economic rights decisions of our courts and attempt to think ways in which our courts can account for it.

In this Chapter I delimit my field of enquiry – I describe the particular aspects of the relationship between transformative political action and socio-economic rights adjudication that draw my focus, attempting in the process to craft a theoretical framework for the analysis of the case law that follows in Chapters 3 and 4.

I start in section 1.2 by describing the kind of political action – transformative politics – I am concerned with.³ My description is determined neither by the forums within which political action takes place (it potentially encompasses formal and extra-formal, institutional and extra-institutional political action) nor by the identity or position of the agents engaging in it (it potentially encompasses political action of impoverished people acting in their own interest or of other groups acting on behalf of or in concert with impoverished people). It is determined in the first place by orientation – that is, I am concerned with political action oriented toward addressing the plight of impoverished people;⁴ and by form – I am concerned with an oppositional or agonistic politics, one which presupposes a certain level of contestation rather than consensus or participation.⁵

I proceed in section 1.3 to describe and analyse different accounts of the relationship between the capacity and space for transformative political action and socio-economic rights litigation.⁶ I start, in 1.3.2, by relating the most common such accounts in the literature - accounts that see the relationship in a positive light, with the enforcement of socio-economic rights regarded as constitutive of transformative political action; or as one way in which to engage in transformative politics; or as opening up space elsewhere for transformative political action. So, for example, it has often been argued that

³ See 15 – 26 below.

⁴ See the discussion at 16 - 18 below, and the sources referred to there.

⁵ See the discussion at 23 - 26 below, and the sources referred to there.

⁶ At 26 and further.

the access to basic resources that courts can through their adjudication of socio-economic rights claims create for impoverished people enables them to participate in political life – is constitutive, that is, of their political agency.⁷ It has also been pointed out that legal action around socio-economic rights, rather than being political action itself, is an important strategy to use in addition to political action and that it can strengthen and add impetus to the political struggles of or on behalf of impoverished people.⁸

In section 1.3.3 I distinguish my own focus from these more common accounts.⁹ I describe two specific ways in which adjudication in general, but in particular adjudication of socio-economic rights claims, can operate to limit transformative political action. Although a wide variety of such critiques are at my disposal, I focus on one analysis of this kind. I investigate ways in which the work of courts enforcing socio-economic rights can discourage and limit transformative political action by bracketing previously contested social questions as somehow not subject to further political contestation – either because of the finality with which courts usually present their decisions; or because of the presentation by courts of their engagement with contested social issues as value-neutral, conducted on the basis of an objective set of materials; or because courts in their judgments use language and rhetorical strategies to describe social issues as incapable of political engagement – as, for example, too technically complex for political engagement, or of private rather than public concern, or simply as insoluble, so that political engagement with it becomes futile.¹⁰

1.2 Transformative politics

I use the term 'transformative politics' to denote the kind of political action that I am concerned with. I could hardly ask for a better description of this kind of politics than that provided by Edgar Pieterse and Mirjam van Donk in a short article they wrote on the politics of socio-economic rights in the *ESR Review*.

⁷ See discussion at 32 - 36 below, and the sources referred to there.

⁸ See discussion at 37 - 39 below, and the sources referred to there.

⁹ See 39 – 46 below.

¹⁰ See 46 – 73 below.

Calling for a 'democratised' approach to the implementation of socio-economic rights, they describe the realisation of these rights as a 'political process of negotiation, disagreement, conflict, occasionally consensus, and, at a minimum, forms of mutual accommodation.'¹¹ Three broad features characterise this kind of politics: it is critical in its orientation; it is non-institutional; and it is substantive and agonistic rather than procedural and consensual in nature.

1.2.1 A critical orientation

Nancy Fraser, writing to describe critical theory, starts by quoting Karl Marx's definition of critical theory as 'the self-clarification of the wishes and the struggles of the age'.¹² What strikes her about this definition is its 'straightforwardly political character' – the fact that it distinguishes critical theory from other forms of theory not by virtue of any 'special epistemological status', but by virtue of a certain political orientation.¹³ On this basis she provides her own description of critical theory as theory

that frames its research programme and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan though not uncritical identification.¹⁴

The political partisanship that according to Fraser distinguishes critical from other theory reminds one of Tshepo Madlingozi's description of 'progressive politics'. In a contribution investigating possible roles for legal academics in social transformation in South Africa, Madlingozi describes progressive politics – the kind of politics that he, *a la* Fraser, urges legal academics to orient their research toward – as politics that 'eschews elite-driven reforms in favour of people-driven reforms and aims to overturn liberal democracy for

¹¹ E Pieterse & M van Donk 'The politics of socio-economic rights in South Africa. Ten Years after Apartheid' (2004) 5:5 *ESR Review* 12 13.

¹² N Fraser 'What's critical about critical theory? The case of Habermas and gender' in S Benhabib & D Cornell (eds) *Feminism as critique* (1987) 31 31 quoting K Marx 'Letter to A Ruge, September 1843' in *Karl Marx: early writings* (1975) (transl R Livingstone & G Benton) 209.

¹³ As above.

¹⁴ As above.

participatory democracy'.¹⁵ Progressive academics, so he proceeds, should orient their research and activism toward such progressive politics and 'connect with the struggle that is being waged by new social movements'.¹⁶

Both these descriptions I find suggestive for my purposes. Because the concern underlying my writing is a partisan political one – a concern with radical transformation of South African society so as to alleviate the plight of impoverished people – the conception of politics that I work with is not simply a mode of practice devoid of specific political content. Rather, it is politics explicitly oriented to the goal of combating impoverishment and addressing severe deprivation. I am interested, therefore in politics, or political action, regardless of by whom it is performed,¹⁷ *that has as its aim the eradication of impoverishment.*

I find it important to make this point to avoid misunderstanding down the line. In some of my earlier writing I identified as one of the problems with current

¹⁵ T Madlingozi 'Legal academics and progressive politics in South Africa: moving beyond the ivory tower' (2005) 2 *PULP Fictions* 5 6.

¹⁶ As above. Initially, following Madlingozi, I used the term 'progressive politics' to describe the politics I am concerned with. However, I have since been alerted to the fact that the term 'progressive' can be taken to refer not to a leftist politics, as Madlingozi clearly intends it to be taken, but to a modernist, instrumentalist stream of thought that espouses a belief in 'progress' through reason and that has given rise to predominantly conservative streams of legal theory (see G Minda *Post-modern legal movements. Law and jurisprudence at century's end* (1995) 25 – 33, describing two streams of legal thought that arose from the American Realist movement of the 1920s and 1930s – *radical* legal realism that 'emphasised a "political critique" ' (28) attempting 'to expose the political ideology of conceptual legal thought' (29) and that gave rise to Critical Legal Studies (31); and *progressive* legal realism that emphasised the pragmatist aspects of legal realism (28), adopting a more 'constructive and apolitical' approach to law (29) and giving rise to legal process theories and law and economics, both of which tend to de-emphasise the political stakes of law (32)). To avoid the possible conservative implications of the term that this history raises, I opted for 'transformative' rather than 'progressive' politics. My thanks to Karin van Marle for alerting me to this point.

¹⁷ Here again, perhaps, I depart slightly from Madlingozi. Madlingozi clearly requires of 'progressive' academics an alignment with new social movements – he requires academics to place themselves at the disposal of such social movements (for his own description of what such social movements are, see T Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' in S Motha (ed) *Democracy's empire: sovereignty, law and violence* (2007) 77 86 – 91; for his own problematisation of the relationship between such social movements and academics that he urges see T Madlingozi 'Hayi bo! Refusing the plan: acting, thinking and revolting by post-apartheid social movements and community organisations' in K van Marle (ed) *Refusal, transition and post-apartheid law* (2009) (forthcoming). Instead, I regard any political action with the goal of alleviating impoverishment as potentially the kind of transformative politics I discuss here, whether performed by social movements consisting of and controlled by impoverished people, or by other actors of civil society.

jurisprudence on socio-economic rights the deference that courts showed in evaluating social policy for consistency with constitutional socio-economic rights to the supposed superior skill and capacity of the legislature, executive and state administration.¹⁸ Clearly, so I argued, at heart this kind of deference was motivated by an entirely appropriate and accurate concern that courts do not have the institutional capacity to solve many of the difficult policy problems that socio-economic rights cases require them to engage with.¹⁹ However, to respond to this concern by deferring to the political branches of government potentially limits political contestation around issues of need and deprivation. It does so by signalling to impoverished people and those who engage in political action with them or on their behalf not only that the issues in question are difficult ones that courts (and perhaps they themselves) cannot solve, but also that they are issues that are appropriately only the business of the legislature, the executive or state administration.²⁰ Rather than defer to the political branches of government, I argued, courts should simply acknowledge the complexity of the issues at hand (decline to conclusively decide them) and then find ways in which to reopen the issues to broad political contestation (by for example issuing orders for mediation of socio-economic rights disputes).²¹ A respected colleague found this argument potentially problematic. She cautioned that it runs the risk of giving a voice or political space not only to impoverished people, but might, given current power imbalances in society, simply confirm the hold that economic elites exert over issues of economic policy.²² In this light I find it prudent to emphasise the political partisanship of my concern – to the extent that I issue to courts a call to re-orient their doctrine in socio-economic rights cases so as to strengthen political engagement outside of government with issues of need and deprivation, the call is for them to privilege the kind of critical, politically partisan political action described above.

¹⁸ D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in A J van der Walt (ed) *Theories of social and economic justice* (2005) 17 30 – 33. For my recapitulation of this point in this dissertation, see 147- 155 below.

¹⁹ As above 31.

²⁰ As above 32 – 33.

²¹ As above 33 – 36.

²² As the point was raised in private e-mail correspondence, I will not identify the colleague involved. Nevertheless I thank her for it and for the rethink of my ideas that it occasioned.

1.2.2 Politics as practice or culture

[T]he political cannot be restricted to a certain type of institution, or envisaged as constituting a specific sphere or level of society. It must be conceived as a dimension that is inherent to every human society and that determines our very ontological condition.²³

There is a pervasive tendency in our courts in their dealings with the concepts political action or democracy, to equate political action, politics or democracy with a certain institutional arrangement – that is, to regard politics as embodied in a set of institutions. This tendency is, for example, evident in two of the most prominent cases in which the Constitutional Court has had occasion to elaborate upon the nature of South African democracy - *New National Party v Government of the Republic of South Africa*²⁴ and *United Democratic Movement v President of the Republic of South Africa*.²⁵

NNP, it will be recalled, concerned the question whether or not the imposition of a requirement for registration to vote and to vote in South Africa's second free general election of possession of a new identity document, in circumstances where it seemed clear that a substantial number of otherwise eligible voters would not be able to obtain the document in question before registration and voting took place, constituted an unjustified breach of the right to vote. Yacoob J, for the majority of the Constitutional Court, decided that it did not, in essence holding that regulation of the right to vote was necessary for voting at all to be possible and useful and that such regulation that limited the opportunity of eligible voters to vote in order to make voting possible, would pass constitutional muster if it was simply rationally related to the legitimate goal of presenting free and fair elections.²⁶ In the process of reaching this conclusion, Yacoob J articulated a two-fold duty imposed on the

²³ C Mouffe *The return of the political* (1993) 3.

²⁴ *New National Party v Government of the Republic of South Africa* 1999 3 SA 191 (CC) (*NNP*).

²⁵ *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as Amicus Curiae)* (No 2) 2003 1 SA 495 (CC) (*UDM*)

²⁶ *NNP* (n 24 above) para 12.

state by the right to vote. First, the right requires the state indeed to present regular elections.²⁷ Second, these elections must be arranged such that they are free and fair and that any arrangement with this purpose that prevents otherwise eligible voters from registering to vote and from voting will be upheld as long as ‘people who would otherwise be eligible to vote are [despite the arrangement at issue] able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote’.²⁸ For Yacoob J then, the state, to give effect to a right central to the constitutional principle of democracy, can be asked to do no more than present regular elections, and to arrange those elections to be free and fair in such a way that it is *possible* for otherwise eligible people to vote.

In *UDM*, the issue was whether representative institutions were arranged in a manner that meets that element of the constitutional standard of democracy that requires the existence of a multi-party democracy. The Court’s definition of multi-party democracy – a system ‘that contemplates a political order in which it is *permissible* for different political groups to organize, promote their views through public debate and participate in free and fair elections’²⁹ – and its finding that the floor-crossing legislation passes constitutional muster because, although it probably frustrates the will of the electorate, it doesn’t actively ‘undermine multi-party democracy’,³⁰ seem informed by the same understanding of the nature of the state’s democracy-related duties as Yacoob J’s judgment in *NNP*. Again the idea seems to be that the state has done enough if it (a) ensures that the required institutions of democracy exist and (b) ensures that they are arranged in such a way that it is *possible* for democracy to operate within them.³¹

²⁷ As above paras 12 – 17.

²⁸ As above para 21.

²⁹ *UDM* (n 25 above) para 26.

³⁰ T Roux ‘Democracy’ in S Woolman *et al* (eds) *Constitutional law of South Africa* 2 ed OS (2006) ch 10 10-27.

³¹ The duty as described in *UDM* is lighter than in *NNP* – it is acceptable for the Court that representative institutions are operated such that they render *permissible* the free political activity that is required by multi-party democracy. *UDM* (n 25 above) para 26.

In sum, the *NNP/UDM* Court's understanding of what the state must do to give effect to the constitution's conception of democracy requires only that the state build the institutions of democracy (elections; representative institutions; processes of direct consultation etc) and then to sit back and wait for democracy to arrive.

One problem with this articulation of the content of the right to vote is that it reflects an entirely institutional understanding of democracy that equates democracy with the institutions of government intended to give effect to it. This view of democracy reflects liberal democratic theory, where democracy is routinely equated with the institutional, in an attempt to assert neutrality.³² Quite apart from the political critique that this liberal conception draws,³³ with which I agree, I have argued elsewhere that such an institutional understanding is flawed simply as a matter of description.³⁴ A collection of democratic institutions is not democracy – it is simply a structure inside which democracy might take place. Democracy itself is a value-system,³⁵ a discursive practice,³⁶ a way of doing and being, a mode of political action, a *culture*. Certainly the Constitutional Court is correct in assuming that the constitution requires in the first place that certain democratic institutions be created and maintained. But that is only part of the picture. Such a democratic system without a democratic culture and practice amongst those that partake in it is an empty shell. A statement of the democracy-related constitutional duties of the state that requires only that a series of democratic institutions be created, without also engaging the problem of creating and fostering the democratic culture with which to give those institutions life, is incomplete.

³² Mouffe (n 23 above) 3.

³³ As above 123.

³⁴ D Brand 'Writing the law democratically: a response to Theunis Roux' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 97 100.

³⁵ T Roux 'The principle of democracy in South African constitutional law' in Woolman & Bishop (eds) (n 34 above) 79 82 and Roux (n 30 above) 10-23.

³⁶ N Fraser 'Talking about needs: interpretive contests as political conflicts in welfare-state societies' (1989) 99 *Ethics* 291 297.

The position related above with respect to democracy applies with equal force to the conception of politics that is my concern in this dissertation. I am not - at least not for present purposes - interested in institutional renditions of politics. The kind of politics that I am interested in is a mode of political action - political practice - that can occur and can be performed inside the formal democratic institutions, but that occurs mostly outside those institutions, in political movements, social movements and in everyday life.³⁷ It is the politics 'conceived as a dimension that is inherent to every human society and that determines our very ontological condition' that Mouffe refers to.³⁸

Again I make this point to avoid confusion later. Politics has featured most obviously in the development of our courts' socio-economic rights jurisprudence in a decidedly institutional form. I refer here to the pre-occupation our courts have shown in their socio-economic rights decisions with that old bugbear of constitutional theorists, the counter-majoritarian dilemma - the dilemma that democratically unaccountable courts through the exercise of their power to review conduct of the representative branches of government get to trump formal expressions of the collective will and in that sense can or cannot be said to work in a counter-democratic manner. This pre-occupation has manifested itself in a variety of forms - either in the traditional form of a concern with limiting the conduct of the executive or legislature because that would amount to limiting the collective political will expressed through those branches of government,³⁹ or in the form of a concern for institutional security, where the attempt is to protect the institutional position of courts against possible encroachment by the 'political' branches occasioned by activist or robust court judgments.⁴⁰ In both these forms, the politics involved in socio-economic rights adjudication is reduced to a matter of institutional relations or, at least, is mediated through institutional

³⁷ See Mouffe (n 23 above) 3.

³⁸ As above.

³⁹ See, in general, M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) *South African Journal on Human Rights* 383; P Lenta 'Democracy, rights disagreements and judicial review' (2004) 20 *South African Journal on Human Rights* 1.

⁴⁰ For an extensive and excellent engagement with this topic in the South African context see, in general, T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

forms. I say reduced, because to express the matter in such institutional terms divests it of substantive political content and presents politics simply as a matter of strategy or of process.⁴¹ The politics that I am concerned with is quite obviously not this kind of institutional politics. However, given the pervasiveness of this kind of institutional analysis of the political stakes of socio-economic rights adjudication in the jurisprudence and academic literature, I consider it prudent to distinguish my focus explicitly at the outset.

1.2.3 An agonistic and substantive rather than a liberal politics

The illusion of consensus and unanimity, as well as the calls for “anti-politics”, should be recognised as being fatal for democracy and therefore abandoned.⁴²

Asserting that liberal democracy is in crisis in the world, Chantal Mouffe, in her book *The return of the political* proceeds to describe a form of politics – agonistic politics – that to her would be able to re-insert the political into liberal democracy. I find her concept of agonistic politics suggestive for my purposes.

Mouffe distinguishes her agonistic model of politics from liberal conceptions of politics in two ways. First, she decries the drive to consensus in liberal politics – the tendency, in order to maintain a fiction of neutrality with respect to substantive visions of the good, to deny conflict and contestation and to emphasise unanimity.⁴³ This drive, for her, threatens liberal democracy itself. For democracy to survive, she argues, it has to be re-imbued with the political – and the political occurs for her only where there is a measure of antagonism rather than consensus. As she puts it:

By “the political”, I refer to the dimension of antagonism inherent in human relations, antagonism that can take many forms and emerge in different types of social

⁴¹ In this sense it is an example of the operation of a liberal conception of politics, that presents politics as process rather than substance, attempting in this way to claim a position of neutrality with respect to substantive (political) question of the good (see in this respect Mouffe (n 23 above) 128 – 130; K van Marle ‘The politics of consent, friendship and sovereignty’ in R Hunter & S Cowan (eds) *Choice and consent. Feminist engagements with law and subjectivity* (2007) 75 (Van Marle ‘Consent’) 79 - 82; ‘Art, democracy and resistance: a response to Professor Heyns’ (2005) 2 *PULP Fictions* 15 (Van Marle ‘Art’) 19 – 20).

⁴² Mouffe (n 23 above) 5.

⁴³ As above.

relations. "Politics", on the other hand, indicates the ensemble of practices, discourses and institutions which seek to establish a certain order and organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of "the political".⁴⁴

As Karin van Marle points out, in an agonistic conception of democracy such as Mouffe's, the central aim is not to achieve consensus through rational deliberation, but to strive toward unity in the face of (ever present) conflict. Although the antagonism inherent in the 'us'/'them' relation is constitutive of the political in such an agonistic view, an agonistic politics is not an 'ensemble of practices, discourses and institutions' through which the enemy (the 'them', other than the 'us') can be overcome or eradicated. Rather its aim is to find ways in which the enemy can be respected despite difference and conflict: 'The enemy is reconceptualised as adversary, antagonism reconceptualised as agonism'.⁴⁵ This point is important. Mouffe's agonistic politics is not a revolutionary politics – the aim is not to obliterate the enemy. Despite its emphasis on contestation, opposition, plurality and difference, agonistic politics does require a certain basis consensus about a set of 'ethico-political' principles. Nevertheless, agonism characterises even this basis consensus – it is a 'conflictual consensus', because the ethico-political principles on which it is based, remain open to conflictual interpretations.⁴⁶

The second way in which Mouffe distinguishes agonistic politics from liberal politics relates to the emphasis in liberal conceptions of democracy and politics on process. In the liberal mind democracy amounts to nothing more than a set of procedures, the aim of which is to provide to individuals the space and mechanism within which to express their preferences and demands. For the liberal there is no such thing as the achievement of a single and homogenous general will, or truth – the aim of democracy is rather to provide procedures capable of arriving at agreement in circumstances where

⁴⁴ C Mouffe 'For an agonistic model of democracy' in N O'Sullivan (ed) *Political theory in transition* (2000) 113 125 - 126, also quoted in Van Marle 'Consent' (n 41 above) 81.

⁴⁵ Van Marle 'Consent' (n 41 above) 81 – 82.

⁴⁶ As above 82.

the achievement of such a homogenous will or truth is impossible.⁴⁷ Mouffe's response to this 'empty' idea of democracy and politics relates to her idea of a 'conflictual consensus' around a set of 'ethico-political principles' related above. She proposes the following:

[A]dherence to the political principles of the liberal democratic regime should be considered as the basis of homogeneity required for democratic equality. The principles in question are those of liberty and equality *and it is clear that they can give rise to multiple interpretations and that no-one can pretend to possess the "correct" interpretation.*⁴⁸

In this way she avoids the fiction of an empty, substance-less politics of liberalism without lapsing into the essentialist and potentially exclusive and totalitarian politics of communitarianism or nationalism – she posits politics as a mechanism through which to respect the enemy despite difference and conflict.

Mouffe's conception of agonistic politics described above resonates closely with the politics that I am concerned with in this dissertation. Both her focus on agonism or conflict and her emphasis on substance rather than only procedure are important for me for the following reason. Patrick Heller, in a comparative study of institutional strategies designed to 'democratise' developmental processes in local government structures, notes that the notion that impoverished people must participate in the planning and decision-making processes through which their fates are determined (that development must occur as a political process) is accepted across the political spectrum in development studies and development economics. This is so to such an extent, he intimates, that the notion is in danger of losing real meaning and its credibility: 'Officially, almost all parties to the debate support ... democratic decentralisation. [Even] [t]he World Bank now routinely underscores the

⁴⁷ Mouffe (n 23 above) 128 – 129. See also Van Marle 'Consent' (n 41 above) 79; 'Art' (n 41 above) 19 – 20.

⁴⁸ Mouffe (n 23 above) 130 (my emphasis).

importance of promoting 'empowerment' ...'.⁴⁹ Andries du Toit is more forthright, noting that attempts by the state to engender participation by impoverished people in developmental processes are often 'based on simplistic assumptions about buy-in', and given local currents of power, often operate as processes of co-optation by the liberal state.⁵⁰ The danger he alludes to is that the liberal state, employing purely procedural mechanisms of participation where contestation about substantive questions are not possible, functions in a disciplining fashion, stilling political contestation through co-optation. To the extent that this dissertation results, in its Chapters 3 and 4 and its conclusion, in suggestions for institutional change designed to engender the politics I am concerned with, I distinguish my notion of transformative politics from the proceduralist and consensus-seeking notion of politics that underlies such subverted institutional mechanisms for participation. I do this by emphasising the conflictual and substantive character of transformative politics.

Against the background of this description of the kind of politics that I am concerned with, I proceed with a consideration of different aspects of the relationship between such a politics and socio-economic rights adjudication.

1.3 The adjudication of socio-economic rights claims and transformative politics

1.3.1 Introduction

In the main, courts in South Africa in enforcing socio-economic rights and those writing about their work in this respect have focussed their analytical efforts on two (related) issues: they have focussed on finding ways in which socio-economic rights can be enforced effectively – that is, in a way that results in concrete change for the better in the lives of impoverished people; and they have focussed on institutional questions relating to the capacity of

⁴⁹ P Heller 'Local democracy and development in comparative perspective' in E Pieterse, S Parnell, M Swilling & M van Donk (eds) *Consolidating developmental local government* (2008) 152 152.

⁵⁰ A du Toit 'Chronic and structural poverty in South Africa: challenges for action and research' (2005) *PLAAS Chronic Poverty and Development Policy Series no 6; Chronic Poverty Research Centre Working Paper no 56* available at <http://www.plaas.org.za/publications/researchreports/2006>, visited 24 August 2008 16 17.

courts and their relations with the other branches of government. Given this preoccupation with the concrete and the strategic, whence my rather more abstract focus on the relationship between the adjudication of socio-economic rights claims and transformative politics as described above?

Economists, development specialists and sociologists interested in the causes of and solutions to impoverishment have long recognised the crucial importance for sustainable socio-economic transformation of building institutions and practices that foster and create space for the kind of transformative politics I describe above. In his book, *A history of inequality in South Africa 1652-2002*,⁵¹ Sampie Terreblanche observes that inequality in socio-economic welfare in South Africa has throughout our history been mirrored by inequality in access to political power: that 'the social and economic history of South Africa has been one of unequal distribution of power'.⁵² Terreblanche makes this claim about the three hundred years of racial domination prior to the changes of the 1990s, but also argues that it still largely holds today.⁵³ He details the extent to which members of the most impoverished half of the population have, post 1990, been further impoverished and attributes their further impoverishment, at least in part, to their continued exclusion (now by a coalition of white economic and black political elites) from political power and their consequent inability to influence government economic and social policy and practice.⁵⁴ From this he concludes that lasting and sustainable socio-economic transformation in South Africa will only occur if the unequal distribution of political power is also addressed – to quote from him again in slightly garbled fashion: we 'cannot address the huge inequalities and injustices that have accumulated during [our history]' if the 'democratic part' of the 'new politico-economic system of democratic capitalism' that is taking hold in South Africa 'remains weak and

⁵¹ S Terreblanche *A history of inequality in South Africa 1652 - 2002* (2002).

⁵² As above 14.

⁵³ As above 16, 17, 18, 20.

⁵⁴ As above 419 - 423. See also P Bond *Elite transition* (2005) 253 and further.

underdeveloped compared to the powerful (and deeply institutionalised) “capitalist” part’.⁵⁵

Terreblanche’s concern with the need for dispersal of political power from elites to impoverished people and groups resonates in a concrete fashion with accounts of socio-economic transformation in South Africa from the fields of development studies and economics that emphasise the need for the democratisation of social and economic processes designed to address impoverishment and deprivation. These accounts oppose the ‘top-down’ approach to socio-economic transformation espoused by the Mbeki government over the last decade, in terms of which a ‘benevolent and rational state’ ‘sets the agenda for’ socio-economic transformation ‘and other actors and stakeholders have to embrace and support the path chosen’.⁵⁶ Instead, they emphasise the politically contested and complex nature of problems of transformation and development⁵⁷ and focus on fostering and strengthening the political agency of impoverished individuals and groups on the one hand,⁵⁸ and fashioning developmental institutions and processes that allow for effective political contestation around issues of poverty and need on the

⁵⁵ As above 17 – 18, 21. This is, of course, one element only of the solution Terreblanche proposes for South Africa’s current economic woes. His full proposal is for the construction of what has elsewhere been called a ‘democratic developmental state’ (E Pieterse & M van Donk ‘Incomplete ruptures: the political economy of realising socio-economic rights in South Africa’ (2002) 6 *Law, Democracy and Development* 193 195 - 196) - in his own terms, a state operating according to a social-democratic version of democratic capitalism (see in general his Chapter 11 ‘Working toward a social-democratic version of democratic capitalism’ 419 - 474). Such a state would in the first place be explicitly committed to human development and socio-economic transformation through the provision of social welfare (415 - 455). In terms of economic structuring, it would be a strong state in the sense both that it would adopt a ‘leading and enabling’ (446, quoting an excerpt from the ANC’s *The Reconstruction and development programme: a policy framework* (1994) 78 - 79) role in the economy in terms of regulation and intervention and that it would possess the infrastructural, organisational and administrative capacity required to carry out its developmental role efficiently and effectively (446 - 449). Finally, it would operate in a democratic fashion with respect to its economic and developmental policy – it would acknowledge and have in place processes and structures to give effect to the idea that decisions about the allocation and utilisation of resources and about economic structuring and developmental policy ‘ought to be taken collectively through the democratic process and through continuing public discourse about what our national interest is, or what will best promote the social welfare of society at large in the long run’ (453; see also 449 - 451).

⁵⁶ Pieterse & Van Donk (n 11 above) 14. See also Pieterse & Van Donk (n 55 above) 195 - 196 and Heller (n 49 above) 152.

⁵⁷ See eg E Pieterse, S Parnell, M Swilling & M van Donk ‘Consolidating developmental local government’ in Pieterse, Parnell, Swilling & Van Donk (eds) (n 49 above) 1 18; Pieterse & Van Donk (n 11 above) 13.

⁵⁸ See eg Du Toit (n 50 above) 16, 17.

other,⁵⁹ so that solutions to impoverishment can be found through a 'political process of negotiation, disagreement, conflict, occasionally consensus, and, at a minimum, forms of mutual accommodation'.⁶⁰

The 'democratised' approach to addressing impoverishment that arises from these accounts is first justified at a structural level in the way that Terreblanche does it – if what made and makes it possible for some in our society to impose an unequal distribution of wealth and resources on others was and is at least in part an unequal distribution of political power, then the unequal distribution of wealth can only be addressed if the unequal distribution of power is challenged.⁶¹

The democratised approach is often also justified in directly instrumental terms, by linking democratisation to the efficiency and effectiveness of development. On this argument the complexity of problems of socio-economic transformation is such that no one actor in the process of transformation such as the state can claim to hold all the answers – answers are more likely to be effective if they are arrived at after input from a variety of actors. Also, so it is claimed, transformative processes and their outcomes are more likely to be effective if they were in part designed by or with the participation of those who derive benefit from them, as they know best what their own needs are and, in many cases what the most direct ways are of addressing them. Finally, it is recognised that the chance for viable and sustainable development is enhanced if impoverished people 'buy into' developmental processes and outcomes because they were involved in conceptualising and implementing them.⁶²

⁵⁹ Pieterse, Parnell, Swilling & Van Donk (n 57 above) 18 - 20.

⁶⁰ Pieterse & Van Donk (n 11 above) 13.

⁶¹ Terreblanche (n 51 above) 17 - 18, 21.

⁶² See eg Pieterse & Van Donk (n 11 above) 15 and Pieterse & Van Donk (n 55 above) 207; Pieterse, Parnell, Swilling & Van Donk (n 57 above) 18. This particular justification can of course be problematic – if the motivation for engaging with impoverished people when designing programmes to alleviate their plight is merely to generate this kind of 'buy-in' political engagement comes close to co-option. See my brief discussion of this problem at 25 - 26 above and the sources cited there.

Perhaps most importantly, a democratised approach to socio-economic transformation is also justified in explicitly normative terms. In this view democratic empowerment of all in South Africa is an important element in itself of our vision of a just society. That is, one of the desired outcomes of transformation, alongside the physical eradication of poverty and socio-economic inequality, is the creation of a society in which all – perhaps in particular impoverished people - are able to participate in a meaningful fashion in the decisions that affect them and that affect the society of which they are a part.⁶³

Although there is disagreement about exactly what participation entails and when it will be effective,⁶⁴ and about which degree of participation in developmental processes can be allowed before the efficiency of those processes will be affected,⁶⁵ there seems to be a least surface consensus in the literature about socio-economic transformation in South Africa from disciplines other than law that the ability of impoverished people and those acting in their interest to engage in transformative political action is a prerequisite to sustainable and viable transformation.⁶⁶

Importantly, development economists seem to recognise that South African courts, when deciding cases dealing with issues of impoverishment and deprivation, can play an important role in fostering the kinds of democratised developmental processes they support, because ‘they are located in the political space between [the state and impoverished groups and people] and therefore shape the focus of the contestation between civil society and the state’.⁶⁷ The implication seems to be that courts and those interested in their work should be alive to the relationship between the process of adjudication

⁶³ Pieterse & Van Donk (n 55 above) 208.

⁶⁴ Du Toit (n 50 above) 17.

⁶⁵ Heller (n 49 above) 152.

⁶⁶ As above.

⁶⁷ Pieterse & Van Donk (n 55 above) 198. One hears here echoes of Karl Klare’s assertion that ‘[w]e may ... legitimately expect constitutional adjudication to innovate and model intellectual and institutional practices appropriate to a culture of [democracy] ...’ (K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 147).

and transformative political action and should be sensitive to the need to foster, legitimise and create space for such politics.

Surprisingly, however, both our courts and those who engage with their work have, at least until relatively recently, shown little interest in this issue. Once the normative debate about whether or not justiciable socio-economic rights should be included in the 1996 constitution – the debate, that is, about their legitimacy – had been concluded,⁶⁸ academic writing about socio-economic rights in South Africa for an extended time moved away from theory and focussed instead on the development and description of legal doctrine to aid the engagement of courts with these rights. Institutional concerns about the relationship between courts and the other branches of government and about the institutional capacity of courts in deciding socio-economic rights cases, and practical concerns about the extent to which the decisions of courts could indeed generate concrete change in the lives of impoverished people have dominated the debate, leaving the seemingly more abstract or theoretical question of the relationship between the work of courts enforcing socio-economic rights and transformative politics by the wayside.

Such engagement with this question that there has been, has also mostly been of a certain kind and orientation – one that is different from my own engagement with it here. Most scholars have emphasised the possible positive aspects of the relationship, pointing out that the adjudication of socio-economic rights claims can in different ways be constitutive of transformative political action, or a channel through which such action can occur or a way in which to open up space for transformative political action. In what follows I first describe these more common positive accounts of the relationship, before I turn to describing my own perspective on the question.

⁶⁸ For an overview of the terms of this debate see S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2003) 6 *Law, Democracy and Development* 159 161 - 162; D Brand 'Introduction to socio-economic rights in the South African constitution' in D Brand & CH Heyns *Socio-economic rights in South Africa* (2005) 1 21 - 22.

1.3.2 Common accounts of the relationship between socio-economic rights adjudication and transformative politics

Most existing accounts of the relationship between socio-economic rights adjudication and transformative politics in the existing literature in South Africa fall into one of two broad streams.

First, and most prominent, there are those who see socio-economic rights as constitutive of transformative politics, in that the access to basic resources that these rights supposedly enable for impoverished people makes it possible for them to engage in political action – I will call this approach, with a nod in the direction of John Hart Ely,⁶⁹ the ‘representation-reinforcing’ approach.

1.3.2.1 Representation reinforcement

This kind of argument was most clearly presented during the debate about whether or not socio-economic rights should be included in the constitution – in other words, when the aim of those supporting these rights was still to legitimise their inclusion as justiciable rights in the constitution. A prominent participant in the debate at that time – Nicholas Haysom - forcefully articulated the point in an article in an issue of the *South African Journal on Human Rights* that focussed on the question whether or not justiciable socio-economic rights should appropriately be included in the constitution.⁷⁰

Referring to Franklin Delano Roosevelt’s assertion in the 1940s that freedom from hunger is as important for the survival of democracy as freedom of speech,⁷¹ Haysom describes what he calls a ‘civic equality’ argument for the inclusion of socio-economic rights in the constitution. The premise is that democracy can function only if political and civil equality exists – if all citizens are equal social and political participants. This equality is more than a simple formal equality of opportunity, which requires no more than a guarantee of open access to political life for whoever is able to make use of it. It is a substantive vision of equality in terms of which it is recognised that people

⁶⁹ See sources cited in and text accompanying n 77 below.

⁷⁰ N Haysom ‘Constitutionalism, majoritarian democracy and socio-economic rights’ (1992) 8 *South African Journal on Human Rights* 451.

⁷¹ As above 460.

need to be guaranteed the basic material conditions for survival and dignified life in order to be able to participate actively in political life. In short, for Haysom, 'an illiterate, hungry person' cannot 'participate in the political process let alone social life',⁷² at least not on a basis of equality with those who do not suffer from want. Accordingly

a minimum floor of rights should be constitutionalised to enrich political contest and democratic participation - not by limiting political choice but by facilitating real participation in social and political life.⁷³

In developing an argument in the late 1960s and 1970s that a constitutional right to minimum material welfare – what we would call socio-economic rights to housing, health care, education and a minimum income - should be recognised in the US constitutional system, Frank Michelman relied on a similar line of thought. Michelman sought to justify the proposition that a society should be ordered such not only that a fair opportunity exists for people to generate through their own effort an income sufficient to meet their basic material needs, but that the satisfaction of such basic needs is absolutely insured, 'free of any remote contingencies pertaining to effort, thrift or foresight'.⁷⁴ He did so using four discrete lines of argument: what André van der Walt has called a jurisprudential, a moral, a procedural fairness and an interpretivist argument.⁷⁵ The interpretivist argument comes close to

⁷² As above.

⁷³ As above 461.

⁷⁴ F Michelman 'The Supreme Court 1968 term – Foreword: on protecting the poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7.

⁷⁵ See AJ van der Walt 'A South African reading of Frank Michelman's theory of social justice' in H Botha, JWG van der Walt & AJ van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 163 181 - 193. The jurisprudential argument, developed in Michelman (n 74 above), involves analysis of a series of cases in which welfare rights were protected, but explicitly or implicitly on the basis of equal protection guarantees – Michelman proposes that these cases can be explained more coherently as having been decided on the basis of a constitutional right to minimum welfare and argues, in typical counter-intuitive fashion, that the cases in fact show such a right already exists in US constitutional law. In the moral argument, developed in his 'In pursuit of constitutional welfare rights: one view of Rawls' theory of justice' (1973) 121 *University of Pennsylvania Law Review* 962, Michelman defends the proposition, on the basis of John Rawls' *A theory of justice* (1971), that 'morality and justice demand that certain basic social and economic needs should be satisfied by the state' (Van der Walt (above) 183). The procedural fairness argument, developed in his 'Formal and associational aims in procedural due process' in J Pennock (ed) *Due process (Nomos XVIII)* (1977) 126 again posits that welfare rights are implicitly recognised in US constitutional law, this time by analysing procedural due process cases and pointing out that

Haysom's justification of justiciable constitutional socio-economic rights as constitutive of political capacity and participation.⁷⁶ In this respect Michelman refers to the theory of constitutional interpretation of John Hart Ely. To explain the recognition of rights not explicitly enumerated in the US constitution without at the same time having to abandon the theoretical point of departure that interpretation of the constitution has to proceed from a premise that is inside the constitution, Ely formulated his well-known 'representation-reinforcing' theory of interpretation.⁷⁷ In broad terms Ely managed to justify the recognition of unenumerated rights relying on a basic constitutional value that he argued is implicit in the constitutional text – the value of 'political participation through representation'.⁷⁸ Judges interpreting the constitution and giving content to its provisions can opt for interpretations that are not explicit in the text if those interpretations enhance the potential for participation in representative politics. Relying on this interpretive principle of 'representation-enhancement', Michelman argues that minimum welfare rights to things such as housing and a minimum income can legitimately be read into the constitution, because command of a minimum level of material welfare is a prerequisite for participation in the political process – indeed, in his words, 'the universal, rockbottom prerequisite[] of effective participation in democratic representation.'⁷⁹

Michelman's 'representation-reinforcing' justification for a constitutional right to minimum welfare is similar to Haysom's argument in support of justiciable

procedural due process strictures were imposed on state conduct more readily in cases involving decisions affecting aspects of minimum welfare, than in cases involving less basic needs. The interpretivist argument, developed in his 'Welfare rights in a constitutional democracy' (1979) 3 *Washington University Law Quarterly* 659 (Michelman 'Welfare rights'), is described below at 34 - 35.

⁷⁶ For Andre van der Walt's description and analysis of the interpretivist argument, see Van der Walt (n 75 above) 189 - 193.

⁷⁷ JH Ely 'Constitutional interpretivism: its allure and impossibility' (1978) 53 *Indiana Law Journal* 399; 'The Supreme Court, 1977 term – Foreword: on discovering fundamental values' (1978) 92 *Harvard Law Review* 5; and 'Toward a representation-reinforcing mode of judicial review' (1978) 37 *Maryland Law Review* 451.

⁷⁸ Michelman 'Welfare rights' (n 75 above) 669.

⁷⁹ As above 677. For Ely's response to the use to which Michelman put his theory of interpretation, see his 'Democracy and the right to be different' (1981) 56 *New York University Law Review* 397 399 n 5 and *Democracy and distrust* (1980) 162 (expressing his frustration that his theory does not, in his view, extend the kind of protection to impoverished people as a discrete class that Michelman envisages).

socio-economic rights not only in content, but also in purpose. Both Michelman and Haysom's aim was justificatory – their arguments were at the time they were made intended to justify the constitutional recognition of justiciable socio-economic rights there where they were not (yet) recognised.⁸⁰ The 'representation-reinforcing' view of the relationship between adjudication of constitutional socio-economic rights and transformative politics did not translate as an explicit approach to the interpretation of socio-economic rights when these rights were included in the constitution in South Africa and courts started to engage with them. Rather, it has operated as an important inarticulated, or perhaps mutely articulated, premise of one of the most prominent critiques of the earlier half of our courts' socio-economic rights jurisprudence.

Early commentators on that jurisprudence such as Sandra Liebenberg and David Bilchitz mounted a spirited attack on the broad and generalised reasonableness review approach adopted by the Court in *Government of the Republic of South Africa v Grootboom*⁸¹ and applied in subsequent cases.⁸² The gist of their concern with this approach was that it had made of what could be rights of real people to real things such as houses, food, water and health care, rights of a generalised collective of people to reasonable policies. Instead they advocated what has come to be called the 'minimum-core' or 'basic needs' approach to the interpretation of socio-economic rights. For them, in cases where what was at stake was access to a certain minimum level of a basic material resource such as housing (the minimum core), courts should forego the attenuated and generalised reasonableness review approach occasioned by their perceived lack of institutional capacity relative to the political branches of government. Instead, in such cases, the courts should operate in a more activist fashion and interpret and enforce socio-economic rights as individual rights in the first place, on the basis of which, in

⁸⁰ With respect to Michelman on this point, see Van der Walt (n 75 above) 181.

⁸¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

⁸² For representative samples of their work in this respect, see D Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 119 *South African Law Journal* 484 (Bilchitz 'Teeth') and 'Towards a reasonable approach to the minimum core: laying a foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1 (Bilchitz 'Reasonable approach'); Liebenberg (n 68 above).

the second place, claimants can be awarded concrete and immediate relief to alleviate their acute deprivation.⁸³ Their justification for the claim that courts should in such cases of acute deprivation throw deference to the wind was in part that the basic level of welfare at stake in such cases is indispensable not only to human survival, but is also a prerequisite for the capacity to operate as a social and political being.⁸⁴

Sandra Liebenberg has recently returned to the ‘representation-reinforcing’ theme in her work about the use of human dignity as a value in the interpretation of socio-economic rights. In this work, drawing amongst others on Jennifer Nedelsky,⁸⁵ she develops a specifically relational conception of dignity that operates not as an aspect of an individualist autonomy but as an aspect of social relations. Against this background, she asserts that:

Socio-economic rights are not valued as commodities, but because of what they enable human beings to do and to be. If basic subsistence needs are not met, humans face severe threats to life and health. But, in addition, such deprivation impedes the development of a whole range of human capabilities, including the ability to fulfil life plans and participate effectively in political, economic and social life.⁸⁶

⁸³ Bilchitz ‘Reasonable approach’ (n 82 above) in general, but specifically 26; Liebenberg (n 68 above) 168 – 169, 176 – 177, 188, 190. The ‘minimum core’ approach to interpreting socio-economic rights, in particular as it has been articulated by its most vociferous advocate, David Bilchitz, can itself be subjected to the critique that it tends to depoliticisation and so works counter to transformative politics. The gist of such a critique would be that Bilchitz’s insistence that courts interpret socio-economic rights so as to impose certain immutable, universal basic standards of social provisioning, denies the inherently political nature of the process of determining the degree and nature of needs and deprivation. I do not engage in such a critique in this dissertation more than in passing. In this respect I should mention that Sandra Liebenberg, the other prominent protagonist of the ‘minimum core’ approach I identify, has departed from Bilchitz in this respect, making it clear from the outset that her concern is not, as with Bilchitz, the perceived need to ‘give content’ to socio-economic rights by describing universal standards and, more recently, stating that she seeks to avoid doing so precisely because such an attempt denies the politics of socio-economic rights (see in this respect, for example, S Liebenberg ‘Socio-economic rights: revisiting the reasonableness review/minimum core debate’ in SC Woolman & M Bishop (eds) *Constitutional conversations* (2008) 303 313).

⁸⁴ See, for example, Bilchitz ‘Reasonable approach’ (n 82 above) 12 (‘[w]ithout protecting people’s survival interests, all other interests and rights that they may have – whether civil, political, social or economic – become meaningless’).

⁸⁵ J Nedelsky ‘Reconceiving rights as relationships’ (1993) 1 *Review of Constitutional Studies* 1.

⁸⁶ S Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ in Van der Walt (ed) (n 18 above) 143 143 – 144.

1.3.2.2 Socio-economic rights adjudication as a tool of politics

The second broad stream within which accounts of the relationship between socio-economic rights adjudication and transformative politics fall, addresses that relationship more explicitly than the representation-reinforcing stream. On this account, socio-economic rights litigation and decisions of courts in socio-economic rights cases can operate as part of political struggles by or on behalf of impoverished people – as tools to be used strategically within that struggle.

In South Africa, this understanding has been expressed most consistently in writing recounting the experience of political campaigning of the Treatment Action Campaign. This conglomerate of civil society organisations successfully challenged the refusal of the Department of Health of the South African Government to make available the antiretroviral medicine Nevirapine to HIV positive women giving birth at public health facilities in order to prevent the transmission at birth to their babies of HIV in the case of *Minister of Health v Treatment Action Campaign*.⁸⁷ Some of those involved in the Treatment Action Campaign and commentators analysing its campaigns as examples of successful political advocacy and mobilisation have consistently emphasised the extent to which, supposedly, the Treatment Action Campaign used litigation targeted on specific issues to create space for and strengthen its broader political campaigns.

So, for example, in an article explicitly styled as a review of the implications for political strategies of the *Treatment Action Campaign* case, Mark Heywood, at the time National Secretary of the Treatment Action Campaign, recounts the way in which the case was used strategically as part of the organisation's broader campaigns to intensify the fight against HIV/AIDS.⁸⁸ He details the manner in which the decision was taken to take the matter to court, the way in which the case was developed and run through the different courts, and the way in which the implementation of the final order of the

⁸⁷ *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

⁸⁸ M Heywood 'Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the treatment action campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278.

Constitutional Court was monitored by the Treatment Action Campaign. In the process he argues persuasively that, if used creatively, litigation around socio-economic rights - not only the judgments of courts, but also the process of litigation and of adjudication – can contribute to political struggles on much broader issues than those relevant to the case itself.

By way of illustration, he points to an ‘interesting dialectic’⁸⁹ between law and political struggle that arose from the decision of the state to appeal against the order of the High Court in favour of the Treatment Action Campaign and from its attempts to stay execution of the High Court order that Nevirapine be made available, pending the finalisation of its appeal to the Constitutional Court. In Heywood’s words:

During this time ... [t]he pressure of the ongoing legal action forced the government back into court, and the different stages of the appeal and the application for an execution order spurred further advocacy and social mobilisation – which in turn placed new pressures on government.⁹⁰

Heywood recounts how the Treatment Action Campaign throughout this process, through the skilful use of publicity, mobilisation and protest, managed to build pressure on government with respect to its policies on HIV/AIDS to such an extent that, two weeks before the hearing on the Nevirapine issue would commence in the Constitutional Court, the government announced a plan for the universal provision of anti-retroviral medicines to HIV carriers at public health facilities, and for the first time publicly acknowledged that anti-retrovirals had an important role to play in managing the impact of the disease. This, a major political victory for the Treatment Action Campaign at the time, illustrates to Heywood the extent to which litigation targeted to address a specific issue can generate political pressure that leads to gains in other issues that are part of a broader political struggle.⁹¹

⁸⁹ Heywood (n 88 above) 304.

⁹⁰ As above.

⁹¹ As above 303 – 307, 310, 314. See also J Berger ‘Litigation strategies to gain access to treatment for HIV/AIDS: the case of South Africa’s Treatment Action Campaign’ (2002) 20

Others have also emphasised how the Treatment Action Campaign's use of litigation has managed to place the issues at stake on the public agenda and to raise political awareness about them⁹² or how victories in litigation have 'facilitated empowerment' of the movement and its members by expanding the horizons of the possible and so opening space for further political action.⁹³

1.3.3 My own account – the limiting effect of the adjudication of socio-economic rights on transformative politics

1.3.3.1 Introduction

The two accounts of the relationship between the adjudication of socio-economic rights claims and transformative politics related in section 1.3.1 above share two characteristics.

First, both these accounts depict the relationship in a positive light. That is, both accounts see litigation and adjudication around socio-economic rights as supportive in some way of transformative politics – in the representation-reinforcing account because the access to basic material resources that can be leveraged for impoverished people by such litigation enables them as political actors and in the second account because such litigation operates as a tool of transformative political struggle.

Second, both these accounts can be described as 'outcomes-oriented'. That is, both evaluate the nature of the relationship between the adjudication of socio-economic rights claims and transformative politics by virtue of the concrete results generated in the process of socio-economic rights adjudication. For the representation-reinforcing analysis the relationship

Wisconsin International Law Journal 596 598 ('[w]hile the TAC aims to secure a legal victory whenever litigation is undertaken, the organisation is also highly aware of the role of the litigation process beyond the orders made in court judgments').

⁹² Berger (n 91 above) 599 ('[I]tigation is also used to place issues on the agenda, both before the judge and in the court of public opinion').

⁹³ S Friedman & S Mottiar 'Rewarding engagement?: the Treatment Action Campaign and the politics of HIV/AIDS' (2004) Research report prepared for the Centre for Civil Society and School for Development Studies, University of KwaZulu-Natal, available at <http://www.ukzn.ac.za/CCS/files/FRIEDMAN%20MOTTIER%20A%20MORAL%20TO%20THE%20TALE%20LONG%20VERSION%20.PDF>, visited 1 November 2008 text accompanying notes 190 – 191.

between adjudication of socio-economic rights claims and transformative politics and the positive nature of that relationship are defined by the results it can generate. It is determined by the fact that such adjudication can result in impoverished people getting access to certain material things – houses, food, water, health care, education – that make it possible for them to operate as political agents. The second account is equally results-oriented: it defines the relationship by virtue of the fact that socio-economic rights litigation can achieve concrete political gains within a broader political struggle.

The outcomes-oriented nature of the two common accounts of the relationship between socio-economic rights adjudication and transformative politics reflects, I believe, a certain understanding of what transformation entails. South African poet and novelist Antjie Krog describes this understanding of transformation thus:⁹⁴

The word consists of two parts: the prefix 'trans', which is Latin for across, the other side (as in Transkei, Transvaal); and 'form' which means to give structure to, to create, to bring forth. In its deepest structure then, the word 'transformation' means: to form the other side, to start creating where you are going.

In terms of this understanding transformation is first and foremost results-oriented – it is concerned with real and concrete changes in society, with the achievement of certain concrete transformative goals. The transformative performance of courts in socio-economic rights cases is as a consequence also evaluated in a results oriented fashion: the transformative litmus test becomes the extent to which doctrine and remedial approaches in socio-economic rights cases can and do 'tangibly alleviat[e] the consequences of poverty and deprivation',⁹⁵ or achieve 'a specific contextual form of equality',⁹⁶ or 'give[] effect to the value of human dignity'.⁹⁷ It would seem that this concept of transformation underlying the two accounts of the relationship

⁹⁴ A Krog *A change of tongue* (2003) 126.

⁹⁵ M Pieterse 'Resuscitating socio-economic rights: constitutional entitlements to health care services' (2006) 22 *South African Journal on Human Rights* 473 477. See also Liebenberg (n 68 above) 160.

⁹⁶ P De Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258 258.

⁹⁷ Liebenberg (n 86 above) 158.

between socio-economic rights adjudication and transformative politics is determinatively linked to the positive description of that relationship found in those accounts. In this approach the point of departure is in the first instance a positive one - that the enforcement by courts of socio-economic rights holds real transformative potential – and the project is to shape the work of our courts with respect to socio-economic rights in such a way that the potential is realised, that transformative goals are achieved.⁹⁸

I am naturally drawn to this kind of pragmatist, results-oriented approach to assessing the transformative performance of our courts in socio-economic rights cases.⁹⁹ I share with those operating in terms of it, at least to some extent, a certain constitutional optimism, a belief in the potential for law, rights and specifically adjudication to achieve meaningful social transformation and in the virtue of pursuing the realisation of that potential.¹⁰⁰ I am also, as they are, acutely aware that in South Africa today homelessness, hunger, ill-health, poverty, inequality and the resultant social and political exclusion are enormous and urgent problems that require concrete and immediate solutions and believe that legal scholars should focus their attention on generating such solutions. Indeed, much of my writing about the judicial enforcement of socio-economic rights to date has proceeded from precisely the assumption that these rights and our courts' work with respect to them are potential transformative instruments and should be interpreted as such.¹⁰¹

Nevertheless, I approach my own evaluation of the relationship between transformative politics and the adjudication of socio-economic rights claims on the basis of a different understanding of transformation.

⁹⁸ This point of departure and this project are most clearly articulated by Sandra Liebenberg, who states that '... socio-economic rights were included as justiciable rights in the Bill of Rights primarily to assist the poor to protect and advance their fundamental socio-economic needs and interests. These rights should therefore be interpreted in a way that promotes this purpose.' (Liebenberg (n 68 above) 160).

⁹⁹ Pragmatist in the sense that it is an approach that evaluates law and adjudication for its 'actual consequences for ... people', for the extent to which it does or does not satisfy human needs (JW Singer 'Property and coercion in federal Indian law: the conflict between critical and complacent pragmatism' (1990) 63 *Southern California Law Review* 1821 1821 - 1822).

¹⁰⁰ I borrow the term 'constitutional optimism' from Emiliios Christodoulidis who uses it (and critiques it) in his 'Constitutional irresolution: law and the framing of civil society' (2003) 9 *European Law Journal* 401 403 and what follows.

¹⁰¹ See, for example, my 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?" ' in Botha, Van der Walt & Van der Walt (eds) (n 75 above) 33.

I take my cue in this respect from Karl Klare, who in his now famous article 'Legal culture and transformative constitutionalism' cautioned that the choice of South Africans to allow a significant portion of their transformation to occur through adjudication, although alive with possibility and potential, is also 'fraught with ... consequences'.¹⁰² Neil Walker has recently pointed out that, in this age of unprecedented constitutional optimism, in which more faith is placed internationally than probably ever before in the potential for constitutions and the associated institution of constitutional judicial review to manage and effect social organisation, constitutionalism and judicial review 'have also been subject to a perhaps unprecedented range and intensity of attack'.¹⁰³ In South Africa, to a lesser extent, we have also seen this. Certainly, as pointed out above, there is currently in South Africa a great deal of belief in the power of the constitution and of courts enforcing that constitution to drive and manage the transformation of our society – indeed in some quarters our transformation is conceptualised as nothing but a constitutional transformation.¹⁰⁴ But at the same time, a small group of legal academics have cautioned against constitutional over-optimism and have focussed their writing on the negative consequences of our choice to allow a significant portion of our transformation to occur through adjudication. Recognising that adjudication, despite its transformative potential, is at best a limited and at worst a limiting instrument for transformation, they have focussed their energies on identifying the different ways in which adjudication, whilst effecting transformation or attempting to do so, can at the same time have an anti-transformative effect.

So, for example, at an early stage in the debate, Karl Klare traced the extent to which the Constitutional Court in some of its early judgments, through

¹⁰² Klare (n 67 above) 147.

¹⁰³ N Walker 'The idea of constitutional pluralism' (2002) 65 *Modern Law Review* 317 318.

¹⁰⁴ For a description and critique of the extent to which our transformation has been constitutionalised, see K van Marle 'Revisiting the politics of post-apartheid constitutional interpretation' 2003 *Tydskrif vir die Suid-Afrikaanse Reg/Journal for South African Law* 549 ('Revisiting') and 'Love, law and the South African community: critical reflections on "suspect intimacies" and "immanent subjectivity"' in Botha, Van der Walt & Van der Walt (eds) (n 75 above) 231. For a description of the ways in which this kind of constitutional optimism presents itself internationally, see Christodoulidis (n 100 above) 403 and what follows.

denying the politically contingent nature of its work, exerted a negative influence on the maintenance of a vibrant progressive politics – something that he regards as a prerequisite to transformation.¹⁰⁵ More recently, Henk Botha has analysed the modes of reasoning and in particular the metaphors employed by both pre- and post-apartheid courts and has pointed out how reliance on the metaphor of boundaries to describe legal rules and rights rather than a conceptualisation of rights as relationships limits the extent to which our courts can develop a ‘potentially transformative constitutional jurisprudence’.¹⁰⁶ As a final example, André van der Walt has highlighted the anti-transformative tendency of adjudication to reach finality or to establish orthodoxy – to close issues off from further contestation (and further transformation).¹⁰⁷

These different analyses also have in common a certain understanding of transformation, importantly different from the understanding of transformation related above, and, as a result, a certain understanding of what the transformative orientation of the constitution requires of courts. In terms of this understanding transformation is not, at least not only, concerned with the outcomes generated by a system or an institution, with the achievement of certain goals. Much rather, real transformation requires that the system or institution itself be transformed – that the system or institution itself be

¹⁰⁵ Klare (n 67 above) 172 - 188. See 48 - 52 below for a fuller discussion.

¹⁰⁶ H Botha ‘Metaphoric reasoning and transformative constitutionalism (part 2)’ 2003 *Tydskrif vir die Suid-Afrikaanse reg/Journal for South African Law* 20 34. See also his ‘Metaphoric reasoning and transformative constitutionalism (part 1)’ 2002 *Tydskrif vir die Suid-Afrikaanse reg/Journal for South African Law* 612, ‘Freedom and constraint in constitutional adjudication’ (2004) 20 *South African Journal on Human Rights* 249 (‘Freedom’) and ‘Democracy and rights. Constitutional interpretation in a postrealist world’ (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561. See 55 - 61 below for a fuller discussion.

¹⁰⁷ AJ van der Walt ‘Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law’ (2002) 17 *SA Publiekreg/Public Law* 258 (‘Orthodoxy’). See also his ‘Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state’ (2001) 118 *South African Law Journal* 258 and ‘Tentative urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court’ (2001) 16 *SA Publiekreg/Public Law* 1, where he explores other aspects of the conflicted nature of the role of courts participating in social transformation. The examples I mention in the text here are of course only examples of an extensive literature. See at the minimum also H Botha & JWG van der Walt ‘Democracy and rights in South Africa: beyond a constitutional culture of justification’ 2000 *Constellations* 341; WB le Roux ‘From Acropolis to metropolis: the new Constitutional Court building and South African street democracy’ (2001) 16 *SA Publiekreg/Public Law* 139; and Van Marle ‘Revisiting’ (n 104 above) 549 (see 52 - 55 below for a fuller discussion).

changed so radically that its very identity is altered.¹⁰⁸ Again, Antjie Krog comes to my aid:¹⁰⁹

But ‘trans’ also appears in words like transfigure, transfer, transcend, transaction, transgress, transience. And it is embedded in the Dutch *hemeltrans*, where it means ‘firmament’. One could say that in order to create the other side, one has to remake the firmament – no mere change of structure or exterior, but of the guiding essence.

Certainly, this understanding of transformation is not apathetic to the need to achieve concrete transformative goals. Indeed, it is partly motivated by the recognition that an institution’s capacity to generate truly transformative outcomes is importantly limited if it unreflexively continues to operate in terms of its accepted methods and intuitions.¹¹⁰ But the focus is different: whereas the first conception of transformation related above focuses on the law and adjudication’s transformative potential, this second conception of transformation is concerned with law and adjudication’s inevitable anti-transformative impact. The transformative performance of courts in terms of the latter conception is consequently evaluated not in terms of the immediate and direct results they generate with their decisions, but through scrutiny of the process of adjudication itself: the transformative litmus test becomes to what extent courts, while seeking to achieve transformative outcomes in their decisions and while developing the legal doctrine with which to do so, are able to limit the broader anti-transformative impact of their work by reconsidering and adjusting their ‘professional sensibilities, habits of mind and intellectual reflexes’.¹¹¹ The point of departure is, at least in part, negative – that the work of courts inevitably has a transformative cost – and the project is to seek ways in which this cost can be accounted for.

¹⁰⁸ This conception of transformation as I describe it here is derived from the work of Drucilla Cornell (see D Cornell *Transformations: recollective imagination and sexual difference* (1993) 1 - 2) but is current elsewhere also – see, for example, Nancy Fraser’s description of ‘transformative strategies’ as aiming ‘to correct unjust outcomes precisely *by restructuring the underlying generative framework*’ (my emphasis) (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) 7-74).

¹⁰⁹ Krog (n 94 above) 126.

¹¹⁰ Klare (n 67 above) 171 - 172. See also Krog (n 94 above) 128: ‘Marx had another definition of transformation, the Internet reminds me. The superstructure can only change if the underlying economic base changes’.

¹¹¹ As above 166.

In my own analysis of the relationship between a transformative politics and the adjudication of socio-economic rights claims, I adopt this second, less commonly applied conception of transformation. I do not focus on the transformative potential of socio-economic rights litigation, on the extent to which such litigation can advance and strengthen a transformative politics. Rather, I focus on ways in which such litigation can limit a transformative politics. I do not analyse the cases in the first place for the results they generated or the results they could have generated. I analyse the manner in which the cases were decided with the aim of identifying instances where the work of courts in them may have an anti-transformative impact on transformative politics more generally than simply with respect to the discrete issues before the court.

From the broad realm of critical accounts of law – in particular the US Critical Legal Studies – I have at my disposal a number of well-established analyses and critiques with which to explore this anti-transformative impact. I could, for example, employ a ‘false consciousness’ critique, investigating to what extent legal victories achieved in socio-economic rights cases induce a false sense of achievement in political actors that real change will result, when, instead they operate only to legitimize the *status quo*.¹¹² Alternatively, I could trace to what extent the translation of collective issues of need and deprivation into the language of individual rights works to erode the different forms of collective organisation necessary to achieve real change in the political realm.¹¹³

I elect to do neither. Instead, I choose to employ two other lines of critique. Both these lines of critique investigate the ways in which adjudication, through the rhetoric, metaphors, language and conceptual structures that it employs,

¹¹² M Jackman ‘Constitutional rhetoric and social justice: reflections on the justiciability debate’ in J Bakan & D Schneiderman (eds) *Social justice and the constitution: perspectives on a Social Union for Canada* (1992) 17 22. See in this respect S Wilson ‘Taming the constitution: rights and reform in the South African education system’ (2004) 20 *South African Journal on Human Rights* 418 423 - 424, who points out how the Department of Education has effectively co-opted rights-talk to ‘provide ideological window-dressing for policies and practices, which actually countenance significant limits on the very rights they are supposed to advance’ (424).

¹¹³ See 70 - 71 below and the sources cited there.

works to depoliticise issues of political concern – to depict them as matters that are not open to political contestation and in particular not open to the kind of transformative politics I work with. In the first I am concerned with the tendency in adjudication toward achieving closure or certainty – the tendency to depict issues that have been decided as removed from political contestation because they have been finally and authoritatively decided or as conclusively determined by a self-evident legal text. In the second I am concerned with the tendency in adjudication to depict, in different ways, issues as removed from political contestation because they are in some way devoid of political content, or politically neutral.

Below I explore these two critiques of the nature of the relationship between transformative political action and adjudication – the former primarily with reference to the debate in South African law about the relative virtues within a transformative legal setting of rules and standards, relying on the work of Karl Klare, Duncan Kennedy, Robert Cover, Andre van der Walt and Henk Botha in this respect; the latter relying on the analysis of Nancy Fraser of the political debate around poverty and deprivation and the ways in which that debate is depoliticised, echoed in the more closely legally oriented work of Thomas Ross and Lucy Williams, who trace the operation of the kind of depoliticising rhetoric that Fraser also identifies in the work of courts.

1.3.3.2 Final decisions and straight lines – the drive to certainty

Writing about the early property and equality Constitutional Court decision of *Harksen v Lane NO*,¹¹⁴ André van der Walt and Henk Botha provide the following appraisal of the equality standard enunciated by the Court in that case on the back of its earlier decision in *President of the Republic of South Africa v Hugo*¹¹⁵ (despite its length it is worth, for my purposes, quoting it in full):

Few lawyers would fail to be impressed by the court's neat and orderly exposition of its equality jurisprudence. Here, it seems, is a sophisticated yardstick which combines

¹¹⁴ *Harksen v Lane NO* 1998 1 SA 300 (CC).

¹¹⁵ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

analytical rigour with a sensitivity to context; and which draws upon the strengths of both United States (different levels of scrutiny) and Canadian (the two stage approach) jurisprudence, in a manner which does justice to the language, structure and underlying values of the South African bill of rights. The fact that the two judges who applied this test reached quite different conclusions should perhaps not distress us, as we have come to realise that the meaning of words is never fixed, and that it is precisely the fact that a constitution is open to a variety of interpretations which enables it to unify a nation consisting of groups and individuals with radically different values and belief systems. Seen thus, the generality of the equality standard may be regarded as a strength and not a weakness. In any event, it may be argued, the (relative) indeterminacy of the test is not the result of a lack of interpretative guidelines laid down by the Court, but has more to do with the margin for contextualisation allowed by its approach. And surely that can't be a bad thing!¹¹⁶

This passage heralds for me the extension into the realm of public law in South Africa of the debate about the difference between rules and standards and the equation of the former with individualism and the latter with altruism that had long been ongoing in private law circles.¹¹⁷ It also, in the space of a few words, prefigures the link that would be explored in later writing in South Africa between the fashioning and application of broad and flexible standards in adjudication rather than bright-line rules on the one hand and the transformative ethos of the constitution and the fostering of a transformative politics on the other. In what follows I explore this debate and this link. First, I trace Karl Klare's use of Duncan Kennedy's extended exposition of the extent to which judicial choice determines legal interpretation in his own exposition of

¹¹⁶ AJ van der Walt & H Botha 'Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*' (1998) 13 *SA Publiekreg/Public Law* 17 35 (references omitted).

¹¹⁷ In private law, this debate was initially introduced by Duncan Kennedy with his 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1658 and brought to South Africa by Alfred Cockrell in his 'Substance and form in the South African law of contract' (1992) 109 *South African Law Journal* 40. For an excellent recent discussion within the context of South African contract law, see AJ Barnard-Naude '“Oh what a tangled web we weave ...” Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract' (2008) 1 *Constitutional Court Review* (forthcoming). Alfred Cockrell, in his 'Rainbow jurisprudence' (1996) 12 *South African Journal on Human Rights* 1 had of course two years earlier than Van der Walt & Botha touched upon the use of flexible and general standards in constitutional adjudication. However, his engagement with the issue stops at a critical appraisal of what he at the time perceived to be an uncritical engagement by courts with such standards that operated to hide the substantive reasoning underlying their judgments – he does not explore the link between the use of flexible standards and transformation through adjudication that Van der Walt & Botha allude to.

the transformative nature of the constitution.¹¹⁸ Then, I briefly describe André van der Walt's caution against the adoption of new orthodoxies or final answers in post-apartheid law as an illustration of Robert Cover's idea that the law through its drive to finality exerts violence.¹¹⁹ Finally for this section, I dwell for a more extended time on Henk Botha's description of the nature of adjudication, which he develops on the basis of Duncan Kennedy's description of adjudication as a field, and which he links to the transformative ethos of the constitution.¹²⁰

(a) Klare – indeterminacy as openness

In his 1998 article on the character of the South African constitution, Karl Klare sets out to do two things. First, he makes and describes the claim that the South African constitution is a transformative or post-liberal document. Second, having made that claim, he proceeds to describe the implications of that nature of the constitution for judges and their work – he makes some observations about what an approach to adjudication aligned to the transformative ethos of the constitution would look like.

For his description of such a transformatively inclined notion of judging Klare relies on Duncan Kennedy's problematisation of the liberal legalist understanding of interpretation of legal texts as a mechanical and politically untouched exercise of judges finding law from a set of determinate legal materials. In a lucid account of the familiar CLS indeterminacy thesis, Klare begins by reminding us that legal materials do not self-generate meanings. Meaning is generated from them through interpretative work – 'adjudicators *perform work* within a medium'.¹²¹ The medium within which judges work –

¹¹⁸ Klare (n 67 above), relying on D Kennedy *A critique of adjudication: {fin de siècle}* (1997) (*A critique*); 'Strategizing strategic behavior in legal interpretation' (1996) *Utah Law Review* 785; 'The stakes of law, or Hale and Foucault!' in *Sexy Dressing Etc.* (1993) 83; and 'Freedom and constraint in adjudication: a critical phenomenology' (1986) 36 *Journal of Legal Education* ('Freedom') 518.

¹¹⁹ Van der Walt 'Orthodoxy' (n 107 above) 258 – 278, relying on, amongst others, R Cover 'Violence and the word' (1986) 95 *Yale Law Journal* 1602 ('Violence') and 'The Supreme Court, 1982 term - foreword: nomos and narrative' (1983) 97 *Harvard Law Review* 4 ('Narrative').

¹²⁰ Botha 'Freedom' (n 106 above), relying on Kennedy 'Freedom' (n 118 above) 518 and further and *A critique* (n 118 above).

¹²¹ Klare (n 67 above) 160.

legal materials – is indeed constraining, but that constraint is never an absolute quality. First, legal materials are ambiguous, ‘shot through with gaps [and] conflicts’ – those gaps have to be filled through legal work.¹²² Second, even there where constraint appears at face value – where a rule seems articulated with one clear meaning only or where a particular professional sensibility seems ineluctably to mandate a specific reading of a legal text – this is ambivalent. This is so because constraint is not some innate quality of the materials. Rather, it is an experience of the materials, mediated through the context, professional codes and sensibilities and ability of the particular interpreter.¹²³ Klare recounts that any lawyer has experienced how, in circumstances where her political intuition points to a certain result, but that result is resisted by the materials, despite her best efforts she is unable to make the material budge. However, any lawyer has also experienced that material that initially seemed to indicate in an absolute constraining fashion a certain result, dissolves with the application of a measure of extra effort, so that the result initially intuited can be achieved.¹²⁴

What determines the ‘bindingness’ of constraint, therefore, is not only the professional sensibilities, habits of mind and skill of the particular interpreter, but also sometimes the question whether or not the interpreter is willing to expend the extra effort to achieve a result not initially indicated by the materials – ‘in contested cases, what makes for a “good” or “legally sound” or “legally correct” interpretation is partly a question of the practitioner’s training, skill and insight, and partly a question of choices about the allocation of her intellectual energies and resources’.¹²⁵ Crucially, this leads to the conclusion that legal interpretation, and therefore the process of adjudication, is laden with politics in at least two ways:

First, legal work - the interpretive practices in which judges, advocates and commentators engage - *partially constitutes the legal materials*, thereby imbuing them with value-laden meanings. Indeed, legal work even shapes lawyers’ sense of what

¹²² As above 159.

¹²³ As above 160.

¹²⁴ As above.

¹²⁵ As above 163.

materials are pertinent to a particular legal question. Second, judges and other participants in adjudication constantly make conscious and unconscious choices about how to deploy their intellectual energy and resources. These choices rest on values, perceptions and intuitions external to the legal materials, since the choices only arise in response to apparent gaps, conflicts and ambiguities in the materials.¹²⁶

Taken on its own, Klare's explanation of the indeterminacy of legal materials and of the political stakes of legal interpretation is uncontroversial – it is no more than a (particularly well-constructed and lucid) recapitulation of a well-known postulate of CLS theory. It is what he does with it that matters.

Duncan Kennedy, with his account of the process of adjudication from which Klare derives his description related above presents no explicit normative conclusions.¹²⁷ Klare, however, draws clear normative implications from it for the South African context. His article concludes with an extended plea for a shift in legal culture in South that would enable South African lawyers more readily to acknowledge and work with the pliability of legal materials and to acknowledge and work with the political stakes of interpretation and adjudication. Such a 'leavening' of lawyerly attitude would for him, in our context, hold two signal advantages. First, he argues that the belief that the prevailing legal culture has in the constraining nature of legal material and the consequent strict separation between law and politics 'obscure[s] and mystif[ies] the choices judges and advocates routinely make in their interpretive work'.¹²⁸ This has the effect that the transparency and accountability of the legal process is undermined. Acknowledgement of the open texture of legal materials and the element of choice operating in adjudication would have the opposite effect, opening up the decisions to public scrutiny and contributing in this way to the deepening of democratic culture.¹²⁹ In addition, Klare proceeds, failure to adapt current legal culture and an unreflexive application of current conservative jurisprudential attitudes may result in a certain intellectual caution – an unwillingness to stretch legal

¹²⁶ As above 162 - 163 (references omitted).

¹²⁷ Kennedy 'Freedom' (n 118 above) 518.

¹²⁸ Klare (n 67 above) 171.

¹²⁹ As above.

materials beyond their initial impression of constraint. For him this raises the possibility that

“caution” of this kind (some would call it “professionalism”) might in some cases discourage a judge or advocate from investing intellectual resources in interpretive projects that might, if successful, produce 'non-obvious' results (ie, results that, while morally or politically appealing, appear to require a leap too far beyond what the legal materials - on first impression - appear obviously to require or permit) [and that] [c]onstitutional transformation might suffer accordingly.¹³⁰

To take one step back, then: Klare’s description and his normative conclusion related here raises a number of salient points relevant to my concern with the limiting effect of the adjudication of socio-economic rights claims on transformative politics.

Klare is concerned about attempts to describe the law as clear and certain and related attempts to describe legal work (judging and lawyering) as processes of apolitical, neutral extrapolation of rules from a clear and certain text – that is, about accounts of legal work that emphasise the constraint that inheres in legal materials. These accounts he finds troublesome because they both limit the extent to which legal interpreters will seek to find new interpretations of materials, on the basis of which to achieve transformative results and, in presenting law as given, as a-political, insulate judicial work from scrutiny and from accountability.

Instead he points out that legal materials are much more pliable than traditional legal minds would have it, and urges, in South Africa, an acknowledgement of this fact.

Importantly, he recognises that legal materials do indeed constrain decision making. However, constraint is never absolute – it is pliable, so that legal interpretation occurs within the tension between freedom and constraint.

¹³⁰ As above.

Finally, he gives a normative spin to his critique of legal certainty – he points out that recognition of the potential for *uncertainty* in law both enhances the prospects of judges and lawyers seeing and generating new possibilities through their work and exposes judicial work to public scrutiny, enhancing in this way the possibility for the occurrence of a transformative politics.

(b) Van der Walt and Cover: the violence of closure

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.¹³¹

One finds a similar idea about the anti-transformative effect of law's drive to certainty and finality in the work of André van der Walt on the post-apartheid transformation of South African land law.¹³² Van der Walt discusses two land cases – *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*¹³³ and *Woerman & Schutte NNO v Masondo*¹³⁴ - in which courts were presented with the opportunity to change existing law. *Lebowa Mineral Trust* dealt with the consistency of legislation abolishing a trust that held mineral rights on behalf of an erstwhile homeland government with the section 25 property guarantee. The applicants in the case argued that the legislation was inconsistent with the constitution because it deprived or expropriated their property interest in the mineral rights held by the Trust in conflict with the requirements for deprivation or expropriation in section 25. To decide this question, the Court first had to decide whether or not mineral rights were property qualifying for the protection of section 25. Despite ample authority to the contrary, including persuasive indications from the drafting history of section 25 that mineral rights were indeed intended to be included in the term 'property', the Court held that mineral rights were not property for purposes of section 25.

¹³¹ Cover 'Narrative' (n 119 above) 40.

¹³² Van der Walt 'Orthodoxy' (n 107 above).

¹³³ *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T).

¹³⁴ *Woerman & Schutte NNO v Masondo* 2002 1 SA 810 (SCA).

Woerman concerned an application for an eviction order that raised the issue whether or not the common law rules relating to eviction were changed by section 26(3) of the constitution, which in broad terms determines that no one may be evicted from their home without a court order granted after all relevant circumstances had been considered. The court declined to decide this question, holding instead that the real issue was whether or not the respondent was a labour tenant, so that the Land Reform (Labour Tenants) Act 3 of 1996 would apply.¹³⁵

Asking why the respective courts declined development of the existing law where the law clearly presented itself for change, Van der Walt suggests that the reason might be a 'structural inertia' or a complacent response to tradition.¹³⁶ Courts, so he argues, where they have a choice whether or not to change the law 'will avoid the interpretation that necessitates or promotes change, and opt for the interpretation that seems to stabilise and uphold the *status quo*.'¹³⁷ Such complacency, so Van der Walt continues, reflects not so much an opposition to transformative politics as a failure to see the possibility of change where an interpretation of the law is available that 'preserves stability and certainty' – where such an interpretation is available, courts simply seem as a matter of habit to slip into it.¹³⁸

Is one way in which to break this cycle, Van der Walt asks, to 'establish a whole new jurisprudential attitude, or even a whole new perception of the law, a whole new system of law?'¹³⁹ He cautions against any such attempt. He points out that such an attempt, based as it is on a modernist conception of transformation as linear progress, through which failed understandings of the past can be jettisoned and replaced with new and better understandings, will simply lead to the replacement of one orthodoxy with 'a new, constitutional

¹³⁵ Van der Walt 'Orthodoxy' (n 107 above) 260 – 268.

¹³⁶ As above 264, 267 – 268.

¹³⁷ As above 268.

¹³⁸ As above 268 – 269.

¹³⁹ As above 269.

orthodoxy [that] could be as restrictive' as the old.¹⁴⁰ Drawing on Robert Cover,¹⁴¹ he recalls how orthodoxy, whether in an old, or a new 'transformed' system of law or legal method, is never more than a hierarchical imposition on law, designed to achieve what are perceived as the virtues of clarity, certainty and predictability. Such an imposition always occurs through suppressing other views and understandings. Clarity, certainty and predictability are attained at the expense of at least 'some of the energy and diversity that is at work in a legal system.'¹⁴² Thus described, a linear progressive understanding of transformation that underlies an attempt to propose a new, transformed legal method, in fact presupposes the end(ing) of transformation. In Van der Walt's own words:

Transformation and legal reform depend on the energy of change, but when orthodoxy is established in the name of transformation the message is that there has been enough change, that the process is complete and can be terminated.

...

[T]he goal of transformation cannot be regarded as a definable and stable position that is justifiably occupied once the move has taken place – transformation is a continuous process that demands continuous attention, analysis, critique and adaptation. By aiming for a simple, straightforward process of linear reform we are setting our transformation sights too low.¹⁴³

Aspects of Van der Walt's analysis remind one of Klare's description of the nature of legal interpretation and judicial work described above. Although he is concerned with the broader question of legal transformation and not, more narrowly, the question of the nature of legal interpretation, Van der Walt also identifies and is concerned about a tendency in law to veer toward certainty, predictability and finality and to avoid uncertainty, change and unpredictability. His concern also relates to the possibility of transformation of and through law – for him the tendency toward certainty, predictability and finality works to

¹⁴⁰ As above 269 – 270.

¹⁴¹ Cover 'Violence' (n 119 above); and 'Narrative' (n 119 above).

¹⁴² Van der Walt 'Orthodoxy' (n 107 above) 271.

¹⁴³ As above. Van der Walt also points out that the linear model of transformation as progress establishes a false dichotomy between old-style and new, transformative legal attitudes, which obscures the actual complexity of transformation (271).

privilege the *status quo*, persuading lawyers and judges to fall back on what is known, rather than to think new possibilities.

Similar to Klare's description of legal interpretation as a flexible, 'plastic' process rather than a mechanical one, Van der Walt's preferred view of legal transformation is also open-textured, a continuous process of change that never reaches complete conclusion or finality.

Van der Walt, like Klare, urges neither a complete subjugation to certainty (quite obviously), nor a complete embrace of freedom (less obviously so) – for him a complete break with tradition and existing lines of development (an attempt at complete freedom) inevitably results in a complete reversion to certainty, in the establishment of a new orthodoxy.

As Klare cautions against an over-emphasis on constraint in legal interpretation, because that would decrease the possibility that judges could achieve new interpretations of legal materials leading to transformative outcomes, Van der Walt links his preferred open-textured, continuous view of transformation to transformative possibility. He points out how the closure and finality achieved when at the end of a linear progression of development a new orthodoxy is imposed, in the first place stops change and in the second place limits the extent to which new possibilities can be thought.

(c) Botha and Kennedy: lines and fields

When it comes to obstacles, the shortest line between two points may be the crooked one.¹⁴⁴

In an article considering the influence that the metaphorical structure of legal thought and argumentation exerts on legal work, Henk Botha, relying on the work of Duncan Kennedy, describes three different ways in which legal rules are metaphorically depicted.¹⁴⁵

¹⁴⁴ B Brecht *The life of Galileo* (1987) (transl H Brenton) sc 14 83.

¹⁴⁵ Botha 'Freedom' (n 106 above).

Kennedy relates the first of these – the traditional account – as depicting legal rules as straight lines, or borders of a field.¹⁴⁶ Previously decided cases (trees – constraints) giving meaning to the rule thickly occupy the space right next to it. Should the case considered by a judge according to its facts fall within an area close to the line or border that is thickly populated by previously decided cases and interpretations, the judge will be constrained in the outcomes she can achieve.¹⁴⁷

But there are also spaces or clearings along the border, where previously decided cases have not yet taken root to give meaning to the rule. Should the judge's case fall within one of these clearings she is free from constraint to decide the case as she sees fit. Note that this metaphorical depiction of legal rules posits a strong and clear distinction between certainty and gap, between constraint and freedom. Either the judge is completely constrained or completely free. Moreover, whenever a case falls in a clearing rather than a thicket, the judge is, by deciding her case, filling in part of that gap and creating constraint that will be binding in subsequent cases. In this sense freedom is 'self-annihilating' – its exercise leads to its demise.¹⁴⁸ Also, finally, constraint is experienced as 'pervasive and impenetrable', whilst freedom is transitory and exceptional.¹⁴⁹ Botha concludes his description of this account of rules by noting that it

has been particularly influential in South Africa. The image of the judge who is merely following the rules laid down by legislation or existing at common law, who is giving effect to straight, solid boundaries and only occasionally fills in gaps in the law, has had – and still has – a powerful hold on the South African legal imagination.¹⁵⁰

Botha contrasts the traditional view of rules, in terms of which legal meaning is self-evident, found in a mechanical process of interpretation, and legal

¹⁴⁶ Kennedy 'Freedom' (n 118 above) 538.

¹⁴⁷ As above.

¹⁴⁸ As above 539, also quoted in Botha 'Freedom' (n 106 above) 255.

¹⁴⁹ Botha 'Freedom' (n 106 above) 255.

¹⁵⁰ As above.

materials absolutely constraining, with Kennedy's alternative description of legal rules as argument-bites.¹⁵¹

In this account, legal rules are depicted as pairs of 'argument-bites' – pairs of arguments and counter-arguments recognised as valid according to professional legal sensibility. An assertion of the rule *pacta sunt servanda* can be countered with 'as long as it doesn't run counter to public policy'; or the idea that constitutional provisions should be interpreted in a generous fashion with the counter-bite that words should be given their ordinary meaning. In such argument-bite pairs there is no hierarchy. Although only a given number of such pairs are recognised according to professional sensibility as valid, within a pair one bite is potentially as valid as the other. Which bite, which rendition of a rule prevails in a given set of facts, depends entirely on the judge:

Legal materials are, therefore, plastic and manipulable, rather than solid and determinate ... Adjudication itself is strategic activity, in which judges employ those legal arguments that provide the best justification for their preferred outcomes.¹⁵²

Despite this plasticity, however, judges are to an extent constrained by the fact that only certain argument-bite pairs are regarded as valid. In order to have their arguments accepted in the professional circle of which they are part, judges must reduce their arguments and the specificities of cases before them to fit a set of stock argument-bite pairs.

Botha concludes his description of this second account of the nature of legal rules by pointing out that the notion of legal rules as argument-bites, although superficially seeming to be in direct opposition to the notion of legal rules as straight lines or borders (the former depicts legal work as entirely free and legal meaning as generated by the preferences of judges; the latter depicts legal work as entirely constrained and legal meaning as self-generated) is also importantly similar:

¹⁵¹ As above 256 and what follows.

¹⁵² As above 257.

Like mainstream legal scholars, Kennedy seems to assume that law must be either determinate, or irreducibly subjective and ideological. Kennedy, too, looks for meta-principles to demarcate the scope of application of conflicting rules. When he finds none, he declares that adjudication is simply ideology dressed up as law. In short, Kennedy's account is structured in terms of the same either/or logic as the conventional understanding.¹⁵³

Viewed from a transformative perspective, Botha finds both depictions problematic. The traditional understanding of legal rules as long, straight lines of development tends to favour the *status quo* – to encourage an unreflective falling back onto existing rules of common law, without interrogating their content.¹⁵⁴ It also depicts law as devoid of politics, legal meaning as found rather than generated. The depiction of rules as argument bites in turn both empties law of all content, subjecting it to the personal preferences of individual judges, and at the same time requires legal argument to occur in terms of a series of stock phrases, thrusts and parries. This for Botha does not bode well for 'attempts at serious ethical debate'.¹⁵⁵

However, Botha also describes another way in which to depict legal rules metaphorically: Kennedy's rendition of law and rules as 'fields of action'.¹⁵⁶ On this account, the constraint that a judge experiences when first considering a case where the applicable legal rule contradicts the judge's preferred outcome, is not an immutable characteristic of the legal materials as in the first metaphor of rules as straight lines. Rather, it is the judge's experience of those materials. If a case falls right alongside the boundary of a rule that a judge seeks to avoid in order to achieve a preferred outcome, the judge can 'work through the field' to attempt to move further away from the boundary, for example by distinguishing it from other cases on the facts, or reinterpreting the rule in question, or finding other rules that are applicable. Judges can therefore 'work with' the legal materials in an attempt to come closer to their

¹⁵³ As above 260.

¹⁵⁴ As above 255. There are echoes here of the 'complacency' described by Van der Walt 'Orthodoxy' (n 107) above.

¹⁵⁵ As above 260.

¹⁵⁶ As above 260 and what follows.

preferred outcomes in the face of a rule that at first glance seems to exclude it.¹⁵⁷

Judges are aided in this endeavour by the operation in the field of policies as vectors – the closer the case at hand falls to a given policy, the stronger the pull of policy and the more likely will be an interpretation that gives effect to the policy in question. The further away a case falls from a policy the weaker its pull and the greater the capacity for the judge to reach her preferred outcome without being constrained by the policy in question.¹⁵⁸

In this depiction, there is no either/or opposition between freedom and constraint. Certainly the judge is constrained – by the professional sensibilities within which she operates; at the outer limits by the material itself; by her capacity (intellectual and otherwise) to press the material to conform to her needs; and by her need to maintain a reputation of professionalism, among other things. But, because constraint is culturally determined, it is pliable, so that freedom and constraint operate in tension with rather than in opposition to each other.¹⁵⁹

The introduction by Kennedy of the idea that constraint is culturally constructed and of the notion of policies operating in the field as vectors, exerting a pull on interpretation is significant for Botha:

The metaphor of the field then, enables an understanding of constraint as cultural. It allows us to understand freedom and constraint as graded categories, legal reasoning as imaginative and therefore capable of resisting the conclusion that a particular outcome is necessitated by the relevant legal materials. Field configurations are not objective properties of a particular legal field, but are part of the cognitive apparatus through which we order and understand law. It is because of this that judges are often able to reconfigure the field and thus to resist the ways in which inequality, exclusion and violence are sanctioned and normalised in the name of the law.¹⁶⁰

¹⁵⁷ As above 261.

¹⁵⁸ As above 263.

¹⁵⁹ As above 262.

¹⁶⁰ As above 265.

Seeing legal rules as straight lines or boundaries, with freedom and constraint innate properties of the materials, leads to complacency with respect to the *status quo* and to an understanding of law that is devoid of politics. This means that possibilities for transformation cannot easily be imagined and that legal work is insulated from public scrutiny and democratic evaluation.

Seeing legal rules as sets of argument bites leaves legal meaning entirely to the preference of the individual judge and therefore divests law of any meaningful content and makes it a matter of politics alone. At the same time, the highly structured and constructed nature of argument that such a view of legal work implies, means that substantive ethical argument as a way in which to seek solutions becomes impossible.

By contrast, the notion of legal rules as a field introduces the idea that constraint is culturally constructed and 'may form the basis of a more self-conscious style of adjudication, which is characterised by a greater willingness on the part of judges to subject deeply held assumptions to critical scrutiny and to articulate the moral and political reasons for their decisions.'¹⁶¹

Again, links appear between the analyses of Klare, Van der Walt and now Botha. Botha is also concerned about a view of law that depicts it as clear and self-evident, and certain and final (constraining). This view for him ineluctably leads to a preference for the *status quo*, because it excludes the possibility of imagining new things. It also denies the political nature of law and insulates legal work from political debate.

Botha proposes a way to look at the law that presents it as pliable – constraint is depicted as culturally determined, so that it can be overcome. Like Klare and Van der Walt, Botha sees neither freedom nor constraint as absolute – indeed, he demonstrates how absolute freedom has the same depoliticising effect on the operation of the law as absolute constraint. He proposes instead

¹⁶¹ As above 266.

that freedom and constraint operate as ‘graded categories’ in creative tension with one another.

Botha links his preferred view of law as a ‘field of action’ with a certain transformative potential, showing how, because it depicts constraint as culturally determined, it invites a new judicial imagination, a willingness to interrogate deeply held assumptions and intuitions, that opens the judicial mind to new possibilities.

Botha introduces one further innovation that I find important for my purposes: reaching back to his and Van der Walt’s appraisal of the equality standard developed in *Hugo* and *Harksen*, Botha manages to operationalise his analysis of the metaphorical stakes of law. He argues that a preference in constitutional adjudication for broad and flexible standards – standards such as the equality standard developed in *Harksen* - rather than clear and fixed rules, reflecting as it does a view of law as a field of action, is better attuned to both the culture of justification underlying the constitution and its transformative vision.¹⁶²

1.3.3.3 *The rhetoric of poverty – the drive to neutrality*

The second line of critique I develop in this Chapter draws on the work of political philosopher Nancy Fraser to show how courts can be complicit in the depoliticisation of political debates about impoverishment by confirming and legitimating rhetorical tropes intended to still political contestation. Fraser argues that poverty and basic need – those social problems of hunger, homelessness and inadequate access to health care, social assistance and education that give rise to socio-economic rights litigation – are questions of major political concern. These issues occupy a significant part of the discourse in our formal political institutions. In the competitive environment of parliamentary politics, different understandings of, for example, the causes of HIV/Aids, of who bears responsibility for providing treatment for people living with HIV/Aids and of how best to treat them are centrally important subjects of

¹⁶² As above 275 and what follows.

political contestation and forms of political currency. These issues are also central to informal participatory forms of politics. An issue like inadequate access to basic services such as water and electricity gives rise to popular demonstrations and constitutes the *raison d'être* of informal social movements that engage in direct political action; uncertainty about the nature and extent and the causes of homelessness sustains political debates in the print and visual media; and questions about whether or not South Africa should extend its social assistance system occupy the discursive politics of social activists and academics. In sum, in South Africa 'talk about people's needs is an important species of political discourse,' 'has been institutionalised as a major vocabulary of politic[s]' and is 'an idiom in which political conflict is played out and through which inequalities are symbolically elaborated and challenged'.¹⁶³

At the same time there is, in the different political discourses about these questions, a pervasive tendency toward their *depoliticisation* – that is, a tendency to talk about them in such a way that they are bracketed as non-political, not subject to or not capable of being subjected to political contestation. When government publicly warns that further extension of the social assistance system would lead to the inculcation in poor people of a 'culture of dependency',¹⁶⁴ the implication is that poor people somehow are themselves to blame for their predicament, that they are poor because they are lazy or lack entrepreneurial vigour. The political causes of their poverty are hidden, papered over. When ordinary people lament the enormity of poverty in South Africa, pointing to the inexorable impact of a globalised economy, or an inadequate natural resource base as its cause, something similar happens. Poverty is attributed to forces over which we have no control, with which political engagement is impossible or futile.¹⁶⁵

¹⁶³ Fraser (n 36 above) 291.

¹⁶⁴ See the remarks of government spokesperson Joel Netshitenze, in response to the proposal by the Taylor Commission of Inquiry into a Comprehensive System of Social Security for South Africa for a universal basic income grant, saying that it would amount to a 'handout' and would encourage a culture of entitlement. Netshitenze further indicated that the cabinet prefers a public works programme, because it believes 'able-bodied' South Africans should enjoy 'the opportunity, the dignity and rewards of work' (quoted in A Habib & C Skinner 'The poor must fend for themselves' (04-08-2002) *Sunday Times* 14).

¹⁶⁵ LA Williams 'Welfare and legal entitlements: the social roots of poverty' in D Kairys (ed) *The politics of law. A progressive critique* 3 ed (1998) 569 569.

Against this background, Nancy Fraser describes what she calls the process of 'need interpretation' – giving meaning to basic need and poverty, determining their causes, deciding which needs and what poverty merit state intervention and deciding how best to address deprivation – as follows:

[N]eeds talk appears as a site of struggle where groups with unequal discursive (and non-discursive) resources compete to establish as hegemonic their respective interpretations of legitimate social needs. Dominant groups articulate need interpretations intended to exclude, defuse and/or co-opt counterinterpretations. Subordinate or oppositional groups, on the other hand, articulate need interpretations intended to challenge, displace, and/or modify dominant ones.¹⁶⁶

In short, the political discourse around issues of poverty and basic need is a process of politicisation, depoliticisation and repoliticisation of the issues at stake. Particular questions of deprivation – say, inadequate access to anti-retroviral treatment for people living with HIV/AIDS, or insecurity of tenure for the propertyless – are inserted into political discourse, and claimed as legitimate political concerns through the oppositional social action of social pressure groups or political movements. Dominant societal groups, intent on immunizing their privileged position as property owners or hiding their complicity in the suffering of people living with HIV/AIDS or justifying to themselves their position of relative privilege, attempt to remove these issues from the searchlight of robust political contestation, to depoliticise them. Subordinate groups – the people living with HIV/AIDS or the propertyless - in turn, intent on challenging their positions of relative deprivation and on claiming from society the assistance to which they feel entitled, work to retain these questions as issues of political concern, to politicise or repoliticise them.

In this political to-and-fro, this process of depoliticisation and repoliticisation, a set of stock depoliticizing rhetorical strategies are usually employed. The first of these strategies is to 'domesticate' issues of poverty and need – to describe them as issues that fall within the domestic rather than the political

¹⁶⁶ Fraser (n 36 above) 296.

sphere. As such, these issues can be cast as private or familial issues rather than public or political.¹⁶⁷ Martha Fineman describes the nature and effect of this domestication strategy as follows:

The private family is the social institution that is relied upon to raise children and care for the ill, the needy and the dependent. Ideally it performs these tasks as a self-contained and self-sufficient unit without demanding public resources to do so. In the societal division of labor among institutions, the private family bears the burden of dependency, not the public state. Resort to the state is considered a failure. By according to the private family responsibility for inevitable dependency, society directs dependency away from the state and privatizes it.¹⁶⁸

In a patriarchal, capitalist society such as ours, the depoliticizing effect of the domestication of an issue is profound. One needs think only of how recently still forced sex within a marriage was in South Africa not regarded as rape but as a 'private matter' between husband and wife, to be reminded of how startlingly strong the perceived normative split between the public (political) and the private (personal) still is, or until recently was, in this respect.¹⁶⁹

The second common depoliticisation strategy employed by dominant groups is the *personalisation* of need and dependence – the status of poverty, of being dependent, is attributed to the personal character traits, the failure, the abnormality of poor people themselves, rather than to the social, political and economic forces that actually shape it. Thomas Ross writes that this rhetorical process of personalisation of poverty takes place in two stages. The first rhetorical step is the creation of the 'abstraction the "poor"' as a distinct class of people 'who are them, not us'.¹⁷⁰ This makes possible the second rhetorical move – the attribution to the poor of moral weakness. To describe the poor as morally weak, they first have to exist as a separate group. This creation of

¹⁶⁷ As above 299.

¹⁶⁸ MLA Fineman 'Masking dependency: the political role of family rhetoric' (1995) 81 *Virginia Law Review* 2181 2205.

¹⁶⁹ As late as 1993 our courts still held that Roman Dutch law did not recognise the crime of marital rape. See *S v Ncanywa* 1992 2 SA 182 (Ck) and *S v Ncanywa* 1993 2 SA 567 (CkA). Section 5 of the Prevention of Family Violence Act 133 of 1993 settled the matter by explicitly outlawing non-consensual marital sex.

¹⁷⁰ T Ross 'The rhetoric of poverty: their immorality, our helplessness' (1991) 79 *Georgetown Law Journal* 1499 1499 - 1500.

otherness has a further result: it makes it possible for the middle class and the affluent to proclaim not only the moral weakness of the poor, but also their deviance, their abnormality.¹⁷¹ In similar vein, Lucy Williams relates how popular understandings of poverty and dependence in the US distinguish between the 'deserving' and the 'undeserving' poor. Poverty or dependence that cannot be explained as the result of 'natural' factors such as natural disaster, physical or mental disability or age is undeserving of social assistance. Such 'undeserving' poverty, in the absence of a 'natural' cause, so the assumptions go, can only be explained by the personal degeneracy and deviance of the poor person, who is to blame for her own position and consequently doesn't deserve assistance.¹⁷² Perceptions or assumptions about the moral degeneracy of the poor and their consequent blameworthiness for their predicament are prevalent in South Africa. South Africa's social assistance system is built on a distinction between deserving and undeserving poor. It is almost wholly special-needs based – regular grants are paid only to groups such as children, older people and the disabled, who cannot be blamed for the condition of poverty, while no provision is made for social assistance to people who are poor, but 'able bodied'. Government's reaction to the proposal made in 2002 by the Taylor Commission of Inquiry into a Comprehensive Social Security system for South Africa that a universal basic income grant should be introduced, is illuminating in this respect. Government rejected the proposal and introduced instead an extended Public Works Programme. At the time, a government spokesperson explained this move as motivated by the fear that a basic income grant would breed in poor people both a 'culture of entitlement' and dependency, and went on to say that a public works programme is apposite, as 'able-bodied' South Africans should enjoy 'the opportunity, the dignity and rewards of work'.¹⁷³

A third rhetorical strategy employed by dominant groups within the political discourse about need and poverty to depoliticise the debate is the

¹⁷¹ As above 1500 - 1501.

¹⁷² Williams (n 165 above) 569. See also Ross (n 170 above) 1501 - 1502; and N Fraser & L Gordon 'A genealogy of dependency: tracing a keyword of the US welfare state' (1994) 19 *Signs: Journal of Women in Culture and Society* 309 (reproduced in LA Williams *Welfare law* (2001) 47) 323 - 324.

¹⁷³ Joel Netshitenze, quoted by Habib & Skinner (n 164 above).

naturalisation of poverty. Poverty and deprivation are depoliticised by them being attributed to 'natural' causes, wholly outside of the control of society. This process of naturalisation can occur in two ways. The first is through the act of throwing one's hands in the air and succumbing to the enormity of the problem of poverty – simply saying that there is so much of it that it will always be with us. The second is through the act of attributing inexorable causes to poverty, over which society has no control, such as the uncompromising, impersonal forces of the global market. Common to both these assertions is the idea that poverty is somehow 'naturally' part of the structure of our society, and will consequently always be there, whatever we do:

The causes of poverty, we assume, are a product of a complex set of factors tied to politics, culture, history, psychology and philosophy. Thus, only in a radically different world might poverty cease to exist. And, whatever the extent of [our] ... powers ... , radically remaking the world is not one of them.¹⁷⁴

A fourth and for now the final depoliticizing rhetorical strategy employed in the political discourse about poverty is the process of *technicisation* of needs-talk.¹⁷⁵ The political discourse about poverty and need occurs in different discursive arenas – within informal social movements and pressure groups, more formal organs of civil society such as NGO's and academia and, finally, within official discursive arenas such as Parliament or specialist administrative agencies.¹⁷⁶ These different discursive arenas occupy positions of relative power in the struggle to determine and fix meaning in the interpretation of questions of poverty and need. The descriptions given to poverty and need in the official discursive arenas such as parliament and specialist administrative agencies are officially sanctioned. As such they exert an authoritative influence on the political discourse around poverty and need. At the same time the interpretation of poverty, need and deprivation that takes place in these official discursive arenas is explicitly depoliticizing. When Parliament, or a department of state, speaks about a particular need and engages in the interpretation of that need, they do so with a specific purpose. The need in

¹⁷⁴ Ross (n 170 above) 1501.

¹⁷⁵ Fraser (n 36 above) 299.

¹⁷⁶ As above 295.

question has been legitimized as deserving of state intervention and their purpose is to find the best way to satisfy it – they are in the process of ‘translating politicized needs into administerable needs.’¹⁷⁷ As such, the previously politicized issues with which they were confronted become ‘technical problems for managers and planners ... in contradistinction to political matters.’¹⁷⁸ This process of translation depoliticises the issues in three ways. First, on the understanding that a technical approach to a problem such as impoverishment and the standard of efficiency that underlies it is politically a neutral approach, impoverishment is in this way bluntly depicted as devoid of politics, a problem that can be solved without the need to engage political questions of redistribution and social justice.¹⁷⁹ Second, this process brackets the issues in question as technically complex issues with which ordinary, non-expert participants in the discourse on poverty cannot usefully engage. And third, the subordinate participants in the discourse are repositioned – whereas before they were active participants in the process of interpretation of their needs, engaged in political action, they now become the passive recipients of services – their predefined needs are administered to them through a process of therapeutic assistance.¹⁸⁰ As a result, their political engagement is negated.

The different strategies of depoliticisation described above are politically motivated – they are used to further particular political agendas and are as such in themselves acutely political.¹⁸¹ Dependence and deprivation is attributed to the personality traits of poor people so that the complicity of the legal and political system in creating their predicament can be obscured; challenges to these systems can be avoided; and positions of relative affluence can be justified – it is the fault of poor people themselves that they are poor and of no one else. Poverty is described as inevitable, as a constant

¹⁷⁷ As above 306.

¹⁷⁸ As above 299. See also J Habermas ‘Law as medium and law as institution’ in G Teubner (ed) *Dilemmas of law in the welfare state* (1986) 204 210.

¹⁷⁹ See Singer (n 99 above) 1824 where he points out that such a ‘complacent’ pragmatist approach to social problems with its exclusive focus on ‘what works’ is adopted precisely to avoid the need to engage substantive political questions of redistribution and social justice.

¹⁸⁰ Habermas (n 178 above) 210; see also Fraser (n 36 above) 307.

¹⁸¹ Fraser (n 36 above) 298: ‘[O]ne of the primary stakes of social conflict in late-capitalist societies is precisely where the limits of the political will be drawn.’

presence in society so that personal and collective inaction with respect to it can be justified – society can assert its helplessness in the face of ‘natural’ deprivation and so avoid having to do anything in particular about it. In broad terms all these strategies of depoliticisation are aimed to preserve the *status quo*, both by immunizing it from attack by hiding its complicity in creating and maintaining poverty and by justifying inaction in the face of poverty and hardship. As such these acts of depoliticisation are cause for concern: they constitute attempts by society to assert its helplessness in the face of poverty, to get away with doing nothing about something that indeed is, at least to some extent, within its control.¹⁸²

That the law is determinatively involved in the discourse about the political stakes of poverty and need is a point that hardly requires making. Precisely the social provisioning activities of the welfare state – state provision of housing, of health care services, of education and of other social services - are regulated by vast, complicated and ever-expanding networks of law, in the widest possible sense of that word, including formal legislation, administrative rules and decisions and, more recently, constitutional or statutory welfare rights elaborated in judgements by courts. The law in question is of a particular kind – it is ‘regulatory’, ‘instrumentalised’ law aimed, not as law traditionally was at resolving particular and discrete disputes, but at regulating, guiding, constituting and giving effect to the social provisioning programmes and goals of the state. As such it is part of and in certain respects constitutive of the political discourse around poverty and need. South Africa certainly also experiences this kind of what has come to be called ‘juridification’.¹⁸³ Although the apartheid-state already operated according to its fair share of regulatory law, South Africa has, post-liberation, seen an explosion of law intended to control, guide and give effect to the ‘societal

¹⁸² Ross (n 170 above) 1509 - 1513.

¹⁸³ ‘Juridification’ is the term used to describe the phenomenon of growth of regulation or growth of law in the welfare state. See, for a good synopsis of both the phenomenon of juridification itself and the body of scholarship that has developed from the study of its nature, causes and effects, JWG van der Walt *The twilight of legal subjectivity: towards a deconstructive republican theory of law* (1995) unpublished LLD dissertation, Rand Afrikaans University 319 - 326; see also the various contributions in Teubner (ed) (n 178 above) and GTeubner (ed) *Juridification of social spheres* (1987).

guidance intentions'¹⁸⁴ of the new state. Courts' socio-economic rights judgements, and the doctrine established and elaborated in those judgements, form a significant part of our process of juridification.

The effects of juridification - the role of law in the welfare state, its impact and the consequences of its operation there - have for long attracted scholarly attention. Scholars have first analysed and questioned the effect of legal expansion on the law itself, arguing for instance that, because law is bound to fail in its social engineering role, juridification causes a crisis of credibility for law¹⁸⁵ and that the instrumentalisation of law for social purposes threatens its conceptual structures,¹⁸⁶ rendering it internally incoherent and 'disintegrat[ing] basic legal values and the unity of the legal system.'¹⁸⁷

More pertinently, juridification scholars have also devoted considerable attention to the effect of juridification on the areas of life and society into which law newly expands or in which existing regulation densifies. In this respect juridification commentators have explored and analysed a familiar problem. They have pointed to the 'ambivalence of guarantees of and denials of freedom'¹⁸⁸ that is occasioned by the process of juridification – the problem that, whilst juridification patently has an emancipatory intent (guaranteeing, for instance, access to basic social benefits to protect against the depredations of the market), it operates simultaneously in a repressive fashion in that it limits the potential for transformative and critical political action.¹⁸⁹

Juridification – including the work of courts in the process of interpreting and applying socio-economic rights - can exercise this stilling effect on transformative and critical political action first by destructing or subverting the

¹⁸⁴ G Teubner 'The transformation of law in the welfare state' in Teubner (ed) (n 178 above) 3 3.

¹⁸⁵ G Teubner 'Juridification concepts, aspects, limits, solutions' in Teubner (ed) (n 183 above) 1 6.

¹⁸⁶ N Luhman 'The self-reproduction of law and its limits' in Teubner (ed) (n 178 above) 111, in general.

¹⁸⁷ Teubner (n 184 above) 4. See also Van der Walt (n 183 above) 324.

¹⁸⁸ Habermas (n 178 above) 209.

¹⁸⁹ Van der Walt (n 183 above) 323 (juridification is aimed at 'serving the goal of social integration, yet ... merely contribute[s] to the process of social disintegration').

various forms of social organisation upon which such action depends.¹⁹⁰ Johan van der Walt, for example, refers to the ‘individualizing tendency’ of juridification – rights and the individual entitlements emanating from them that are inserted into the social sphere through juridification ‘take[] the place of spontaneous communal support in family as well as in local community life’, so that collective organisation and collective political action is impaired, replaced by self-interest seeking action.¹⁹¹ This kind of ‘privatisation of right’ has been well documented in historical accounts of labour movements in Europe, where the creeping legalism of juridification has contributed to the transformation of these movements from collective bodies advocating for the emancipation of workers as a class, to ‘incorporated organisations’ representing the individual consumer interests of their members. Membership of the group loses its political dimension, becoming instead an instrument for the furtherance of individual interests.¹⁹²

Juridification further works to ‘gloss over’ and ‘pacify’ political conflict and contestation.¹⁹³ The intrusion of rights and the language of rights in the social sphere runs the risk of promoting ‘a false expectation in disadvantaged individuals and groups that the pursuit of legal rights through the courts can effect lasting social change’, whereas ‘rights...operate instead to...channel potentially radical demands for change into legal claims which, by definition, will not be disruptive of the social and economic *status quo*.’¹⁹⁴

Juridification can also diminish the potential for critical political action in another way. The law can, through the language it uses, through the interpretations of need and poverty that it authorizes, confirm and legitimate the depoliticizing strategies that participants in the political debate around need employ. Courts can play a particularly significant role in this respect. The

¹⁹⁰ Habermas (n 178 above) 211: ‘... [W]hile the welfare state guarantees are intended to serve the goal of social integration, they nevertheless promote the disintegration of life relations.’

¹⁹¹ Van der Walt (n 183 above) 324. See also AAG Peters ‘Law as critical discussion’ in Teubner (ed) (n 178 above) 250 276 - 277.

¹⁹² Peters (n 191 above) 276. See also S Simitis ‘Juridification of labor relations’ in Teubner (ed) (n 183 above) 113 132 - 134.

¹⁹³ Van der Walt (n 183 above) 324.

¹⁹⁴ Jackman (n 112 above) 22. See also Wilson (n 112 above) 423 - 424.

particular rhetorical power that their processes and their work-product enjoy in our democracy has been noted before – in Karl Klare’s words, we may ‘legitimately expect’ adjudication ‘to innovate and model intellectual and institutional practices’ in our democracy.¹⁹⁵ To some extent at least, and it might be to only a very small extent,¹⁹⁶ but nevertheless, when courts speak, people listen and sometimes copy. When courts engage with issues of poverty and need in socio-economic rights cases they also engage with and participate in the political discourse around poverty and need. This happens in different ways. First, courts’ adjudication of socio-economic rights claims becomes part of the political discourse, even a medium through which this discourse partly plays out. Civil society organisations and social movements regard and use socio-economic rights litigation as tools of political struggle, not separate from but as part of that struggle.¹⁹⁷ Court judgments in these kinds of cases, once handed down, become rallying points, political currency in their struggles. Second, courts also occupy a symbolic or, perhaps more accurately, an exemplary role with respect to poverty and need discourses – their vocabulary, the conceptual structures they rely on, the rhetorical strategies they employ infiltrate and so influence and shape the political discourses around poverty and need. This is, despite its protestations to the contrary,¹⁹⁸ particularly true of the Constitutional Court, because of its prominence and its symbolic significance – one can but think of the extent to which the ‘reasonableness’ test that the Court developed in *Grootboom* and *Treatment Action Campaign* with which to evaluate the state’s social provisioning activities has shaped civil society monitoring of planning and

¹⁹⁵ Klare (n 67 above) 147.

¹⁹⁶ Wilson (n 112 above) 420 - 421.

¹⁹⁷ See Wilson (n 112 above) 436 - 442 for an account of use of the right to education in this ‘instrumental’ sense by social movements and NGO’s in struggles pertaining to basic education. With respect to the use of litigation in this sense, see Heywood (n 88 above) 314 - 315; and Liebenberg (n 68 above) 159.

¹⁹⁸ See eg *Treatment Action Campaign* (n 87 above) paras 20 - 21: ‘[T]he issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention ... [S]ome of this contention and emotion has spilt over into this case ... Ultimately, however, we have found it possible to cut through the overlay of contention and arrive at a straightforward and unanimous conclusion.’ For a discussion see Botha ‘Freedom’ (n 106 above) 249 - 250 and Van Marle ‘Revisiting’ (n 104 above) 552 - 553.

delivery with respect to social services and the political advocacy informed by that monitoring.¹⁹⁹

Now, as I pointed out at the start of this section, the political discourse about poverty and need in the welfare state in which law is a participant consists not only in a political process of the interpretation of need, but also in a political process of drawing the limits of the political, of determining which issues related to poverty and need are legitimately subject to political contestation. In the political struggle around issues of poverty and deprivation, rhetorical strategies of domestication, personalisation, naturalisation and technicisation are employed, usually by the socially dominant participants, to depoliticise issues in need-interpretation, to cast them as non-political, as falling outside the scope of legitimate political contestation. Were courts to invoke these rhetorical strategies in their interpretation and judgement when deciding socio-economic rights cases, they could potentially exert a profound depoliticising influence on the political discourse around poverty and need. Invoking such depoliticizing rhetorical strategies will in the first place significantly determine the outcomes of their decisions – courts, like the participants in the political discourse, usually invoke such strategies to justify their avoidance of particular issues, to assert, as Thomas Ross has described it, their helplessness with respect to a particular aspect of poverty or deprivation.²⁰⁰ This means in the first place that the court does not decide the issue in question. However, more importantly for my purpose, it also means that substantive political discussion of that issue in court is precluded.²⁰¹ In the second place, invocation of these rhetorical strategies could also, because of the rhetorical power that the language of courts enjoy in our political discourse around poverty and need, influence and shape that discourse, contribute to drawing the limits of the political there.

¹⁹⁹ See eg J Streak & J Wehner 'Children's socio-economic rights in the South African constitution: towards a framework for monitoring implementation' in E Coetzee & J Streak (eds) *Monitoring child socio-economic rights in South Africa: achievements and challenges* (2004) 50-79.

²⁰⁰ Ross (n 170 above) 1511.

²⁰¹ As above.

To recapitulate: in this section I described ways in which courts can work to erode and limit political contestation. I focussed on one particular way: the invocation by courts in their interpretation and judgment in socio-economic rights cases of depoliticising rhetorical strategies of domestication, personalisation, naturalisation and technicisation of issues of poverty and basic need. I pointed out that courts' reliance on these strategies could limit the transformative impact of their decisions and could work to depoliticize the political discourse around issues of poverty and basic need.

1.4 Conclusion

This Chapter serves as the analytical background to the Chapters that follow. In it, I describe the two different but related ways in which adjudication of socio-economic rights claims can limit transformative politics. First, I describe critiques of the tendency of legal work to seek finality, certainty and predictability, showing how this intuition can lead to a confirmation of, or at least complacency toward, the *status quo* and how it can insulate legal work and its results from public scrutiny and evaluation. Second, I describe the use in political debates about the causes and nature of impoverishment of a set of rhetorical tropes intended to depoliticise that debate and described how courts can become complicit in the resultant processes of depoliticisation.

Chapter 2 comprises an overview of the case law that is the subject matter of my study. In Chapters 3 and 4 I trace the two lines of critique that I developed here. I show in Chapter 3 how some of the rhetorical tropes of depoliticisation that I identified here have impacted on and formed the socio-economic rights jurisprudence of our courts, but at the same time I identify a number of nascent countervailing trends. In Chapter 4, finally, I consider the broad and flexible reasonableness test developed by our courts to decide socio-economic rights cases to evaluate to what extent this standard takes account of the critiques of legal certainty and finality in decision-making that I focussed on here. I also take issue with the remedial approach of our courts in socio-economic rights cases and point out how this approach relates to the critique of certainty and finality that I develop here.

2 *Socio-economic rights in the courts*

2.1 Introduction

In Chapter 1 I described the theoretical framework in terms of which I analyse, in Chapters 3 and 4, the relationship between the work of courts adjudicating socio-economic rights cases and transformative political action. This Chapter is also devoted to description: I describe the broad body of case law (socio-economic rights case law) on which I focus my analysis in Chapters 3 and 4.

To do so imposes on me two tasks. First, it is necessary to describe what I mean with the general category 'socio-economic rights case law'. As Amartya Sen has famously asserted, the law, in the form of 'a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc)', literally 'stands between' the basic resources such as shelter, food, water, healthcare and education that form the objects of socio-economic rights, and the impoverished people who need access to those resources.¹ In this light, more or less any run-of-the-mill case in which the rules of ownership, exchange or transaction are applied and potentially developed can qualify as a socio-economic rights case - at least indirectly, the outcome of such a case would affect the system of law that controls access to basic resources. A related problem is that the interests that socio-economic rights are there to protect and advance (broadly speaking access for everyone to basic material resources) are often at issue in constitutional cases involving other - 'non-socio-economic' - rights, as these rights are concerned with the capabilities that are required for people to gain access to the basic resources that socio-economic rights provide an entitlement to.² Examples of these capabilities are

¹ A Sen *Poverty and famines: an essay on entitlement and deprivation* (1981) 166. See also J Drèze & A Sen *Hunger and public action* (1989) 20.

² For an extended discussion of what is meant with this term 'capabilities' and an extended exposition of the idea that the capabilities entailed in more traditional civil and political rights such as the ones I list here, see A Sen *Development as freedom* (1999), in particular 54 – 86 (describing the link between personal freedom in its various guises and access to basic material resources) and 87 – 110 (describing the term 'capabilities' and the link between an absence of capabilities and impoverishment).

political agency and power (freedom of assembly; freedom of association; freedom of expression; voting rights); a measure of control over administrative processes (administrative justice rights; the right to have access to information); a livelihood (freedom of trade, occupation and profession; labour rights); and, most broadly conceived, personal freedom (freedom and security of the person; freedom of movement and residence). To what extent would cases involving these ‘capabilities-related’ rights have to be included in the category ‘socio-economic rights cases’? A final related problem is that it is, of course, not only the courts that have actively engaged with constitutional socio-economic rights. The legislature has also exercised its constitutional mandate to give effect to socio-economic rights by enacting legislation, in a variety of different areas. This legislation, in particular in an area such as access to housing and shelter, has given rise to a large and complex body of additional case law.

My second task is to describe the particular sub-category of socio-economic rights cases that my analysis in Chapters 3 and 4 will engage. However one delimits the category ‘socio-economic rights cases’, it by now encompasses an enormous body of case law. After an initial slow start when the 1996 constitution entered into operation fifteen years ago, more and more cases have reached our courts in which socio-economic rights have, in some way or other, been at issue. For this study to be useful I cannot engage the whole body of case law that has so emerged directly – particularly because my purpose is not to describe developments in the positive law, but to describe and analyse approaches to adjudication within a specific context. I must therefore determine my particular focus. To do so I need to describe a typology of the body of socio-economic rights case-law, a way in which to distinguish the different kinds of cases that form part of the whole.

This Chapter is organised around these two tasks – defining the category and then determining a typology for it. I start, in 2.2 below, by describing what I see qualifying as socio-economic rights cases. Then, in 2.3 below, I consider two ways in which to design a typology – either by categorising the cases according to the manner in which socio-economic rights were *applied* in them;

or by following the categorisation suggested by section 7(2) of the constitution, organising the cases according to the nature of the duties derived from socio-economic rights that were at issue in them.

I conclude that these two possible bases for a typology are sufficiently related and intersecting that I can use both. I then proceed, still in 2.3 below, nominally on the basis of a section 7(2) categorisation, but taking account also of the manner in which rights applied in the different cases, to describe – in the manner of an overview - the body of socio-economic rights case law.

Finally, in 2.4 – my conclusion for this Chapter – I briefly describe and justify my particular focus within the general body of cases.

2.2 What are ‘socio-economic rights cases’?

To the first question then: what, for purposes of this Chapter, are socio-economic rights cases? Clearly, to define the category as including all decisions that relate to socio-economic rights in the sense that they affect the broad legal framework indirectly regulating access to basic material resources for human welfare would make it so wide as to render it unworkable. Although the point of departure in such an approach – that it is precisely the ‘ordinary’ law that most acutely blocks access to basic resources for impoverished people³ – is theoretically sound and intuitively appealing, such a category would include virtually all cases in which the private law rules of contract and property (at the very least)⁴ were developed.

Equally, to limit the category to the obvious cases where litigants or courts explicitly relied on constitutional socio-economic rights would exclude a large body of cases in which, without direct reliance on constitutional socio-

³ See Sen (n 1 above) 166 and Drèze & Sen (n 1 above) 20.

⁴ Rules of contract, property and exchange are those rules of the ordinary law most evidently applicable, but access to resources is clearly also regulated by other, seemingly innocuous rules of, for example procedure. See, for two examples where the rules relating to prescription of money claims related to access to basic resources were at issue *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) (prescription of a claim for payment of arrears on a disability grant) and *Deyssel v Truter* 2005 5 SA 595 (C); *Truter v Deyssel* 2006 4 SA 168 (SCA (prescription of a claim for damages due to negligent medical treatment).

economic rights, the interests or values underlying these rights played a direct and explicit role. Although eminently manageable, such a category would be too narrow, as it would exclude a large number of cases where the interests that socio-economic rights are designed to protect were directly at issue.

For purposes of this Chapter I choose a middle road between these two extreme options: socio-economic rights cases are for me any decisions in which the interests which socio-economic rights are intended to protect – access to basic material resources for impoverished people - in whichever way played an explicit role. This category would include in the first place cases explicitly decided on the basis of constitutional socio-economic rights; cases decided on the basis of other constitutional rights or other constitutional provisions in which the interests protected by socio-economic rights were explicitly at issue; cases decided on the basis of statutory entitlements giving effect to the interests underlying constitutional socio-economic rights; and cases decided on the basis of legislation not explicitly giving effect to constitutional socio-economic rights, but where that legislation is interpreted in light of the values underlying constitutional socio-economic rights or cases where common law rules were developed to give effect to those values. In what follows below I briefly describe each of these groups of cases.

2.2.1 Explicit rights

Socio-economic rights cases are obviously in the first place those cases in which constitutional socio-economic rights are at issue.⁵ Constitutional socio-economic rights are those rights that create direct entitlements to the *material* conditions for human welfare – rights to things such as food, water, health care services and shelter, rather than rights to vote, or speak, or associate.⁶

⁵ That socio-economic rights can be 'at issue' in a case in a number of different ways is a point that should be obvious to any constitutional lawyer – at a minimum socio-economic rights can be used to challenge law or conduct 'directly', or the values underlying these rights can be relied upon to interpret legislation or develop the common law ('indirectly'). Socio-economic rights can also play a role in interpreting other constitutional rights – to determine, for example, whether a deprivation of property is constitutionally sound. For a more extensive discussion of this point see 89 - 94 below.

⁶ There are, of course, controversies regarding this description that I gloss over in this simple statement. Much work has been done in jurisdictions other than South Africa about the question whether it is legitimate to recognise as *constitutional rights* anything more than

Such rights are found in a variety of provisions of the constitution. Section 24 guarantees everyone's right to a safe and healthy environment and requires the state to protect the environment. Section 25(5) requires the state to enable citizens to gain equitable access to land. Section 26 provides for everyone the right to have access to adequate housing and prohibits arbitrary evictions. Section 27 guarantees everyone's right to have access to health care services, sufficient food and water and social security and assistance and prohibits the refusal of emergency medical treatment. Section 28(1)(c) entrenches children's rights to shelter and to basic nutrition, social services and health care services. Section 29 provides for everyone's right to basic education and to further education. Finally, section 35(2)(e) guarantees the right of detained persons to be provided with adequate nutrition, accommodation, medical care and reading material.

entitlements to the very basic level of access to basic resources required for human survival. Frank Michelman has, for example, argued strongly for the recognition of constitutional 'welfare' rights to only the 'universal, rock-bottom prerequisites' for human life ('Welfare rights in a constitutional democracy' (1979) 3 *Washington University Law Quarterly* 659 669), without extending these rights to create entitlements to any higher level of social provisioning (arguing that such extension would render socio-economic rights unmanageable as legal standards; and would present legitimate problems with respect to judicial overreach and the counter-majoritarian dilemma) ('The Supreme Court 1968 term – Foreword: on protecting the poor through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7 8 & 11). See also AJ van der Walt 'A South African reading of Frank Michelman's theory of social justice' in H Botha, JWG van der Walt & AJ van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 163 182 – 183. Michelman's arguments in this respect were of course directed at establishing the legitimacy of a claim for recognition of constitutional socio-economic rights in a context where the idea that such rights could exist was (and perhaps is) generally regarded as outlandish (see Michelman 'Welfare rights' (above) 659, where he notes the 'skeptical, critical, and even derisive' reaction to his argument for the recognition of such rights in the US; see as an example of such a reaction R Bork 'The impossibility of finding welfare rights in the constitution' 1979 *Washington University Law Quarterly* 695 and, for an example of the traditional view that welfare rights have no place in the US constitution, DP Currie 'Positive and negative constitutional rights' (1986) 53 *University of Chicago Law Review* 864). As such his arguments are perhaps more limited than they would have been in another context. In South Africa, the constitution clearly seems to envisage that socio-economic rights create a floor of entitlement to the 'rock-bottom prerequisites for human survival' but also entitlements to something more (the 'progressive realisation' of, for example, 'access to adequate housing', rather than only shelter - sec 26 of the constitution; see D Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 119 *South African Law Journal* 484 490 – 493, where he distinguishes a 'minimal interest ... in survival' and a 'maximal interest ... in living well and flourishing', of which both, according to him, are recognised in the South African constitution). An attempt was made in *Minister of Health v Treatment Action Campaign* 1998 1 SA 765 (CC) by the amici in that case to establish a distinction between a – more or less absolute - *individual right* to Bilchitz's minimal interest in survival; and a qualified *duty* on the state to provide to everyone, within the limits of resources and over time, satisfaction of Bilchitz's maximal interest in living well. However, this distinction was rejected by the Constitutional Court (paras 30 - 39).

The precise formulation of these rights determines the scope and nature of the duties they impose and entitlements they create. Three groups of socio-economic rights can be distinguished. First, some rights - the '*qualified socio-economic rights*' - follow a standard formulation, circumscribing the positive duties⁷ they impose on the state. These rights (all rights of 'everyone') are formulated as 'access' rights rather than rights to a particular social good, and the positive duties they impose on the state are described as duties to take reasonable steps, within available resources, to achieve their progressive realisation. Standard examples are the section 26(1) right to 'have access to adequate housing' and the section 27(1) rights to 'have access to' health care services, including reproductive health care; sufficient food and water; and social security and assistance. The positive duties of these rights are explicitly described in subsections 26(2) and 27(2) respectively, so that the state is required to take 'reasonable legislative and other measures, within its available resources, to achieve ... [their] progressive realisation ...' Other qualified socio-economic rights are those in section 24(b) ('[e]veryone has the right to have the environment protected ... through *reasonable legislative and other measures*'); in section 25(5) ('[t]he state must take *reasonable legislative and other measures, within its available resources*, to foster conditions which enable citizens to *gain access* to land on an equitable basis'); and section 29(1)(b) ([e]veryone has the right 'to further education, which the state, *through reasonable measures*, must make *progressively available and accessible*') (my emphasis).

A second group of such rights - '*basic socio-economic rights*'⁸ - are neither formulated as access rights, nor subjected to the qualifications of 'reasonableness', 'available resources' or 'progressive realisation'. These are the section 29(1)(a) right of everyone to 'basic education, including adult basic education'; the section 28(1)(c) rights of children to 'basic nutrition, shelter, basic health care services and social services', and the section 35(2)(e) rights

⁷ See 96 - 102 below for a discussion of the viability of the distinction between positive and negative duties.

⁸ S Liebenberg 'The interpretation of socio-economic rights' in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed OS) (2003) ch 33 5.

of detained persons to 'the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.

Third, sections 26(3) and 27(3) describe particular elements of the section 26(1) right to have access to adequate housing and the section 27(1)(a) right to have access to health care services respectively. These rights are formulated as prohibitions of certain forms of conduct, rather than as rights to particular things. Section 26(3) prohibits arbitrary evictions and section 27(3) the refusal of emergency medical treatment. These two rights are also not subjected to any of the special qualifications that are typically attached to the qualified socio-economic rights.

2.2.2 Related rights

In addition to these explicit socio-economic rights one should take note also of rights not explicitly formulated as rights to material conditions for human welfare, but that can be interpreted to create entitlements to such things. Although these rights cannot be described as socio-economic rights, the interests at stake in the explicit socio-economic rights are clearly in some cases also at stake in the interpretation of these rights – cases decided on the basis of such 'related' rights are also socio-economic rights cases. Obvious examples are cases in which the section 11 right to life, the section 9 right to equality or the section 33 right to administrative justice were at issue. The right to life can be interpreted as not only requiring the state to refrain from killing, but also requiring it positively to protect and sustain life and to foster and maintain a certain quality of life.⁹ The right to equality, in turn, could be used to ground claims that a particular socio-economic benefit provided to a specific class of impoverished people should be extended to others.¹⁰ In

⁹ This argument was advanced in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) to support a claim that a patient suffering from renal failure was entitled to receive dialysis from a state hospital for free, but was rejected on the reasoning that the claim fell properly to be decided on the basis of secs 27(3) and 27(1). However, the Court did not deny that such a positive interpretation of the right to life was possible. For discussion of the space this leaves for advancing claims for material conditions for welfare through the right to life, see M Pieterse 'A different shade of red: socio-economic dimensions of the right to life in South Africa' (1999) 15 *South African Journal on Human Rights* 372 384.

¹⁰ See eg *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (a challenge against provisions of the Social Assistance Act 59 of 1992 restricting eligibility for social assistance

addition, the section 9(3) and 9(4) prohibition on unfair discrimination is relevant to poverty-related legal claims in the sense that socio-economic status could be recognised as a ground for distinction analogous to the grounds explicitly listed in section 9(3), thus rendering distinctions made on the basis of socio-economic status actionable as unfair discrimination.¹¹ Finally, equality is relevant to claims decided in terms of socio-economic rights in that a contextually fair¹² conception of equality is part and parcel of the review standard of reasonableness that the Constitutional Court has developed to determine whether state efforts to realise qualified socio-economic rights are constitutionally sound.¹³

The administrative justice rights in section 33 are also relevant. Most state decisions affecting access to health care, housing, education, social services, food and water qualify as administrative action and must comply with the standards of procedural fairness, lawfulness and reasonableness.

Administrative law grounds of review are potent tools for the protection of socio-economic rights. Courts are comfortable with applying these grounds of review and, particularly in the field of social assistance a large body of socio-economic rights case law based on administrative law principles has developed.¹⁴

grants to South African citizens and excluding people with permanent residence status upheld, both on the basis that the exclusion violated sec 27(1) and discriminated unfairly against permanent residents in violation of sec 9(3)).

¹¹ Sec 34(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 lists socio-economic status as one of a number of grounds that must be considered by the Equality Review Committee established in terms of sec 32 of the Act for future inclusion in the list of prohibited grounds. The special consideration accorded socio-economic status in sec 34 indicates that, at the very least, it will be regarded, for purposes of the Act, as a ground analogous to the listed grounds. This seems to indicate that the legislature regards it for constitutional purposes also to be a ground analogous to those listed in sec 9(3) of the constitution. See, in general, P de Vos 'The Promotion of Equality and Prevention of Unfair Discrimination Act and socio-economic rights' (2004) 5(2) *ESR Review* 5.

¹² See, in general, P De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258.

¹³ See Mokgoro J for the majority in *Khosa* (n 10 above) paras 42 & 44 - 45.

¹⁴ See N de Villiers 'Social grants and the Promotion of Administrative Justice Act' (2002) 18 *South African Journal on Human Rights* 320; AJ van der Walt 'Sosiale geregtigheid, prosedurele billikheid, en eiendom: alternatiewe perspektiewe op grondwetlike waarborge (Deel Een)' ('Social justice, procedural fairness, and property. Alternative perspectives on constitutional guarantees (Part One)') (2002) 13 *Stellenbosch Law Review* 59 and (n 6 above) 172 - 174 187 - 189. The sec 33 administrative justice rights have been given effect in the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA'), which currently forms the basis for review of administrative action. For two recent cases involving access to housing

Socio-economic rights are not only indirectly protected through other constitutional rights. Any number of non-rights related constitutional provisions, that seemingly have nothing whatsoever to do with socio-economic rights, can be used to protect and advance socio-economic rights. In *Mashava v President of the Republic of South Africa*,¹⁵ the validity of a presidential proclamation assigning administration of the Social Assistance Act¹⁶ from national government to the provincial governments was at issue. The case was decided on the basis of a number of technical, non-rights related provisions of the interim constitution regulating transitional arrangements and determining the relationship between the legislative power at national and provincial level, without any explicit mention of a socio-economic right. However, the mischief that the case sought to address was the inability of provincial governments properly to administer the social grant system in terms of the Social Assistance Act. This inability resulted in the frustration of access of people like the complainant to social assistance. In a very direct way, therefore, the case was about the right of everyone to have access to social assistance.

2.2.3 The interpretation of statutory entitlements

Socio-economic rights in South Africa are not only entrenched in the constitution. They are also extensively protected as statutory entitlements in legislation. The constitution is replete with commands directed at the legislature to enact legislation to give effect to specific constitutional rights. Examples are found in section 9, in relation to the prohibition on unfair

and water respectively that were in part decided on the basis of administrative justice rights, see *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*) (held that a decision to evict was an administrative decision and so subject to the PAJA and that the decision was taken without considering relevant circumstances, so that it could be set aside) and *Mazibuko v City of Johannesburg (Centre for Housing Rights and Evictions as Amicus Curiae)* 2008 4 SA 471 (W) (*Mazibuko*) (decision of local authority to install pay-per-use water meters set aside on procedural fairness grounds). For a discussion in particular of the administrative law aspects of *Olivia Road* (the Supreme Court of Appeal judgment - *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 6 SA 417 (SCA)), see G Quinot 'An administrative law perspective on "bad building" evictions in the Johannesburg inner city' (2007) 8 *ESR Review* 25.

¹⁵ *Mashava v President of the Republic of South Africa* 2004 12 BCLR 1243 (CC).

¹⁶ n 10 above.

discrimination; in section 32, in relation to the right to access to information; and in section 33, in relation to the right to administrative justice. Along similar lines, several of the socio-economic rights explicitly require statutory measures to be enacted to give effect to them. So, for instance, sections 26(2) and 27(2) require that the state take 'reasonable legislative ... measures', amongst other things, to realise the right to have access to adequate housing and the rights to have access to health care services, food, water and social security and assistance, respectively.¹⁷ The legislature has reacted to these constitutional commands by enacting a wide range of legislation aimed at facilitating, providing and protecting access to basic resources. In terms of my definition, cases in which these statutory manifestations of constitutional socio-economic rights were determinatively interpreted are also socio-economic rights cases.

The statutory measures envisaged here of course include legislation creating and empowering structures and institutions and setting in place processes for the implementation of socio-economic rights.¹⁸ However, an important aspect of such legislation is the creation of statutory socio-economic rights. Such statutory socio-economic rights can take the traditional form of subjective legal entitlements of particular persons to particular things or services. Examples are statutorily sourced entitlements to receive defined social assistance benefits if one meets certain eligibility conditions that can be enforced against the state¹⁹ and entitlements to tenure on land exercised through legal protection against eviction that can be enforced against other private persons.²⁰ Importantly, such statutory socio-economic rights also include rights or entitlements of a less traditional nature. Given particularly the liberalised law of standing that applies in bill of rights-related litigation in South Africa pursuant to section 38 of the constitution, it is possible for individuals

¹⁷ See also secs 24(b) & 25(5).

¹⁸ See eg the Social Assistance Act (n 10 above), ch 3 & 4 and the South African Social Security Agency Act 9 of 2004.

¹⁹ See ch 2 of the Social Assistance Act (n 10 above), which for eligible persons creates entitlements to a Child Support Grant, a Care Dependency Grant, a Foster Child Grant, a Disability Grant, a War Veteran's Grant, an Older Person's Grant, a Grant-in-Aid and a Social Relief in Distress Grant.

²⁰ See eg secs 8(1) & 11(1), (2) & (3) of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

either on their own behalf, on behalf of a group or class of persons or in the public interest,²¹ to enforce broadly phrased statutory duties, or statutory commands against the state - a person doing so would not so much be claiming something specific for him or herself (perhaps also that), but the performance of a public statutory duty or commitment on behalf of a larger collective. In *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*,²² the plaintiffs had applied for the Social Relief of Distress Grant, but despite clearly being eligible, did not receive it. Their complaint in response was not framed only as an application for each individual complainant to receive the social assistance grant for which they were eligible and to which they each had a subjective statutory right. Instead, the complaint alleged that, although, in terms of the Social Assistance Act²³ and its regulations, the state had statutorily committed itself to provide to eligible persons a Social Relief in Distress Grant and had placed a duty on provincial governments to make good that commitment, the province in question had not dedicated the necessary human, institutional and financial resources to do so: the grant was available only on paper. The case was settled and resulted in a particularly wide-ranging order requiring certain relief specific to the parties, but also various forms of general relief. Apart from requiring the provincial government in question to acknowledge its legal responsibility to provide Social Relief of Distress effectively to those eligible for it, the order requires it to devise a programme to ensure the effective implementation of Social Relief of Distress and to put in place the necessary infrastructure for the administration and payment of the grant. In essence, the state was ordered to make good on a statutory commitment to give effect to an aspect of the right to

²¹ Sec 38:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

anyone acting in their own interest;

anyone acting on behalf of another person who cannot act in their own name;

anyone acting as a member of, or in the interest of, a group or class of persons;

anyone acting in the public interest; and

an association acting in the interest of its members.’

²² *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003 23 October 2003 (B). My thanks to Nick de Villiers, of the Legal Resources Centre in Pretoria, for providing me with a copy of the order.

²³ n 10 above.

have access to social assistance, with the result that the grant would in future be available to all eligible persons, in addition to it being paid out to the individual complainants.

The enforcement of socio-economic rights through both these kinds of statutory entitlements holds great promise. Statutory entitlements are first likely to be much more detailed and concrete in nature than the vaguely and generally phrased constitutional rights forming their background, and are consequently much more direct in the access to resources that they enable people to leverage. In addition, courts are likely to enforce these statutory entitlements more robustly than they would constitutional rights, because they are enforcing a right, duty or commitment defined by the legislature itself, rather than a broadly phrased constitutional right to which they have to give content. As such they are, when enforcing statutory entitlements, not to the same extent confronted with the concerns of separation of powers, institutional legitimacy and technical competence that have so directly shaped and limited their constitutional socio-economic rights jurisprudence.²⁴

In many jurisdictions other than South Africa, where socio-economic rights do not enjoy constitutional status, they are protected as statutory entitlements in the ordinary positive law. Possibly the best examples are a number of the Scandinavian countries, in particular Finland, where rights such as the right to social assistance, the right to housing, the right to day-care for small children and rights of specified assistance for the severely handicapped are protected as subjective rights in national legislation.²⁵ For the same reasons mentioned above in the South African context, this form of protection of socio-economic rights has there been shown to be very effective. However, in the absence of constitutional socio-economic guarantees, the existence of statutory socio-economic entitlements is often precarious. As has been shown in the United States with respect to statutory welfare entitlements at federal level, where

²⁴ See 150 - 151 below where these limitations on the power of courts to develop concrete entitlements on the basis of constitutional socio-economic rights are discussed.

²⁵ For a discussion, see F Viljoen 'The justiciability of socio-economic and cultural rights: Experiences and problems' (2005) (unpublished paper on file with author) 12 - 13; M Scheinin 'Economic and social rights as legal rights' in A Eide, C Krause & A Rosas *Economic, social and cultural rights: a textbook* (1995) 41 61.

broad social agreement that the state has a duty to protect against severe socio-economic deprivation does not exist, or dissipates, statutory entitlements that are not sourced in some substantive constitutional guarantee are always vulnerable to legislative interference.²⁶ In South Africa, statutory socio-economic rights are not subject to legislative *fiat* to the same extent as in other jurisdictions where constitutional socio-economic rights are absent. These rights in South Africa are enacted by the legislature to give effect to constitutional socio-economic rights.²⁷ Legislative interference with a statutory socio-economic right - such as a restrictive legislative redefinition of a social assistance benefit - therefore constitutes an infringement of the constitutional socio-economic right that the statutory entitlement gives effect to and will only be constitutionally permissible if it is justifiable in terms of the appropriate standard of scrutiny. By the same token, a statutory scheme that is intended to give effect to a socio-economic right can be evaluated against that right to see whether or not it does fully give effect to it.²⁸ Apart from this corrective or protective background role played by constitutional socio-economic rights *vis-à-vis* statutory socio-economic rights, constitutional socio-economic rights of course inform the interpretation of statutory socio-economic rights. Also, the fact that a statutory right or scheme is intended to give effect to a constitutional socio-economic right can in specific cases in a rhetorical sense reinforce the enforcement of that statutory right or scheme.²⁹ Finally,

²⁶ See LA Williams 'Welfare and legal entitlements: the social roots of poverty' in D Kairys (ed) *The politics of law: a progressive critique* (1998) 569 570 - 571 and WH Simon 'Rights and redistribution in the welfare system' (1986) 38 *Stanford Law Review* 1431 1467 - 1477, both describing the gradual cutbacks in statutory welfare rights occasioned by changed public perceptions about the sustained viability of comprehensive welfare provision and by erosion of the idea that the state should provide in the basic needs of its people.

²⁷ Much of the social legislation that has so far been enacted is explicit as to this purpose. See eg the Preamble of the Social Assistance Act (n 10 above), where it is stated that one purpose of the Act is to give effect to sec 27(1)(c) of the constitution. Courts, in their interpretation of such legislation, have also emphasised the link between social legislation and the constitutional rights they are intended to give effect to; see eg with respect to the relationship between the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and secs 26(3) & 25 of the constitution, *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 17 and *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 4 SA 1222 (SCA) para 21.

²⁸ So, eg, in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), the Housing Act 107 of 1997, the statutory framework for the state's measures to give effect to the right to have access to adequate housing, was found to be lacking in that it made no provision for the shelter needs of those in housing crisis (para 52).

²⁹ In *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 6 BCLR 625 (W) the High Court, on the basis of secs 4(1) & 4(3) of the Water Services Act 108 of 1997 gave

constitutional socio-economic rights protect statutory socio-economic rights from legal challenge on the basis of other constitutional rights. *City of Cape Town v Rudolph*³⁰ dealt with a constitutional challenge, brought on the basis of section 25 property rights, to provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).³¹ The impugned provisions of PIE were intended to give effect to section 26(3) of the constitution. The High Court relied on this fact to reject the challenge.³²

2.2.4 Interpretation of 'ordinary' legislation/development of the common law

The interests protected and advanced by constitutional socio-economic rights can also be at issue in non-constitutional cases where no legislation explicitly related to constitutional socio-economic rights plays a role. Section 39(2) of the constitution requires courts, when interpreting legislation or developing the common law, to give effect to the 'spirit, purport and objects' of the bill of rights. This section is widely understood to require courts to infuse in particular the 'ordinary law' (that is, law not explicitly constitutional in status or nature) with the values underlying the provisions of the bill of rights and as such is seen as the major channel through which the constitution can have an influence on the private law. Cases in which ordinary legislation is interpreted in terms of section 39(2) to give effect to constitutional values related to socio-economic rights,³³ or cases in which courts are asked to develop common law rules to give effect to such values³⁴ will also in terms of my definition qualify as socio-economic rights cases. Given Sen's warning related above that it is precisely the ordinary rules of contract and property, actuated in legislation

an interim order that the plaintiff's water supply be reconnected. Although the decision was based on statutory entitlements, the court invoked the sec 27(1)(b) constitutional right to have access to sufficient water to reinforce its finding. The Court proceeded from the assumption that a disconnection of a household water supply was a *prima facie* infringement of the sec 27(1)(b) constitutional right, which had to be justified in order to be constitutionally sound (para 20). The Court then held that the provisions of the Water Services Act constituted 'a statutory framework within which such breaches may be justified' (para 21). Further, throughout the judgment the Court made reference to the fact that the Act was intended to give effect to the constitutional right and that non-compliance with its provisions constituted an infringement of the constitutional right (eg paras 28 - 30).

³⁰ 2004 5 SA 39 (C).

³¹ n 27 above.

³² *Rudolph* (n 30 above) 74H - 75J.

³³ For examples see my discussion at 115 - 116 below.

³⁴ For examples see my discussion at 116 - 119 below.

and the common law that regulates and limits access to basic resources for impoverished people,³⁵ one would have expected this group of socio-economic rights cases to represent a significant portion of the category. Instead, only a very few cases in which ordinary rules of property or contract, or other areas of law, were subjected to evaluation in terms of the values underlying constitutional socio-economic rights have reached the courts.³⁶ This is particularly true of cases decided on the basis of the common law. In addition, with one possible exception, in those cases in which our courts have so far been asked to develop common law rules in line with socio-economic rights-related constitutional values, they have declined to do so.³⁷

2.3 An overview

In this section I provide a descriptive overview of the body of case law delimited in section 2.2 above. Because this body of case law is evidently so large and, more importantly, so diverse, it is necessary to organise my overview in some way – as I noted in the Introduction to this Chapter, to craft a typology of sorts. There seem to be two obvious bases upon which to do so. First, one can arrange the cases according to the manner in which socio-economic rights played a role in them – to use the ordinary parlance, according to the manner in which socio-economic rights *applied* in them. Second, one can take a cue from section 7(2) of the constitution, and arrange the cases according to the nature of the duty imposed by socio-economic rights – the duty to respect, or to protect, or to promote and fulfil – that was at issue in them. Below I describe and problematise each of these two possible bases for a typology.

2.3.1 A typology

2.3.1.1 The manner in which the rights applied

The power of courts to translate socio-economic rights into concrete legal claims in this way is mediated through two provisions of the constitution. Sections 8 and 39(2) (the application sections) regulate the question of how

³⁵ See (n 1 above).

³⁶ See the discussion at 115 – 119 below.

³⁷ See 116 - 119 below for a description.

and under what circumstances fundamental rights, including socio-economic rights interact with existing law and with conduct. As such, these sections indicate which kinds of legal claims can be launched through the courts on the basis of constitutional socio-economic rights, against whom and how such claims may be handled by courts.

Section 8(1) declares that the bill of rights 'applies to all law'³⁸ and 'binds the legislature, the executive, the judiciary and all organs of state'. Section 8(2) extends the reach of the bill of rights to the private sphere, declaring that, if the 'nature of [a] right and the nature of any duty imposed by [that] right' allows, the right 'binds a natural or a juristic person'. In terms of section 8(3), a court, once it has in terms of section 8(2) found that a right in the bill of rights is applicable in litigation between private parties, and that the right has been limited by one of the parties to the litigation, must give effect to that right by applying an existing statutory or common law remedy, or, in the absence of such an existing remedy, must develop the common law to create a remedy that will give effect to the right.³⁹ Finally, section 39(2) determines that a court, when interpreting legislation or developing the common law, 'must promote the *spirit, purport and objects of the Bill of Rights*', thus placing a general interpretive injunction on courts to infuse existing law with constitutional values.

What exactly these sections mean is still mired in uncertainty.⁴⁰ In this Chapter, I do not engage in any of the many controversies that have developed around them. I am interested only in the different ways in which they allow the socio-economic rights in the bill of rights to be used to

³⁸ See *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) for a unanimous holding that the same term in sec 7(2) of the interim constitution referred to statute, common law and customary law.

³⁹ A court can also develop a common law rule to limit the right, provided that such a rule would then have to be justifiable in terms of sec 36(1) of the constitution.

⁴⁰ The application of rights in the bill of rights has been one of the most contentious issues in South African constitutional law scholarship over the last several years; see eg SC Woolman 'Application' in Woolman, Roux & Bishop (eds) (n 8 above) ch 31; ch 10 'Application of the bill of rights' in J de Waal *et al* (eds) *The bill of rights handbook* (2001) 35; H Cheadle 'Application' in H Cheadle *et al* (eds) *South African constitutional law: the bill of rights* (2002) 19.

challenge law and conduct. In this respect, and with an inevitable degree of over-simplification, the application sections provide the following possibilities.

One can challenge the constitutionality of any *law* – that is any statutory rule, common law rule or customary law rule - whether it is the state or a private party that relies on it.⁴¹ The consequence of a successful constitutional challenge to a statutory rule is that the rule is overturned and the situation reverts to the common law position that existed before the particular rule was enacted. This should lead to the legislature enacting new legislation to regulate the same issues, but the court can also itself remedy the constitutional defect by reading words into the impugned provision. If a rule of common law is successfully challenged, a court will employ its inherent power to develop the common law to change that rule, or develop new rules so as to make the common law position consistent with the constitutional right in question.⁴² A statutory provision was challenged in this way as inconsistent with a constitutional socio-economic right in the recent case of *Khosa v Minister for Social Development*,⁴³ where provisions of the Social Assistance Act and the Welfare Laws Amendment Act⁴⁴ that restricted access to social assistance to South African citizens, to the detriment of permanent residents and their children, were successfully challenged as inconsistent with the section 27(1) right of everyone to have access to social security and

⁴¹ The textual basis for a bill of rights challenge to a statutory or common law rule relied upon by the state as against a private entity is sec 8(1). Similarly, the textual basis for a bill of rights challenge to a statutory rule relied upon by one private entity against another is clearly sec 8(1). However, there is some controversy about whether the textual basis for a challenge to a common law rule relied upon by one private entity against another is sec 8(1) rather than sec 8(2) read with sec 8(3). The Constitutional Court in *Khumalo & Others v Holomisa* 2002 5 SA 401 (CC) rejected reliance on sec 8(1) in a challenge directed at the existing common law rules of defamation relied upon by a private party, opting instead to bring the bill of rights to bear through secs 8(2) & (3).

⁴² It seems that this would be the case, irrespective of whether the bill of rights is brought to bear upon a dispute through sec 8(1) or secs 8(2) & (3).

⁴³ n 10 above. See also *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) (provisions of the Magistrates' Courts Act 32 of 1944 allowing for the sale in execution of debtors home to satisfy judgment debt found inconsistent with sec 26(1) of the constitution; words read into the Act to remedy the defect.)

⁴⁴ Secs 3(c), 4(b)(ii) & 4B(b)(ii) of the Social Assistance Act (n 10 above) and sec 3 of the Welfare Laws Amendment Act 106 of 1997.

assistance and the section 9(3) prohibition on unfair discrimination.⁴⁵ More recently, in *Olivia Road*, provisions of the National Building Regulations and Building Standards Act⁴⁶ that effectively authorised a local authority to coerce occupants of unsafe buildings to vacate those buildings at pain of criminal sanction, without recourse to a court, were found to be inconsistent with section 26(3) of the constitution.⁴⁷ The court remedied the inconsistency with a reading order providing that a criminal sanction would only follow once a court had given an order for eviction.⁴⁸ An example of where a common law rule was challenged as inconsistent with a constitutional socio-economic right occurred in *Brisley v Drotsky*,⁴⁹ where the existing common law rules regulating private evictions were (unsuccessfully) challenged as inconsistent with the section 26(3) prohibition on arbitrary evictions. Had the challenge been successful, the court would have had to develop the common law so as to take adequate account of the section 26(3) injunction that courts take account of 'all relevant factors' before issuing an eviction order, with the result that courts would have a discretion, exercised on the basis of their consideration of relevant circumstances whether or not to grant the order.⁵⁰

One can challenge state or private *conduct* as inconsistent with a constitutional right. If state conduct is successfully challenged, it would simply be invalid and the court will craft a constitutional remedy to vindicate the right in question. If private conduct is successfully challenged, a court will attempt to find a remedy in the existing statutory or common law that can be adapted to vindicate the right in question, and in the absence of such existing remedy, will develop the common law so as to provide such a remedy. An example of a successful constitutional challenge to state conduct as inconsistent with a constitutional socio-economic right is *Minister of Health v Treatment Action*

⁴⁵ The various sections were found to be inconsistent with the constitution, but were not invalidated to the extent of their inconsistency. Instead, the Court read words into the section to remedy the constitutional defect; *Khosa* (n 10 above) para 98.

⁴⁶ Act 103 of 1997.

⁴⁷ *Olivia Road* (n 14 above) para 49.

⁴⁸ As above para 50.

⁴⁹ 2002 4 SA 1 (SCA).

⁵⁰ This decision was effectively revisited in *Olivia Road* (n 14 above); see my discussion at 117 - 118 below. For a variety of reasons, the use of constitutional socio-economic rights in this indirect, interpretative way to influence the existing law is potentially extremely important. See 116 below for further discussion of this point.

Campaign,⁵¹ where a policy position of the national department of health was successfully challenged as inconsistent with the section 27(1) right to have access to health care services, with the result that the policy was invalidated and the government ordered to adopt and implement a policy that would be constitutionally sound. There has as yet not been an example of a challenge to private conduct as inconsistent with a constitutional socio-economic right.

Finally, one can, in the course of litigation, argue that a rule of law that the other party to the litigation relies on is inconsistent, not with a particular right, but with the general tenor of the bill of rights, the 'objective value system' that underlies its particular provisions. A court that accepts such a proposition would then interpret the statutory provision in question, or develop the common law rule so as to give effect to the 'spirit, purport and objects' of the bill of rights. An example of this kind of interaction between the bill of rights and the existing law occurring in the context of socio-economic rights protection is the much-maligned decision in *Afrox Health Care (Pty) Ltd v Strydom*,⁵² where the Supreme Court of Appeal was (unsuccessfully) asked to develop the common law of contract, through the rule that contractual terms that conflict with the public interest are unenforceable, so as to render unenforceable disclaimers in contracts between hospitals and their patients that indemnify the hospitals from liability for damage negligently caused to patients. A more recent decision – *Tswelopele Non-profit Organisation v City of Tshwane Metropolitan Municipality*⁵³ - concerned the development of the common law remedy of a spoliation order to protect against destruction of property during unlawful evictions. Again the Supreme Court of Appeal declined the invitation to develop the common law.

To arrange my overview of the case law according to these different ways in which socio-economic rights, or the interests underlying them, played a role in litigation is tempting. Such a typology would have the signal virtue of avoiding

⁵¹ n 38 above.

⁵² 2002 6 SA 21 (SCA).

⁵³ 2007 6 SA 511 (SCA). For a discussion and critique of the decision, see AJ van der Walt 'Developing the law on unlawful spoliation and squatting' (2008) 125 *South African Law Journal* 24. See also my own discussion at 117 below.

the ‘ghettoisation’ of socio-economic rights case law – of underscoring the important point that socio-economic rights interact with law and conduct in the same way as all other constitutional rights and are not an exotic add-on that has to be treated differently.⁵⁴ However, such a typology would suffer from the flaw that it would not sufficiently cater for the range of different kinds of socio-economic rights cases forming part of the category as delimited above. As will become clear from my discussion below, socio-economic rights (indeed all rights in the bill of rights) are regarded as imposing a range of different possible duties on those they bind – duties to respect, protect, promote and fulfil.⁵⁵ Although, again as I make clear below, the distinction made between these different kinds of duties is in itself flawed,⁵⁶ it remains important, primarily because our courts have relied on that distinction to fashion their approaches to deciding different kinds of socio-economic rights cases. Importantly, depending on which of the duties are at stake in a case, our courts have applied different standards of scrutiny.⁵⁷ Clearly, from my perspective, where I am interested not so much in the results (in legal development and otherwise) generated in the cases, but in the nature of the process of adjudication in those cases, these distinctions in approach and in standard of scrutiny are important. Consequently, the failure of a typology based on the different ways in which to apply socio-economic rights on its own to make these distinctions is problematic for my purposes.

2.3.1.2 The duties at stake

Section 7(2) determines that ‘[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights’. Section 7(2) is central to the transformative ethos of the constitution. It explicitly conveys the idea that the state is not simply required to refrain from interfering with the enjoyment of rights, but

⁵⁴ This ‘ghettoisation’ is hinted at by André van der Walt in his ‘The state’s duty to protect property owners v the state’s duty to provide housing: thoughts on the *Modderklip* case’ (2005) 21 *South African Journal on Human Rights* 144, where he questions the Supreme Court of Appeal’s decision to rely on a ‘duty to protect’ construction rather than simply, or also, on its duty to develop the common law in order to reach a conclusion in the case that develops the law relating to the relationship between the housing rights of squatters and property rights of landowners.

⁵⁵ See 94 - 96 below.

⁵⁶ See 96 - 99 below.

⁵⁷ See 99 – 103 below for a discussion.

must act so as to protect, enhance and realise the enjoyment of rights.⁵⁸ For practical purposes, this provision is important, as it indicates the scope and nature of the duties and entitlements that socio-economic rights can create and so shows when and how they can be used to advance legal claims.

The *duty to respect* rights requires the state to refrain from interfering with the enjoyment of rights. The state must first not limit or take away people's existing access to, for instance, housing, without good reason and without following proper legal procedure; second, where limitation or deprivation of existing access to housing is unavoidable, must take steps to mitigate that interference (in the context of state eviction, for example, must take steps to find alternative accommodation for the evictees); and third, must not place undue obstacles in the way of people gaining access to housing.

The *duty to protect* rights requires the state to protect the existing enjoyment of rights, and the capacity of people to enhance their enjoyment of rights or newly to gain access to the enjoyment of rights against third party interference. The state must, for instance, regulate private health care provision to protect against exploitation by private institutions and must, through such regulation, provide effective legal remedies where such exploitation or other forms of interference occur. An aspect of this duty that is often overlooked is the duty that it places also on courts, through their powers of developing the common law and interpreting legislation, to strengthen existing remedies or develop new remedies for protection against private interference in the enjoyment of rights.⁵⁹

⁵⁸ The realisation that rights impose such different kinds of duties is usually attributed to Henry Shue (H Shue *Basic rights: subsistence, affluence and US foreign policy* (1980)). His typology is widely adopted in international law circles; see eg GJH van Hoof 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views' in P Alston & K Tomasevski (eds) *The right to food* (1984) 97-99; and Committee on ESCR General Comment No 12 (*The right to adequate food (art 11 of the Covenant)*) UN Doc E/2000/22) para 15; General Comment No 14 (*The right to the highest attainable standard of health (art 12 of the Covenant)*) UN Doc E/C 12/2000/4) paras 33 - 37; and General Comment No 15 (*The right to water (arts 11 and 12 of the Covenant)*) UN Doc E/C 12/2002/11) paras 20 - 29.

⁵⁹ See 15 - 19 below for a discussion.

The *duty to promote* rights is difficult to distinguish from the broader duty to fulfil rights. Liebenberg describes it as a duty to raise awareness of rights, that is, through educational programmes, to bring rights and the methods of accessing and enforcing them to the attention of right holders and to promote the most effective use of existing access to rights.⁶⁰ Budlender describes it as a duty placed on administrative bodies to use the promotion of socio-economic rights as a primary consideration in their discretionary decision making, much like, I suppose, the constitutional injunction contained in section 28(2) requires that the best interest of the child be the primary consideration in any decision affecting a child.⁶¹ In this Chapter, for the sake of convenience, I discuss the duty to promote as part of the duty to fulfil.⁶²

The *duty to fulfil* requires the state to act, to ‘adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures’⁶³ so that those that do not currently enjoy access to rights can gain access and so that existing enjoyment of rights is enhanced.

Despite the advantage alluded to above – that it tracks the manner in which the courts themselves and most commentators have until now described and organised the cases – a typology based on this distinction between the different duties imposed by socio-economic rights also suffers from a number of difficulties. In short, it is both descriptively inaccurate and normatively problematic.

On the basis of section 7(2), a distinction is often made between positive duties (duties to do something, to act) and negative duties (duties to refrain

⁶⁰ Liebenberg (n 8 above) 6.

⁶¹ G Budlender ‘Justiciability of socio-economic rights: some South African experiences’ in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice. The role of judges in implementing economic, social and cultural rights* (2004) 33 37. This characterisation has recently been given credence in *Olivia Road* (n 14 above) where Yacoob J held that the City of Johannesburg, in taking the administrative decision that a group of people occupying a building that had been declared unsafe for human habitation should vacate that building, where constitutionally bound to consider, as a factor relevant to their decision, the fact that the occupiers would be left without shelter were they indeed to vacate the building (para 46) (Yacoob J did not refer explicitly to the duty to promote in his decision).

⁶² See in this respect 119 and *furtehr* below.

⁶³ Committee on ESCR General Comment No 14 (n 58 above) para 33.

from doing something, not to act). The duty to respect is then classified as a negative duty, whereas the duties to protect, promote and fulfil are described as positive duties.⁶⁴ This distinction is presented in hierarchical fashion. The negative duty to respect is often seen as more amenable to enforcement through adjudication than the positive duties to protect, promote and fulfil.⁶⁵ The argument is that enforcement of a negative duty does not require courts to interfere in allocational choices of the executive or legislature, as the enforcement of positive duties inevitably seems to do. By the same token, it is argued that the enforcement of a negative duty does not immerse courts in the field of policy formulation and evaluation to the extent that the enforcement of positive duties supposedly does. However, in reality, the distinction between positive and negative duties holds little more moment than a simple semantic distinction between acting and not acting.

First, often the same conduct of the state can be described both as an infringement of the positive duty to fulfil a right and an infringement of the negative duty to respect it. As Liebenberg points out, in *Minister of Health v Treatment Action Campaign*, it was not clear whether the refusal to extend provision of Nevirapine for purposes of preventing transmission of HIV from mother to child at birth to all public health facilities, outside of a select few pilot sites, constituted a negative interference in or impairment of the right to have access to health care services, or a failure of the state positively to provide an essential health service. In effect, it could be characterised as both.⁶⁶ Similarly, an element of the supposedly negative duty to respect rights - the duty to mitigate interference in the exercise of a right there where such

⁶⁴ See eg *Jaftha* (n 43 above) paras 31 - 34, where the Constitutional Court discusses the distinction between the negative duty to respect the right to have access to adequate housing and the positive duty to fulfil it. See also *Grootboom* (n 28 above) para 34.

⁶⁵ See eg the following remarks of the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC)* para 78: 'The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'

⁶⁶ Liebenberg (n 8 above) 19, referring to *Treatment Action Campaign* (n 6 above). By the same token, the provisions of the Social Assistance Act (n 10 above) that were challenged in *Khosa* (n 10 above) could be described as either negative or positive infringements of the right to have access to social assistance.

interference is unavoidable - clearly requires the state to act, rather than to refrain from acting.

Second, the distinction in consequence also does not hold up. Enforcement of a negative duty against the state is as likely to have consequences for expenditure of resources as enforcement of a positive duty. Enforcement of a negative duty also potentially requires a court to interfere as deeply in the policy-making powers of the executive or legislature as does enforcement of a positive duty. Suppose the state seeks to evict a group of illegal occupants from state land, with the purpose of developing that land for low-cost housing, to be occupied by a different group of people, next in line on the housing waiting list. For a court to prevent the state from doing so (to enforce the negative duty to respect the right to have access to adequate housing) will have important resource consequences - the state will have to find other suitable land and buy it, or use other state land, which itself in turn might have been allocated for a different use. Equally, in enforcing the negative duty in this respect, a court would interfere very directly in a complex, multi-faceted policy choice about how to decide who gets access to housing first, about where to situate low-cost housing development, etc.⁶⁷

But apart from this problem of descriptive accuracy, basing my typology on the distinction between these different kinds of duties is problematic because it potentially feeds into problematic assumptions about the nature and status, relative to other constitutional rights, of socio-economic rights. Objections to the inclusion of justiciable socio-economic rights in the 1996 constitution almost all, at basis, operated on the assumption that these rights were essentially different from more traditional civil and political rights in that they imposed affirmative duties on the state. It is on the basis of this assumption that all the stock arguments – that these rights do not pose justiciable standards; that they would uniquely require courts to make decisions for which they do not have the expertise; that they would uniquely require courts

⁶⁷ With respect to the blurring of the distinction between positive and negative constitutional duties, see, in general, S Bandes 'The negative constitution: a critique' (1990) 88 *Michigan Law Review* 2271 - 2347.

to meddle in decisions allocating scarce resources – were made. The section 7(2) typology of duties was introduced into the constitution precisely to controvert this basic assumption – to avoid the ‘ghettoisation’ of socio-economic rights as uniquely affirmative rights that are as a result uniquely difficult for purposes of adjudication. Section 7(2) determines that the state must respect, protect promote and fulfil *all* the rights in the bill of rights. However, unfortunately, in practice section 7(2) has virtually exclusively been applied to socio-economic rights – both by our courts and in academic commentary on constitutional law in general.⁶⁸ Ironically, therefore, reliance on section 7(2)’s typology of duties runs the risk of confirming the ‘ghettoisation’ of socio-economic rights and emphasising their supposedly uniquely ‘difficult’ character. This is particularly clear in a case such as *Modderklip*⁶⁹ where the Supreme Court of Appeal, doing nothing other than developing the common law through the so-called horizontal application of the bill of rights, elected to describe what it was doing in terms of a ‘duty to protect construction’.⁷⁰

Nevertheless, despite these descriptive and normative problems, I elect in this Chapter to use section 7(2)’s typology of duties at least as a structure to organise my overview of the case law. The reason is first one of convenience: as indicated above, our courts and most academic commentators have used the section 7(2) typology in their engagements with socio-economic rights. But there is also, again as indicated above, a more substantive reason.

My focus is on the manner in which our courts have decided socio-economic rights cases – on the modes of reasoning and conceptual categories in terms of which they have operated and on the judicial intuitions and assumptions that

⁶⁸ See eg D Brand ‘Writing the law democratically: a reply to Theunis Roux’ in Woolman S & Bishop M (eds) *Constitutional conversations* (2008) 97 100 – 101, where I criticise the Constitutional Court’s failure to interpret voting rights and the constitutional principle of democracy in such a way as to impose also positive duties to protect and to promote and fulfil on the state. See in this respect also, in general, DM Davis ‘Adjudicating the socio-economic rights in the South African constitution. Towards “deference lite” ’ (2006) 22 *South African Journal on Human Rights* 301.

⁶⁹ *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) (*Modderklip SCA*).

⁷⁰ Van der Walt (n 54 above) 160.

have shaped those modes and categories. It is therefore important for me to be able to distinguish the different ways in which our courts have approached the cases. Because our courts have employed the distinctions of section 7(2) to distinguish the different kinds of socio-economic rights cases that have come before them, these different approaches also track section 7(2). One example relates to the standard of scrutiny employed by our courts in different socio-economic rights cases. As a rule, courts will scrutinise infringements of so-called negative duties imposed by socio-economic rights (the duty to respect) more strictly than they would failures in meeting positive duties (the duties to protect and to promote and to fulfil). There is some evidence from the case law that this is a matter of judicial attitude in the first place - that courts simply 'feel' themselves less constrained when adjudicating negative infringements as the perception is that enforcing negative duties requires of them less interference in the sphere of power of the political branches than the enforcement of positive duties would.⁷¹ However, particularly with respect to the qualified socio-economic rights, the difference in degree of judicial constraint at play in cases of enforcement of positive as opposed to negative duties seems simply to be required by the way in which these rights are formulated and by the general structure of constitutional litigation.

Constitutional litigation in South Africa proceeds in two stages. First, the complainant bears the onus to persuade the court that a right in the bill of rights has been infringed. Should a court find that the right has in fact been infringed, the state (or where a constitutional duty has been infringed by a private party,

⁷¹ See, eg, the Constitutional Court's indication in *Grootboom* that retrogressive steps in the process of giving progressive realisation to socio-economic rights (essentially negative infringements of such rights) 'require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' - that is, that the Court would subject such negative interferences in the exercise of socio-economic rights to especially robust scrutiny; Committee on ESCR General Comment No 3 (*The nature of States parties obligations (art 2, para 1 of the Covenant)*) UN Doc E/1991/23) para 9 as quoted in *Grootboom* (n 28 above) para 45. See also *Jaftha* (n 43 above), where the Constitutional Court, having found that provisions of the Magistrates' Courts Act (n 43 above), allowing for the sale in execution of a person's home without adequate judicial oversight, violated the negative duty to respect the right to have access to adequate housing, proceeded to order the relatively intrusive remedy of reading words into the Act, in spite of submissions by the minister of justice that the order of invalidity be suspended to allow the legislature to remedy the constitutional defect in the Act (paras 61 - 64). See, further, my discussion of *Port Elizabeth Municipality* (n 27 above) and *Modderklip SCA* (n 69 above) at 107 - 110 below.

the private party in question) bears the onus to justify and so to render constitutionally sound its limitation of that right. In principle, the standard of scrutiny in terms of which courts decide whether or not any infringement of any constitutional right, including any socio-economic right, is justified is prescribed by section 36(1) - the general limitation section, which applies to all rights. However, despite the fact that section 36(1) in principle applies to all infringements of all constitutional rights, courts in practice do not apply section 36(1) when they must decide whether or not failures by the state to give effect to the *positive duties* to protect, promote and fulfil the *qualified socio-economic rights* can be justified.⁷² It will be recalled that the positive duties imposed by qualified socio-economic rights are explicitly described as duties to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of the rights in question.⁷³ The Constitutional Court has interpreted this qualifying phrase as an internal limitation clause: in essence, a special standard of 'reasonableness' scrutiny, used instead of section 36(1), according to which to decide specifically whether or not failures in meeting the positive duties imposed by qualified socio-economic rights can be justified.⁷⁴

Whether or not the possible justification of an infringement of a socio-economic right is considered in terms of section 36(1) or in terms of the special limitation clause that applies to positive infringements of qualified socio-economic rights determines the standard of scrutiny that is applied in any given case. Section 36(1) poses both a threshold requirement that an infringement of a right must meet in order for it to be capable of justification - the infringement must have occurred in terms of 'law of general application'⁷⁵

⁷² M Pieterse 'Towards a useful role for section 36 of the constitution in social rights cases? *Bon Vista Mansions v Southern Metropolitan Local Council* (2003) 120 *South African Law Journal* 41. See also *Khosa* (n 10 above) paras 83 & 84.

⁷³ Secs 26(2) and 27(2) of the constitution.

⁷⁴ See 119 and further below for a description of this standard of scrutiny.

⁷⁵ In general terms, this means that the infringement must have occurred in terms of a rule (as opposed to a once-off decision) that is clear, precise and public (accessible) and that applies in equal measure to all those that it reaches; see the dissenting judgment of Kriegler J in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) 36 n 86. An infringement occasioned by 'mere conduct', unrelated to law of general application, is incapable of justification - if the mere fact of such an infringement is shown, the conduct in question is unconstitutional.

to be at all justifiable - and a standard of justification that the infringement must satisfy once it has passed the threshold. The standard of justification or scrutiny required by section 36(1) is relatively intrusive. It has been described by our courts as a *proportionality test*: a court weighs the purpose and benefits of the infringement against its nature, effect and severity, and considers the relative efficacy of the infringing measure in achieving its purpose, to decide whether or not it is justified. As such, it allows courts a fair amount of leeway to interrogate state conduct and to prescribe specific alternative options where state conduct is found to be unjustifiable. The reasonableness test that applies in cases of negative infringement of the qualified socio-economic rights, by contrast, is applied as a shifting standard of scrutiny. Usually it operates only at the intermediate level of a means-end effectiveness test⁷⁶ and only in exceptional cases does it rise to the level of proportionality.⁷⁷ Particularly, as a rule it does not allow courts explicitly to consider the relative efficacy of challenged state measures compared to other possible measures.⁷⁸ As a result, infringements of the positive duties imposed by qualified socio-economic rights are usually evaluated against a more lenient standard of scrutiny than that which applies to other infringements of rights in terms of section 36(1). Courts are, in other words, more constrained in their assessment of such infringements than they are with respect to others – their modes of reasoning and the conceptual structures they employ and the kind of argument that they find persuasive is determined by the question

⁷⁶ *Grootboom* (n 28 above) and *Treatment Action Campaign* (n 6 above) at paras 39 - 45; 38 & 123 respectively. In *Soobramoney* (n 9 above) paras 27 & 29 the Court applied an even more lenient basic rationality standard of scrutiny.

⁷⁷ In *Khosa* (n 10 above) the Constitutional Court confirmed a High Court ruling that the exclusion of permanent residents from social assistance benefits violated the right to have access to social assistance (sec 27(1)(c) of the constitution). The measures were found unreasonable because the purpose of the exclusion (to prevent people immigrating to South Africa becoming a burden on the state) could be achieved through means less restrictive of permanent residents' rights (stricter control of access into the country) (at para 65) and because 'the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the state relies' (para 82).

⁷⁸ *Grootboom* (n 28 above) para 41: 'A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.'

whether or not a challenge to law or conduct is characterised in 'duty to respect' or 'duty to protect' or to 'promote and fulfil' terms.⁷⁹

For this reason it makes sense for me at least nominally to employ the section 7(2) typology. However, I attempt throughout the overview that follows also to take account of the manner in which socio-economic rights applied in the cases that I discuss so as to avoid the 'ghettoisation' of these rights warned against above.

2.3.2 The cases

In what follows, I provide an overview of the body of socio-economic rights case law defined above, according to the typology I have just described. My purpose is not to be exhaustive in the sense of describing each and every case that falls within this category – that would be impossible. Rather, I intend to describe in more general terms the approach that our court has adopted to deciding different kinds of socio-economic rights cases, by referring to representative examples of those cases.

⁷⁹ The question whether or not section 36(1) or the special 'reasonableness' limitations clause applies is in a strategic sense important for another practical reason, unrelated to judicial attitude, but important for the extent to which socio-economic rights litigation can be said to operate as a site for transformative political action by impoverished people - it determines the nature of the onus of persuasion facing litigants in socio-economic rights cases. As a rule, in bill of rights litigation a party that alleges that a right in the bill has been infringed must persuade a court that this is indeed so - a complainant has to make a *prima facie* case that the conduct of the respondent has infringed a right in the bill of rights. Once such a *prima facie* case has been made, the respondent bears the onus to persuade the court that the infringement is justifiable (*S v Zuma* 1995 2 SA 642 (CC) para 21). The potential benefit of this structure is that it requires very little of a complainant in the way of establishing questions of fact - the complainant usually simply has to propose a certain interpretation of the right it alleges is being infringed and then has to show that the respondent's conduct infringes the right so described, an exercise that mostly involves arguing questions of law on an abstract level. However, in the kinds of socio-economic rights cases referred to above, where the allegation is that the state has failed to take reasonable steps, within available resources to achieve the progressive realisation of a qualified socio-economic right, this structure is bedevilled. In such cases, for the complainant to show that the right has in fact been infringed involves making a *prima facie* case that the state's existing measures are unreasonable. The state then gets the opportunity to rebut this *prima facie* showing by arguing that its measures are in fact reasonable (Liebenberg (n 8 above) 53). The difficulty is that, for a complainant to make a *prima facie* showing that the state's measures are unreasonable requires it to establish a wide range of factual questions, mostly relating to information that is more or less uniquely in the knowledge of its opponent, the state (Liebenberg (n 8 above) 53 - 54; D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?" ' in Botha, Van der Walt & Van der Walt (n 6 above) 33 52 - 53). Often, of course, the typical socio-economic rights complainant would not have the required access to information and resources to do this.

2.3.2.1 Cases involving the duty to respect socio-economic rights

The duty to respect socio-economic rights requires the state and others to refrain from interfering with people's existing enjoyment of those rights; when such interference is unavoidable, to take steps to mitigate its impact; and to refrain from impairing access to socio-economic rights. As pointed out above, this 'negative' duty is potentially a potent tool with which to ensure people's adequate access to basic resources, as courts, for a variety of reasons, are more likely robustly to enforce the different elements of this duty than the duties to protect, promote and fulfil.

(a) Refraining from interfering with the existing exercise of socio-economic rights

Courts have decided a number of different cases in which this aspect of the duty to respect socio-economic rights have been at issue. In the first place, of course, courts have enforced legislative translations of socio-economic rights in this respect. The most obvious example is the large body of case law that has already developed around the eviction provisions of a statute such as PIE⁸⁰ and the enforcement of the statutory entitlements protecting against water disconnection created in the Water Services Act.⁸¹ However, courts have also directly enforced this element of the duty to respect socio-economic rights to invalidate laws allowing interference in the existing enjoyment of socio-economic rights or to prevent state interference in the enjoyment of such rights. In *Despatch Municipality v Sunridge Estate and Development Corporation*,⁸² the High Court declared that, in light of section 26(3) of the constitution, section 3B of the Prevention of Illegal Squatting Act,⁸³ which permitted the demolition and removal, also by the state, without a court order of shelters illegally erected on land, was 'no longer of application', effectively invalidating the provision.⁸⁴ In *Jaftha v Schoeman; Van Rooyen v Stoltz*,⁸⁵ the Constitutional

⁸⁰ n 56 above. See eg *Port Elizabeth Municipality* (n 27 above).

⁸¹ *Bon Vista* (n 29 above).

⁸² 1997 4 SA 596 (SE).

⁸³ Act 52 of 1951.

⁸⁴ *Despatch* (n 82 above) 611B - C/D. The Prevention of Illegal Squatting Act has since been repealed in its entirety. See sec 11(1) read with Schedule I of PIE (n 27 above).

⁸⁵ n 37 above.

Court found that provisions of the Magistrates' Courts Act⁸⁶ that allowed, without adequate judicial oversight, the sale in execution of a person's home to make good a judgment debt, breached, without justification,⁸⁷ the negative duty to respect the right of everyone to have access to adequate housing. The Court proceeded to read words into the statute to make provision for appropriate judicial oversight.⁸⁸ Most recently, in *Olivia Road*, the Constitutional Court held that provisions of the National Building Regulations and Building Standards Act⁸⁹ that allowed occupants of unsafe buildings to be coerced to vacate those buildings with the threat of criminal sanction, without an order of court, contravened section 26(3) of the constitution. The Court read words into the statute so that the criminal sanction could only follow once an eviction order had been handed down by a court.⁹⁰

Two examples of where state *conduct* was challenged as in breach of the duty to respect a socio-economic rights are *Ross v South Peninsula Municipality*⁹¹ and, again *Olivia Road*. In *Ross* the Cape High Court relied directly on section 26(3) of the constitution to deny a local authority an eviction order, as the granting of such an order would not have been just and equitable in all the circumstances.⁹² Equally, in *Olivia Road* the Constitutional Court denied an application for an eviction order in circumstances where the eviction in question was not covered by the PIE Act.⁹³ Relying on section 26(1) and (2) of the constitution, the Court held that the decision to evict the occupiers was taken without all relevant circumstances having been considered – the City of Johannesburg had neglected to consider the fact that

⁸⁶ Sec 66(1)(a) of the Magistrates' Courts Act (n 43 above).

⁸⁷ The possible justification of this breach was considered by the Court in terms of the sec 36(1) proportionality test; *Jaftha* (n 43 above) para 34.

⁸⁸ *Jaftha* (n 43 above) paras 61 - 64.

⁸⁹ n 46 above.

⁹⁰ *Olivia Road* (n 14 above) para 49 – 50.

⁹¹ n 102 above.

⁹² As outlined above, *Ross* was overturned by the Supreme Court of Appeal in *Brisley* (n 49 above). However, it remains as one example where state conduct interfering in the existing enjoyment of a socio-economic right was tested against that right and found to be wanting.

⁹³ n 27 above.

the eviction would leave the occupiers without shelter – and thus set aside the decision on administrative law grounds.⁹⁴

Section 27(3), the right not to be refused emergency medical treatment, can perhaps also be interpreted to give expression to the state's duty to respect socio-economic rights by refraining from interfering in their existing exercise. In *Soobramoney*, the Constitutional Court held this right only required the state not to refuse arbitrarily emergency medical treatment there where it exists⁹⁵ - an inordinately restrictive reading, which, as Alston and Scott have pointed out, render the right virtually redundant.⁹⁶ A matter which at this stage remains unclear is the question whether or not section 27(3) of the constitution could also be used to prohibit the state from disestablishing an emergency medical service at a public health institution to save costs.⁹⁷

(b) Cases involving the duty to mitigate the impact of interferences in the exercise of socio-economic rights

The duty to respect socio-economic rights of course does not absolutely prohibit the state from interfering in the existing exercise of such rights - there are many instances in which it is simply unavoidable for the state to do so, often to advance the public interest in some respect or to protect the rights of others. In such cases, the duty to respect requires that an effort be made to mitigate the effect of the interference in the enjoyment of the right in question, by providing some form of alternative access to it. This element of the duty to respect socio-economic rights is potentially quite burdensome and often requires the expenditure of significant resources and significant adjustments in policy. Nevertheless, our courts have shown themselves to be willing to enforce this duty in a robust fashion. The security of tenure laws referred to above again provide a good example of how this constitutional duty has been translated into

⁹⁴ *Olivia Road* (n 14 above) para 48. See also *Mazibuko* (n 14 above) where a decision to discontinue water services through the introduction of a pre-paid water meter system was held to have breached the rights to have access to adequate water and administrative law procedural fairness guarantees.

⁹⁵ n 9 above paras 19 - 21.

⁹⁶ P Alston & C Scott 'Adjudicating constitutional priorities in a transnational context: a comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206 245 - 248.

⁹⁷ Liebenberg (n 8 above) 21.

a statutory entitlement of sorts. These laws, in some instances, require courts to consider to what extent suitable alternative land is available for evictees before granting an eviction order and an eviction order can be denied if such an alternative is absent.⁹⁸ A recent case decided in terms of PIE illustrates the scope and nature of this aspect of the duty to respect socio-economic rights in the context of statutory protection of those rights and indicates the robust manner in which courts are willing to interrogate whether or not this duty has been met. In *Port Elizabeth Municipality v Various Occupiers*,⁹⁹ the state had applied for an order to evict illegal occupants from privately owned land in terms of section 6 of PIE. Section 6 allows a court to grant such an order, but only if it is just and equitable to do so, taking into account various factors, including 'the availability to the unlawful occupier of suitable alternative accommodation or land'.¹⁰⁰ The Constitutional Court confirmed the Supreme Court of Appeal's decision denying the eviction order.¹⁰¹ The Court held that section 26(3) of the constitution, mediated through section 6 of PIE, required the state, when it seeks to evict, to provide suitable alternative accommodation to the evictees. This duty would not be operative in all cases of state sponsored eviction.¹⁰² A court would have to decide whether or not to enforce this duty on the basis of a consideration of each case's 'own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible'.¹⁰³ To decide whether or not the duty applies, the Court looked in general terms at the position and the conduct of the occupiers, at the conduct of the municipality in its management of the matter and at the conduct of the landowners in question. The fact that the occupiers in this case had lived on the land in question for a

⁹⁸ In respect of ESTA (n 20 above), see secs 9(3)(a), 10(2) & (3) & 11(3); in respect of PIE (n 27 above), see sec 6(3)(b).

⁹⁹ n 27 above.

¹⁰⁰ PIE (n 27 above), sec 6(3)(c).

¹⁰¹ The Supreme Court of Appeal decision is reported as *Baartman v Port Elizabeth Municipality* 2004 1 SA 560 (SCA).

¹⁰² *Port Elizabeth Municipality* (n 27 above) para 58: 'The availability of suitable alternative accommodation is a consideration in determining whether it is just and equitable to evict the occupiers, it is not determinative of that question.' See also para 28: 'There is therefore no unqualified duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available.'

¹⁰³ As above para 31.

long period of time;¹⁰⁴ that they would be severely affected by any eviction;¹⁰⁵ that they had occupied the land, not in order to force the municipality to provide to them, in preference to others, alternative land when they are eventually evicted, but because they had been evicted from elsewhere and had nowhere else to go;¹⁰⁶ that there was ‘no evidence that either the municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use’;¹⁰⁷ and that the municipality had made no serious effort to reach an amicable conclusion to the matter, but had rushed to apply for an eviction order and had acted unilaterally,¹⁰⁸ drove the Court to the conclusion that an eviction order could not be granted unless suitable alternative land or accommodation was provided. The municipality had indeed offered to allow the occupiers to move to two possible alternative sites. However, the Court went as far as to find that neither of those sites were suitable, most importantly because the municipality could not guarantee to the evictees security of tenure if they were moved there.¹⁰⁹ As a result, the occupiers were allowed to remain on the land in question.¹¹⁰

The robust manner in which the Constitutional Court saw fit to deal with this element of the duty to respect socio-economic rights in *Port Elizabeth Municipality* could certainly in part be explained by the fact that the Court was enforcing a statutory duty in terms of PIE. However, there are also indications in the case law that courts are willing to enforce this burdensome element of the duty to respect against the state even where a statutory duty to this effect does not apply. In *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd*,¹¹¹ the Supreme Court of Appeal was confronted with a claim brought by a private landowner, that the state was constitutionally obliged, in order effectively to protect his constitutional right to property, to enforce and carry out an eviction order that he had obtained in terms of section 4 of PIE against a large group of

¹⁰⁴ As above paras 27, 28, 49 & 59.

¹⁰⁵ As above paras 30 & 59.

¹⁰⁶ As above paras 49 & 55.

¹⁰⁷ As above para 59.

¹⁰⁸ As above paras 45, 55 - 57 & 59.

¹⁰⁹ As above para 58.

¹¹⁰ As above para 59.

¹¹¹ n 69 above.

squatters illegally occupying his land. The Court held that the state was indeed obliged to protect the claimant's right to property against invasion by unlawful occupiers.¹¹² However, at the same time, the state was obliged to protect the right of the squatters to have access to adequate housing.¹¹³ On the facts of the particular case, the Court held that this meant that the state, were it to execute the eviction order against the squatters, would have to act 'humanely'. This meant *inter alia* that the state could not evict the squatters unless it 'provide[d] some [alternative] land'.¹¹⁴ This conclusion led to the Court eventually ordering the state to pay damages to Modderklip to make good the breach of its right to property and its failure to protect against that breach,¹¹⁵ and *to allow the squatters to remain on Modderklip's land until alternative land is made available to them by the state*.¹¹⁶ In effect, the order required the state to rent the land so that the squatters could remain there, without continuing to infringe Modderklip Boerdery's property rights.¹¹⁷ The Court made this intrusive order without considering in any meaningful way the substantial resource consequences that its decision would have for the state and the extent to which its order prescribes a particular policy option to the state, in preference to others. This robust approach, as was the case in *Port Elizabeth Municipality*, is justified by the Court with reference to the conduct of the state, the landowner and the squatters during the course of the dispute. The Court points out that the state, despite the holding in *Grootboom*¹¹⁸ that it must introduce measures to take account of the needs of those in housing crisis, still had no measures in place to deal with the plight of people such as the Modderfontein squatters.¹¹⁹ The Court also highlights the fact that the state had, despite various opportunities to do so,

¹¹² As above para 21.

¹¹³ As above para 22.

¹¹⁴ As above para 26.

¹¹⁵ As above paras 43 & 52. The amount of damages would be determined at a separate inquiry into damages (para 44).

¹¹⁶ As above paras 43 & 52. This order was confirmed by the Constitutional Court when the case went on appeal in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 5 SA 3 (CC) (*Modderklip CC*), but the Court did not rely on either sec 25 or sec 26 to reach its decision, basing it instead on the principle of rule of law and the right to access to court.

¹¹⁷ Although expressly indicating that it would not be proper for it to order the state to expropriate the land in question (n 71 above, para 41), the Court does point out that, in light of its order, it would be the sensible thing for the state to do, indeed to expropriate the land (para 43).

¹¹⁸ n 28 above.

¹¹⁹ n 69 above, para 22. See also in this respect *Rudolph* (n 30 above) 77B - 84H.

failed to attempt to solve the dispute between the squatters, the landowner and itself. The state had failed diligently to pursue a settlement and had reneged on agreements reached,¹²⁰ despite the fact that it had itself caused the predicament of the squatters and the landowner, by previously evicting the squatters from state land without providing alternative accommodation.¹²¹ As such, to some extent, it had made its own bed and now had to lie in it. The conduct of both the squatters and the landowner had, in contrast to the state's, been exemplary. The landowner had at all times acted within the law and had throughout sought to effect an amicable solution that would vindicate both his and the occupiers' rights.¹²² The squatters had occupied the land without intending to force the hand of the state to provide them with land in preference to others and had also sought to reach an amicable solution both with the landowner and the state.¹²³

(c) Refraining from impairing access to socio-economic rights

The duty to respect socio-economic rights is also violated if the state places obstacles in the way of people gaining access to basic resources or in the way of people enhancing their existing access to such resources. The most obvious way in which the state can fail in this duty is if it arbitrarily refuses to provide access to a basic resource that it has the capacity to provide. In, for example, *Soobramoney*,¹²⁴ the Constitutional Court held section 27(3) of the constitution, the right not to be refused emergency medical treatment, to impose a duty on the state not arbitrarily to refuse access to such treatment, there where it exists.¹²⁵ Both *Treatment Action Campaign*¹²⁶ and *Khosa*,¹²⁷ were decided by the Constitutional Court as cases of infringements of the positive duty to fulfil the rights to have access to health care services and social assistance respectively. However, these cases in fact also offer examples of the state breaching the duty to respect those rights by refusing to provide access to a resource that it has the

¹²⁰ As above paras 35 - 38.

¹²¹ As above para 35.

¹²² As above paras 33, 37 & 38.

¹²³ As above para 25.

¹²⁴ n 9 above.

¹²⁵ This interpretation leaves very little, if any, work for the sec 27(3) right that other rights (such as the prohibition on unfair discrimination) and other ordinary legal remedies (such as the rules of the administrative law) do not in any event do; see Alston & Scott (n 96 above).

¹²⁶ n 6 above.

¹²⁷ n 10 above.

capacity to give. In *Treatment Action Campaign*, the policy decision not to make Nevirapine available generally at public health facilities to prevent mother-to-child transmission of HIV at birth was in fact a refusal by the state to provide essential health care to pregnant, HIV-positive women, and not only a failure by the state suitably to extend health care provision to those women.¹²⁸ Equally, in *Khosa*, the provisions of the Social Assistance Act¹²⁹ excluding permanent residents and their children from access to social assistance benefits were a legislative refusal to provide these benefits to them.

A recent case in which this aspect of the duty to respect socio-economic rights was implicitly at issue is *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*.¹³⁰ This case involved a claim of an indigent disabled woman for arrears on a disability grant owed her by the state. The state raised the defence of prescription, arguing that she had brought the case to court only after the prescribed extinctive prescription period had lapsed. Yacoob J raised the question whether or not it would ever be constitutionally sound for the state to rely on prescription to avoid paying to an indigent disabled person arrears otherwise due to her on a disability grant.¹³¹ However, he declined to decide this issue, as it was possible for him to hold on the facts of the case that prescription had not indeed run. Nevertheless, the issue he raised in this way provides an example of a possible breach of this aspect of the duty to respect socio-economic rights. The relevant provisions of the Prescription Act¹³² in effect operate as obstacles to the enforcement of the right to have access to social assistance.

Perhaps a less obvious way in which this element of the duty to respect can be breached by the state is where the state impairs access to a basic resource through its administrative inefficiency. In *Mashava v The President of the Republic of South Africa*,¹³³ the Constitutional Court confirmed an order of the

¹²⁸ Liebenberg (n 8 above) 19.

¹²⁹ n 10 above.

¹³⁰ n 4 above. For an earlier case involving prescription of a claim for damages resulting from medical negligence, see *Truter v Deysel* (n 4 above)

¹³¹ As above para 42.

¹³² Act 68 of 1969.

¹³³ n 15 above.

High Court that a presidential proclamation¹³⁴ assigning the administration of the Social Assistance Act¹³⁵ to provincial governments was invalid. Although the validity of the proclamation was challenged on the argument that the president, in terms of the transitional arrangements in the interim constitution and the allocation of legislative and executive powers between provinces and national government, was not competent to make the assignment,¹³⁶ the case was motivated by the fact that the assignment resulted in the right of access to social assistance of persons eligible for social assistance grants being impaired. The plaintiff was an indigent disabled person who had applied for and been awarded a disability grant, but who, for a period of more than a year after his successful application, did not receive the grant from the Limpopo department of health and welfare.¹³⁷ It was clear that the failure to pay to the plaintiff the grant to which he was entitled was caused by the administrative incapacity of the provincial Department of Health and Welfare and by the fact that the administration of the social welfare system in the province was woefully under-resourced, due to 'demands for the reallocation of social assistance monies to other [provincial] purposes'.¹³⁸ The plaintiff contended that the Social Assistance Act (and the payment of his disability grant) could be administered more efficiently and on a more equitable basis by the national government than by the provinces. As a result, the assignment of the administration of the Social Assistance Act to the provinces constituted a negative impairment of the right to have access to social assistance. In effect, therefore, the decision of the Constitutional Court invalidating the assignment is a decision that the state must give effect to the duty to respect the right to have access to social assistance, by removing an impediment to its effective exercise.

¹³⁴ Proclamation R7 of 1996, *Government Gazette* 16992 GN R7, 23 February 1996. The assignment was made in terms of sec 235 of the interim constitution.

¹³⁵ n 9 above.

¹³⁶ *Mashava* (n 15 above) para 1.

¹³⁷ As above para 9.

¹³⁸ As above para 10.

2.3.2.2 Cases involving the duty to protect socio-economic rights

The duty to protect socio-economic rights requires the state to protect the existing enjoyment of these rights, and the capacity of people to enhance their enjoyment of these rights or newly to gain access to the enjoyment of these rights, against third party interference.

Courts can, in a number of important ways, act so as to protect socio-economic rights. In the first place, courts can protect socio-economic rights by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.¹³⁹ This protective role of courts has been illustrated in *Minister of Public Works v Kyalami Ridge Environmental Association*.¹⁴⁰ In this case, a state decision temporarily to house destitute flood victims on the (state-owned) grounds of a prison outside Johannesburg, was challenged by surrounding property owners as in violation of their administrative justice rights. The challenge was in part based on the argument that the decision was unlawful, as the minister of public works had no statutory authority to take such a decision. The Court rejected this argument, primarily because it held that the minister had the requisite power to take the decision by virtue of the state's common law rights as property owner,¹⁴¹ but also because the decision was taken in furtherance of a constitutional duty to provide shelter to those in dire straits.¹⁴² Through its decision, the Court effectively protected the right to have access to adequate housing of the flood victims against private interference. Similarly, in *City of Cape Town v Rudolph*,¹⁴³ the Cape High Court rejected a property-based constitutional challenge to the security of tenure law PIE.¹⁴⁴ The Court held that PIE authorised neither the arbitrary deprivation¹⁴⁵ nor the expropriation of property,¹⁴⁶ and as such did not infringe property rights. The decision was

¹³⁹ See, in general, CH Heyns 'Extended medical training and the constitution: balancing civil and political rights and socio-economic rights' (1997) 30 *De Jure* 1.

¹⁴⁰ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC). See in this respect Budlender (n 61 above) 36.

¹⁴¹ As above para 40.

¹⁴² As above paras 37 - 40.

¹⁴³ n 30 above.

¹⁴⁴ n 27 above.

¹⁴⁵ *Rudolph* (n 30 above) 72J & 74G.

¹⁴⁶ As above 73F.

partly based on the finding that the state was at the very least authorised, but probably obliged by the constitution to enact legislation such as PIE, in order to give effect to the right to have access to adequate housing and the prohibition on arbitrary evictions.¹⁴⁷

Courts can also protect socio-economic rights through the exercise of their law-making powers in interpreting legislation and developing the rules of common law. As pointed out above, courts are constitutionally obliged to interpret legislation and develop rules of common law in such a way that the 'spirit, purport and objects' of the bill of rights are promoted.¹⁴⁸ Courts are in other words required to infuse legislation and the common law with the value system underlying the constitution - to read the rights in the bill of rights and the values underlying them into the existing law. This power of courts to engage constitutionally with the existing (common and statutory) law is, particularly with respect to the common law, potentially an extremely important, but unfortunately as yet much neglected way in which socio-economic rights can be advanced. In a private ownership economy such as ours, common law background rules of property and transaction centrally determine access to and distribution of basic resources.¹⁴⁹ Although the development of constitutional socio-economic rights so as to establish new and unique constitutionally based remedies certainly is an important endeavour on its own, to explore the full transformative potential of socio-economic rights, sustained critical engagement, also with these common law background rules, is crucial. Experience with welfare rights campaigning in the United States, for example, has shown how a focus on the development of constitutional protection for welfare rights¹⁵⁰ at the expense of an adequately critical engagement with the common law background rules has, in the

¹⁴⁷ As above 74H - 75J.

¹⁴⁸ See sec 39(1) of the constitution.

¹⁴⁹ Simon (n 26 above) 1433 - 1436; Williams (n 26 above) 575 - 577. See in this respect also Sen (n 1 above) 166, who writes that access to food (and I would add other basic resources) is most importantly determined by 'a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc)', and that these legal relations, or the law itself quite literally 'stand between' such resources and those in desperate need of them.

¹⁵⁰ The focus of this movement, which reached its zenith in the Supreme Court decision of *Goldberg v Kelly* (n 20 above), was obtaining for statutory welfare rights the same kind of due process protection as that afforded property and other basic personal rights. See Williams (n 26 above) 571 - 575 for an overview.

struggle for social justice, been counter-productive in the longer term, because it sublimates deep political questions regarding distribution of basic resources.¹⁵¹ In South Africa, some of these common law background rules have of course been significantly adapted through legislation - the impact of the different security of tenure laws on private property rights is a case in point.¹⁵² However, courts retain an important responsibility to extend the protection afforded socio-economic rights in the 'ordinary' law, through their powers of interpretation of legislation and development of common law.

Courts have readily engaged with legislation in attempts to broaden the protection of socio-economic rights. So, for instance, the Labour Tenants Act¹⁵³ and ESTA,¹⁵⁴ both primarily intended to protect what formerly were weak rights to land against private interference, have in various respects been interpreted by courts so that their protection also extends to other rights, such as the right to food.¹⁵⁵ In addition, the decision of the Constitutional Court in *Jaftha v Schoeman*¹⁵⁶ provides an interesting example of how courts can, when dealing with legislation, advance the duty to protect socio-economic rights. In *Jaftha*, the Court considered provisions of the Magistrates' Courts Act¹⁵⁷ that authorised under certain circumstances, without proper judicial oversight, the sale in execution of the home of a debtor to satisfy a judgment debt. On the basis of the section 26(1) right of everyone to have access to adequate housing, the Court, through a combination of interpretation and of

¹⁵¹ Williams (n 26 above) 581 - 582; Simon (n 26 above), 1486 - 1489.

¹⁵² See sections 4.1.1 & 4.1.2 above. See also AJ Van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land reform legislation' 2002 *Journal for South African Law* 254.

¹⁵³ Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act).

¹⁵⁴ n 20 above.

¹⁵⁵ The Land Claims Court has in a number of cases, dealing with either ESTA (n 20 above) or the Labour Tenants Act (n 153 above), for example interpreted the term 'eviction' broadly so as to extend not only to interference with occupation of land for purposes of shelter, but also to landowner interference with activities on land through which people gain access to food (eg grazing and watering rights). See eg in this respect, re ESTA, *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust* [2003] JOL 10996 (LCC) para 4; and, re the Labour Tenants Act, *Van der Walt v Lang* 1999 1 SA 189 (LCC) para 13 and *Zulu v Van Rensburg* 1996 4 SA 1236 (LCC) 1259. See also *In re Kranspoort Community* 2000 2 SA 124 (LCC) (Land Claims Court interpreting the term 'rights in land' in the Restitution of Land Rights Act 22 of 1994 to include also 'beneficial occupation', so that the long term use of land for grazing and cultivation purposes also constitutes such a right in land that can be reclaimed).

¹⁵⁶ n 43 above.

¹⁵⁷ n 43 above. See sec 66(1)(a).

reading words into the Act, adapted the Act so that a judgment debtor's home can only be sold in execution if a court has specifically ordered so after considering all relevant circumstances.¹⁵⁸ *Jaftha* was argued and decided on the basis of the negative duty to respect the right to have access to adequate housing.¹⁵⁹ However, in effect, the Court's order amounts to an instance of interpretative lawmaking through which the court introduces into the Magistrates' Courts Act a measure of *protection* for the right to housing - the Court gave effect to its duty to protect that right. In addition, the judgment has opened the door for further court driven development in this respect. Although *Jaftha* involved only the protection of a judgment debtor's home and right to have access to adequate housing against sale in execution, in future cases where a creditor seeks the sale in execution of immovable property that a judgment debtor uses, for example, to produce food, courts can certainly extend the Constitutional Court's reasoning. The fact that the immovable property is the debtor's means with which to exercise the right to food must also be considered relevant to the decision whether or not to allow its sale in execution. In this way courts could further develop the law to protect judgment debtors' right to food against interference from creditors.¹⁶⁰

Courts have been far less active in engaging with the common law so as to enhance the protection of socio-economic rights than they have been with respect to legislation.¹⁶¹ In those few cases where the courts have been asked

¹⁵⁸ *Jaftha* (n 43 above) paras 61 - 64 & 67. The factors that the Court lists that should be considered are: 'the circumstances in which the debt was incurred; ... attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt *and any other factor relevant to the ... facts of the case ...*' (para 60) (my emphasis).

¹⁵⁹ As above paras 17, 31 - 34 & 52. See also the discussion in sec 4.1.1 above.

¹⁶⁰ The judgment suggests this possibility. The list of factors provided by the Court to take account of when considering whether to allow sale in execution of immovable property is not exclusive. The Court explicitly stated that any other factor that, on the facts of the case before it, is relevant, must be considered (para 60). The Court also emphasised that the severe impact that the execution process could have on the human dignity of a judgment debtor and on a judgment debtor's capacity to have access to the basic necessities of life importantly influenced its decision (paras 21, 25 - 30, 39 & 43). Certainly, the impact on an indigent person's human dignity and basic survival interests of the attachment and sale in execution of immovable property that the person uses to produce food for own use is comparable to the impact of the sale in execution of such a person's home.

¹⁶¹ This is certainly due in the first place to the fact that, except in the area of eviction law (see eg *Brisley* (n 49 above)), few such cases have been brought to court. Second, courts have in those few cases where the development of the common law to protect socio-economic rights

to develop the common law so as better to give effect to socio-economic rights, they have declined. In *Afrox Healthcare Bpk v Strydom*,¹⁶² the Supreme Court of Appeal was invited to develop the common law of contract so that disclaimers in hospital admission contracts indemnifying the hospitals against damages claims on the basis of the negligence of their staff would be seen as in conflict with the public interest and consequently unenforceable. The argument was that such disclaimers had the effect that patients were not adequately protected against unprofessional conduct at such hospitals and that they as such constituted an impairment of access to health care services.¹⁶³ This argument was rejected and the common law position remained intact.¹⁶⁴ Equally, in *Brisley*,¹⁶⁵ the Court declined to develop the common law of eviction in line with section 26(3) of the constitution. More recently, in *Tswelopele*¹⁶⁶ the Supreme Court of Appeal was asked to develop the common law figure of spoliation such that a victim of an unlawful eviction who had not only been removed from the land in question but whose property had been destroyed in the course of such eviction, could claim restitution both of occupation and of the destroyed property. The Court, per Cameron JA, declined the invitation, instead handing down an order based on section 26 of the constitution that the destroyed property of the evictees be restored to them. Although, in other words, the evictees received more or less the relief they sought, the decision illustrates the unwillingness of our courts to develop common law rules so as to give effect to socio-economic rights.¹⁶⁷ *Olivia Road* possibly represents a departure from this trend. As indicated above, in *Brisley* the Supreme Court of Appeal held that section 26(3) of the constitution

did come into play, readily deferred to the legislature rather than drive the development themselves; as pointed out above (section 3.2.2), whereas in *Brisley* the Supreme Court of Appeal was unwilling itself to develop the common law so as to extend the protection of sec 26(3) to unlawful occupants who 'hold over', it was willing to do so in *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA) by extending the legislative protection afforded other unlawful occupiers.

¹⁶² n 52 above.

¹⁶³ As above para 21.

¹⁶⁴ For critiques of this aspect of the judgment, see D Brand 'Disclaimers in hospital admission contracts and constitutional health rights' (2002) 3:2 *ESR Review* 17 - 18; PA Carstens & JA Kok 'An assessment of the use of disclaimers against medical negligence by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations' (2003) 18 *SA Public Law* 430; D Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*' (2002) 17 *SA Public Law* 473.

¹⁶⁵ n 49 above.

¹⁶⁶ n 53 above.

¹⁶⁷ See Van der Walt (n 53 above) for a critique of the case.

does not require the development of the common law rules of eviction so that courts would acquire a discretion, exercised on the basis of a consideration of all relevant circumstances, whether or not to grant an eviction or upon application.¹⁶⁸ In *Olivia Road*, which dealt with an eviction that was not covered by the PIE Act and to which section 26(3) in other words applied, Yacoob J held one circumstance relevant to the decision of a court whether or not in terms of section 26(3) of the constitution to grant an eviction order to a municipality is whether the municipality had made reasonable efforts to engage meaningfully with the evictees before applying for an eviction order.¹⁶⁹ In its assumption that, in eviction cases where PIE does not apply, section 26(3) requires courts to consider all relevant circumstances, Yacoob J seems implicitly to have developed the common law rules of eviction to confer an equitable discretion on courts and so to have overruled *Brisley*.¹⁷⁰

One example of where courts were willing to develop the common law so as to protect socio-economic rights is the case of *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*.¹⁷¹ *Ngxuza* dealt with a class action claim brought in terms of section 38 of the constitution by a number of social assistance grantees for the reinstatement of disability grants that had unlawfully been terminated by the Eastern Cape Province. The respondents in the case had been granted leave to proceed with such a class action claim by the court *a quo*. The province appealed against this grant of leave to the Supreme Court of Appeal. The Supreme Court of Appeal, in the absence of any legislative form having been given to section 38's provision for class actions, proceeded to develop the common law of standing to make provision for such claims. Although the decision certainly opens the door for class action claims, at least where any constitutional right is at play, it is centrally important for the protection of particularly socio-economic rights. As Cameron JA (as he then was) states at the outset of the judgment, for the Court: 'The law is a scarce resource in South

¹⁶⁸ *Brisley* (n 49 above).

¹⁶⁹ *Olivia Road* (n 14 above) para 18.

¹⁷⁰ This advance has a hollow ring, however. Subsequent to the Supreme Court of Appeal's decision in *Ndlovu* (n 161 above), I can think of no other cases of eviction from homes than that at issue in *Olivia Road* that would not be subject to the PIE Act.

¹⁷¹ 2001 4 SA 1184 (SCA).

Africa. This case shows that justice is even harder to come by. It concerns the way in which the poorest of the poor are to be permitted access to both.¹⁷²

2.3.2.3 The duty to fulfil socio-economic rights¹⁷³

(a) Background

The duty to fulfil socio-economic rights requires the state to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures'¹⁷⁴ so that access to basic resources is extended and enhanced - in sum, it must act affirmatively to realise the rights. The state breaches the duty to fulfil not when it invades the existing exercise of socio-economic rights, but when it does not do enough, or does not do the appropriate things fully to realise those rights. For courts to enforce the duty to fulfil requires them directly to evaluate state policy and practice, to decide whether or not those are adequate measures to realise the socio-economic rights in question. Courts are constrained in this evaluation by concerns about technical capacity and institutional legitimacy and by a perceived absence of justiciable standards against which to assess state performance.¹⁷⁵ To deal with these difficulties, the Constitutional Court has used a traditional model of judicial review,¹⁷⁶ but has given it new content. As with any breach of any other right, when it is alleged that the duty to fulfil a socio-economic right has been breached, where *prima facie* such a breach is established, the Court considers whether or not it can be justified. However, the Court has developed a special test or standard against which to evaluate the justifiability of state measures to fulfil socio-economic rights that allows it, in different ways, to mediate its concerns with capacity and legitimacy. Which standard of scrutiny applies to breaches of the duty to fulfil socio-economic rights depends on which socio-economic rights are at issue.¹⁷⁷ If the duty to fulfil a *basic socio-economic right* (children's rights, rights of detainees, or the right to basic

¹⁷² n 171 above, para 1.

¹⁷³ I discuss the duties to promote and fulfil as one duty although various understandings of the duty to promote as distinct from the duty to fulfil have been proposed.

¹⁷⁴ Committee on ESCR General Comment No 14 (n 58 above) para 33.

¹⁷⁵ See 150 - 151 below.

¹⁷⁶ As suggested by Mureinik in an early article; E Mureinik 'Beyond a charter of luxuries: economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* 464.

¹⁷⁷ See 100 - 103 above.

education) is breached, the section 36(1) proportionality standard applies. As the Court has as yet decided no case on the basis of a basic socio-economic right,¹⁷⁸ it is unclear how this standard will operate in the context of socio-economic rights.¹⁷⁹ If the duty to fulfil a *qualified socio-economic right* is breached, that breach can be justified only in terms of a special standard of scrutiny - the Court's 'reasonableness' standard - developed on the basis of the internal limitation clause attached to these rights.¹⁸⁰

(b) Reasonableness review

The Constitutional Court has described its 'reasonableness' standard of scrutiny in five cases. In *Soobramoney v Minister of Health, KwaZulu-Natal*,¹⁸¹ it denied an application for an order that a state hospital provide dialysis treatment to the applicant, finding that the guidelines according to which the hospital decided whether to provide the treatment were not unreasonable¹⁸² and were applied rationally and in good faith to the applicant.¹⁸³ As such, the Court held that the denial of treatment did not breach the section 27(1) right of everyone to have access to health care services.¹⁸⁴ In *Government of the*

¹⁷⁸ It could have, but did not do so in both *Grootboom* (n 28 above) and *Treatment Action Campaign* (n 6 above).

¹⁷⁹ In *B v Minister of Correctional Services* 1997 6 BCLR 789 (C), although finding that detainees' right to adequate medical treatment (a basic socio-economic right) had been breached, the High Court did not explicitly consider the justification for that breach (but see paras 48 - 58, where the Court considers whether the breach can be condoned due to resource constraints). See further in this respect Liebenberg (n 8 above) 55 - 57.

¹⁸⁰ This seems to be so also where a positive duty to fulfil is sourced in sec 27(3), ie where an argument is made that in terms of this right, emergency medical services have to be established at an institution where they do not exist. In *Soobramoney* (n 9 above), the Court held that sec 27(3) only entitled one not to be refused treatment *where it is available* (see n 227 below). However, the Court intimated that, should a positive duty be read into this right, it would be subject to the sec 27(2) internal limitation; para 11; see also Liebenberg (n 8 above) 20.

¹⁸¹ As above.

¹⁸² As above paras 24 - 28.

¹⁸³ As above para 29.

¹⁸⁴ As above para 36. The application was argued around the sec 27(3) right not to be refused emergency medical treatment and a reading of the right to life in terms of which the state is required to keep the applicant alive. The court denied the application in these respects, holding that, because health care rights were explicitly protected in the constitution, it was unnecessary to give such an interpretation to the right to life (para 19) (Pieterse (n 9 above)) and that sec 27(3) did not apply to the applicant's case, because his was not an emergency situation (para 21) and sec 27(3) was a right not arbitrarily to be refused emergency medical treatment *where it was available*, instead of a positive right to make available emergency medical treatment where it was not (para 20) (see Alston & Scott (n 96 above)). Having disposed of these two arguments, the Court on its own initiative proceeded to consider the claim on the basis of sec 27(1) (para 22).

Republic of South Africa v Grootboom,¹⁸⁵ the Court heard a claim that the state was obliged to provide homeless people with shelter. It declared the state's housing programme inconsistent with section 26(1) of the constitution.¹⁸⁶ In *Minister of Health v Treatment Action Campaign*,¹⁸⁷ the Court held that the state's policy not to provide Nevirapine at all public health facilities to prevent the mother-to-child transmission (MTCT) of HIV at birth, as well as the general failure by the state to adopt an adequate plan to combat MTCT of HIV breached section 27(1) of the constitution. The Court held that the state's measures to prevent MTCT of HIV breached its duties in terms of section 27(1) of the constitution,¹⁸⁸ and declared as much and directed the state to remedy its programme.¹⁸⁹ In *Khosa v Minister of Social Development*,¹⁹⁰ the Court held sections of the Social Assistance Act¹⁹¹ excluding permanent residents from access to social assistance grants inconsistent with section 9(3) (the prohibition on unfair discrimination)¹⁹² and section 27(1)(c) (the right to have access to social assistance)¹⁹³ of the constitution. The Court read words into the Act to remedy the constitutional defect.¹⁹⁴ Finally, in *Olivia Road*¹⁹⁵ the Court denied an application for an eviction order and found inconsistent with the constitution provisions of the National Building Regulations and Building Standards Act,¹⁹⁶ on the basis not of the reasonableness test but section 26(3) of the constitution and administrative justice standards. Nevertheless, the Court described significant new aspects of the reasonableness test in the process of reaching its decision on these other bases.

Although the Court has as yet not been explicit about this, it is clear from these cases that the reasonableness standard is a shifting standard of

¹⁸⁵ n 28 above.

¹⁸⁶ As above para 95.

¹⁸⁷ n 6 above.

¹⁸⁸ As above para 95.

¹⁸⁹ As above para 135.

¹⁹⁰ n 10 above.

¹⁹¹ n 10 above.

¹⁹² *Khosa* (n 10 above) para 77.

¹⁹³ As above para 85.

¹⁹⁴ As above paras 89 & 98.

¹⁹⁵ n 14 above.

¹⁹⁶ n 46 above.

scrutiny. In *Soobramoney*, the Court applied a basic rationality and good faith test to the decision of the state not to provide renal dialysis treatment to the claimant.¹⁹⁷ In *Grootboom*¹⁹⁸ and *Treatment Action Campaign*,¹⁹⁹ the Court applied a more stringent means-end effectiveness test.²⁰⁰ In *Khosa*,²⁰¹ in turn, the Court applied a yet stricter proportionality test. The Court has not been explicit about which factors determine the strictness of its scrutiny,²⁰² but the cases indicate that the position of the claimants in society;²⁰³ the degree of deprivation they complain of and the extent to which the breach of right in question affects their dignity;²⁰⁴ the extent to which the breach in question involves undetermined, complex policy questions;²⁰⁵ and whether or not the breach also amounts to a breach of other rights,²⁰⁶ all play a role.²⁰⁷

The Court derives its reasonableness standard from the state's duty to take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of socio-economic rights. In describing this duty, the Court has described the standards against which to evaluate the state's measures. The Court has presented its reasonableness test as a means-end effectiveness test: in *Grootboom*, the Court indicated that the

¹⁹⁷ With respect to its evaluation of the guidelines according to which the state made this decision, the Court applied a stricter reasonableness test; *Soobramoney* (n 9 above) paras 23 - 28.

¹⁹⁸ n 28 above.

¹⁹⁹ n 6 above.

²⁰⁰ It is also clear that in *Treatment Action Campaign*, although the standard of scrutiny applied by the court was in formal terms the same as in *Grootboom*, the Court in fact scrutinised the state policy at issue there more rigorously than it did in *Grootboom*; Brand (n 79 above) 41.

²⁰¹ n 10 above.

²⁰² See for comparison *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 3 SA 265 (CC) para 127, where the Court lists factors that could play a role in determining the strictness of its scrutiny with respect to administrative law reasonableness review.

²⁰³ Whether they are a marginalised or especially vulnerable group; De Vos (n 12 above) 266.

²⁰⁴ *Khosa* (n 10 above) para 80.

²⁰⁵ In *Grootboom* (n 28 above), the issues were much less clearly delineated than in either *Treatment Action Campaign* (n 6 above) or *Khosa* (n 10 above). Also, in *Treatment Action Campaign*, many of the complex issues the Court had to consider (ie the safety/efficacy of Nevirapine and the availability of the necessary infrastructure to provide it properly) had either been determined by specialised bodies empowered to decide such issues (ie the Medicines Control Council), or the Court had dispositive evidence at its disposal with which to decide. In both the latter cases a stricter scrutiny was applied than in *Grootboom*.

²⁰⁶ In *Khosa* (n 10 above), the impugned provisions also breached sec 9(3). In applying this section, the Court uses a standard of scrutiny rising to the level of proportionality. It would make little sense to apply sec 27(2) to the same breach using a more lenient standard.

²⁰⁷ See also 240 - 251 below for a more extended discussion of this matter.

state's measures are evaluated to determine whether they are 'capable of facilitating the realisation of the right'.²⁰⁸ The Court has been at pains in all its judgments so far to emphasise that it does not test relative effectiveness, that it 'will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent', but will leave the 'precise contours and content of the measures to be adopted [to render a programme reasonable] ... [to] the legislature and the executive.'²⁰⁹ The Court quite obviously adopts this distinction between testing effectiveness and testing relative effectiveness to mediate its concern with its institutional capacity and legitimacy and to manage its relationship with the executive and the legislature. However, the distinction is in many cases a fiction. In *Grootboom*, the Court was clearly able to maintain it. The policy issue in question (how best to provide for the needs of the 'absolutely homeless') allowed for a wide variety of different possible solutions, so that the Court could simply declare that the housing programme was inconsistent with the constitution to the extent that it made no provision for the 'absolutely homeless', and leave the choice of specific solution to the state. By contrast, in *Treatment Action Campaign*,²¹⁰ and particularly in *Khosa*,²¹¹ the specificity of the policy issue that the Court evaluated was such that it did not allow this scope. The Court's finding in *Treatment Action Campaign* that the state's restriction of the provision of Nevirapine to the designated pilot sites breached section 27(1), ineluctably led to the state having to provide Nevirapine elsewhere, despite its unwillingness to do so.²¹² By the same token, in *Khosa*, the Court's finding of unreasonableness left no option but that permanent residents should be included in the social assistance scheme. Indeed the Court itself read words to this effect into the Social Assistance Act.²¹³ However, this fiction is useful as it allows the Court to enforce rights, without it

²⁰⁸ *Grootboom* (n 28 above) para 41.

²⁰⁹ As above.

²¹⁰ n 6 above.

²¹¹ n 10 above.

²¹² The Court did manage to soften the prescriptive edge of its finding and order, by directing that Nevirapine be provided only there where the attending physician and the superintendent of the facility in question opined that it was indicated; *Treatment Action Campaign* (n 6 above) para 135, para 3(b) of the order.

²¹³ *Khosa* (n 10 above) para 98.

having to admit to prescribing directly to the state. As such, it helps the Court avoid direct confrontation with the political branches.²¹⁴

The Court's reasonableness standard requires first that the state indeed act to give effect to socio-economic rights, and then requires that what the state does, meet a standard of reasonableness.

Having a plan

The Court's standard requires first that the state must devise and implement measures to realise socio-economic rights - it cannot do nothing.²¹⁵ Although these measures need realise the rights only *progressively* - the need for full realisation is deferred²¹⁶ - the state must have measures in place to realise these rights and must implement them. In addition, the state must show progress in implementing these measures and must be able to explain lack of progress or retrogression. Particularly any deliberate retrogression would be a *prima facie* breach, requiring convincing justification.²¹⁷

Reasonableness

Those measures that the state does adopt must be reasonably capable of achieving the realisation of the right in question.²¹⁸ To be judged as reasonable in this sense, the state's measures must meet at least the following basic standards:

*The measures must be comprehensive and co-ordinated.*²¹⁹ This means in the first place that the state's programme with respect to a right must address 'critical issues and measures in regard to *all* aspects' of the realisation of that

²¹⁴ See, with respect to a similar fiction operating in the context of the Court's engagement with resource allocation issues, T Roux 'Legitimizing transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92-98.

²¹⁵ Secs 26(2) & 27(2) are clearly mandatory provisions with respect to this basic point - 'the state *must* take ... measures ... to achieve the ... realisation of these rights' (my emphasis).

²¹⁶ *Grootboom* (n 28 above) para 45.

²¹⁷ As above. Deliberate retrogression breaches the negative duty to respect rights. As such it is subject for its justification to sec 36(1) rather than to the reasonableness scrutiny that applies uniquely to the positive duties imposed by qualified rights; see 100 and further above.

²¹⁸ *Grootboom* (n 28 above) para 41.

²¹⁹ As above para 39.

right.²²⁰ Using the right to food as an example, the Committee on ESCR has said that this requires the state to adopt measures with respect to the 'production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security', whilst at the same time taking care 'to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels'.²²¹ *Grootboom*, although decided on another basis, offers an example of a case where the state's measures to give effect to the right to housing were not sufficiently comprehensive to be reasonable. The state's mistake in *Grootboom* was that, despite having a programme to provide access to housing that the Constitutional Court described as 'a major achievement',²²² it had done nothing with respect to a critical aspect of the right to housing - it had no measures in place with which to provide shelter to people with no roof over their heads. As such, its housing programme was not comprehensive.²²³ The requirement of co-ordination simply holds that a programme must as a whole be coherent, such that responsibilities are clearly allocated to different spheres and institutions within government. To ensure that state measures are comprehensive and co-ordinated, the Committee on ESCR has suggested that states must adopt national strategies or plans of action,²²⁴ which may or may not be presented in national framework laws, through which to give effect to particular socio-economic rights.²²⁵ The Constitutional Court's references in *Grootboom* to the need for a 'national framework' with respect to housing provision, embodied in 'framework legislation'²²⁶ and to the need for a

²²⁰ Committee on ESCR General Comment 12 (n 58 above) para 25.

²²¹ As above.

²²² *Grootboom* (n 28 above) para 53.

²²³ And, according to the various courts' remarks in *Modderklip SCA* (n 69 above) para 22 and *Rudolph* (n 30 above) 77B - 84H, it was not comprehensive for a significant time after the decision in *Grootboom*.

²²⁴ See eg Committee on ESCR General Comment 12 (n 58 above) paras 21 - 30; General Comment 14 (n 58 above) para 43; General Comment 15 (n 58 above) paras 37 and 46 - 54.

²²⁵ See Committee on ESCR, specifically General Comment 12 (n 58 above) para 29 and General Comment 15 (n 58 above) para 50.

²²⁶ *Grootboom* (n 28 above) para 40.

‘coherent public housing programme’²²⁷ seem to endorse this suggestion by the Committee.²²⁸

Financial and human resources to implement measures must be made available. In *Grootboom* the Court stated that, for a programme to be reasonable, ‘appropriate financial and human resources [must be] available’.²²⁹ The Court has as yet not elaborated on this tantalising phrase. It is clear that the Court is loath to prescribe to the state how and on what it must spend its money - to tell it that it must expend resources so as to do something it did not plan on doing and does not want to do.²³⁰ However, this phrase does seem to indicate that the Court will not allow the state to adopt mere token measures: *where the state has itself decided and so undertaken to do something*, it is under a legal duty, which the Court would be able to enforce, to allocate the resources reasonably necessary to execute its plans. In *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*,²³¹ the plaintiffs had applied for the Social Relief of Distress Grant, but despite clearly qualifying for it, did not receive it. Their complaint was that although, in terms of the Social Assistance Act²³² and its regulations, provincial governments were required to provide the grant to qualifying individuals upon successful application, the North West Province had not dedicated the necessary human, institutional and financial resources to do so. The grant was consequently available on paper only, and not in practice. The case resulted in a settlement order that in essence required the province to dedicate the necessary human, institutional and financial resources to provide the grant. Specifically, it requires the province to acknowledge its legal responsibility to provide Social Relief of

²²⁷ As above para 41.

²²⁸ The South African government also seems to understand its duty to fulfil socio-economic rights in this manner. See eg the recent adoption by the Department of Agriculture, reacting to criticism from various quarters that no coherent and comprehensive plan through which to fulfil the right to food existed in South Africa, of the Integrated Food Security Strategy (a framework document seeking to create institutions through which the fulfilment of the right to food can be co-ordinated), coupled with its ongoing efforts to enact framework legislation in this respect.

²²⁹ n 28 above, para 39.

²³⁰ See below for a discussion of the court’s approach to scrutinising the state’s budgetary choices.

²³¹ n 22 above.

²³² n 10 above.

Distress effectively to those eligible for it and then to devise a programme to ensure its effective provision. This programme must enable it to process applications for Social Relief of Distress on the same day that they are received, must enable its officials appropriately to assess and evaluate such applications and must enable the eventual payment of the grant. Importantly, the province was ordered to put in place the necessary infrastructure for the administration and payment of the grant, *inter alia* by training officials in the welfare administration in the province.²³³

*The state's measures must be both reasonably conceived and reasonably implemented.*²³⁴ This element of the Court's reasonableness test is closely related to the requirement of 'reasonable resourcing' outlined above. Of course (also in terms of the understanding of 'progressive realisation' outlined above) it is not sufficient for the state merely to adopt measures on paper. These measures must also in fact be implemented effectively. The *Kutumela* case,²³⁵ described above in the context of adequate resourcing, also illustrates this element of the Court's reasonableness standard. In effect, the Court in *Kutumela* ordered the provincial government to implement a measure that existed in concept but not in practice.

The state's measures must be 'balanced and flexible', capable of responding to intermittent crises and to short-, medium- and long-term needs,²³⁶ may not exclude 'a significant segment of society',²³⁷ may not 'leave out of account the degree and extent of the denial' of the right in question and must respond to

²³³ See in this respect also *People's Union for Civil Liberties v Union of India* Writ Petition [Civil] 196 of 2001, available at http://www.righttofoodindia.org/mdm/mdm_scorders.html (accessed 31 October 2004), an Indian case dealing with an application in part directed at obtaining orders that the Indian government's existing measures at national and state level to address food insecurity and famine be effectively implemented. The complaint alleged, amongst other things that, although adequate food reserves existed in India, and although the state had adopted various measures to address food insecurity and famine, these measures were not implemented in part because state governments routinely diverted funds from national government, intended to implement them, to other needs. In response, the Indian Supreme Court has issued a number of interim orders requiring, among other things, that funds allocated from national level to state governments for use in public distribution of food and famine measures in fact be used for those purposes.

²³⁴ *Grootboom* (n 28 above) para 42.

²³⁵ n 22 above.

²³⁶ *Grootboom* (n 28 above) para 43.

²³⁷ As above.

*the extreme levels of deprivation of people in desperate situations.*²³⁸ These related requirements of flexibility and ‘reasonable inclusion’²³⁹ formed the basis for the Constitutional Court’s decisions in both *Grootboom* and *Treatment Action Campaign*. In *Grootboom*, the Court found that the state’s housing programme was inconsistent with sections 26(1) and (2) because it ‘failed to recognise that the state must provide relief for those in desperate need’.²⁴⁰ In *Treatment Action Campaign*, the Court held the state’s measures to prevent MTCT of HIV to be inconsistent with the constitution because they ‘failed to address the needs of mothers and their newborn children who do not have access’²⁴¹ to the pilot sites where Nevirapine was provided, and because the programme as a whole was ‘inflexible’.²⁴² In one sense, these different requirements all relate to the idea that the state’s programmes must be *comprehensive*. Any state programme designed to fulfil a socio-economic right, will be incomplete (and as such unreasonable) unless it includes measures through which short term crises in access to the right can be addressed and measures that ‘provide relief for those in desperate need’.²⁴³ However, the intriguing question raised by these requirements related to flexibility and reasonable inclusion, and particularly the Constitutional Court’s phrase in *Grootboom*, that a programme must take account of the degree and the extent of deprivation with respect to a right,²⁴⁴ is whether the Court’s reasonableness test in this respect requires state measures to prioritise its efforts, both with respect to temporal order and resource allocation, according to different degrees of need. Does the test require the state to engage in ‘sensible priority-setting, with particular attention to the plight of those in greatest need’?²⁴⁵ Roux has made a strong argument that it does not. He points out that the Court’s finding in *Grootboom* requires ‘merely *inclusion*’ and that ‘a government programme that is subject to socio-economic rights

²³⁸ As above para 44.

²³⁹ See T Roux ‘Understanding *Grootboom* – A response to Cass R Sunstein’ (2002) 12:2 *Constitutional Forum* 41 49.

²⁴⁰ *Grootboom* (n 28 above) para 66.

²⁴¹ *Treatment Action Campaign* (n 6 above) para 67.

²⁴² As above para 80.

²⁴³ *Grootboom* (n 28 above) para 66.

²⁴⁴ As above para 44.

²⁴⁵ CR Sunstein ‘Social and economic rights? Lessons from South Africa’ (2001) 11:4 *Constitutional Forum* 123 127.

will [in terms of this finding] be unreasonable if it fails to *cater* to a significant segment of society.²⁴⁶ With respect to the finding in *Grootboom*, Roux's reading is correct: the Court there clearly simply required the state to *take account of* the needs of those most desperate, without at the same time suggesting that the needs of such people should in any concrete way take precedence over other needs.²⁴⁷ However, it has been suggested that the Court's reasonableness test can take account of a prioritisation according to need, by varying the standard of scrutiny that it applies to particular alleged breaches of socio-economic rights *according to the degree of deprivation suffered by those affected by the breach*.²⁴⁸ According to this view, a court would scrutinise state measures more rigorously where those complaining of their impact are desperately deprived. This idea has recently been given credence in *Khosa*.²⁴⁹ As pointed out above, the Court in *Khosa*, possibly for a variety of reasons, applied a substantially stricter standard of scrutiny to the state's exclusion of permanent residents than it applied to the state's HIV prevention policy in *Treatment Action Campaign*,²⁵⁰ or the state's housing programme in *Grootboom*.²⁵¹ The Court in *Khosa* applied a proportionality test, weighing the impact that the exclusion had on the dignity and practical circumstances of indigent permanent residents against the purposes for which the state had introduced the exclusion. The Court did not only find that the basic survival interests of the excluded permanent residents should take precedence over the legitimate purposes for their exclusion.²⁵² It also, particularly by rejecting the state's arguments that to include permanent residents in the social assistance scheme would place an undue financial burden on the state, potentially requiring the diversion of resources from other social assistance needs,²⁵³ by implication held that the basic survival needs of

²⁴⁶ Roux (n 239 above) 49.

²⁴⁷ Brand (n 79 above) 50.

²⁴⁸ See D Brand 'The minimum core content of the right to food in context: A response to Rolf Kunneman' in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 108 and D Bilchitz 'Toward a reasonable approach to the minimum core. Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 11 15 - 17.

²⁴⁹ n 10 above.

²⁵⁰ n 6 above.

²⁵¹ n 28 above.

²⁵² *Khosa* (n 10 above) para 82.

²⁵³ As above paras 60 - 62.

the permanent residents should take precedence over further expansion of the social assistance system as it applies to South African citizens. The most important factor determining the Court's robust scrutiny in this respect was 'the severe impact [that the exclusion of permanent residents from the scheme was likely to have] on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants'.²⁵⁴

*The state's measures must be transparent in the sense that they must be made known both during their conception and once conceived to all affected.*²⁵⁵ This element of the Court's reasonableness test was added in *Treatment Action Campaign* where the Court held that, in order for it to be reasonable, a programme's 'contents must be made known appropriately'.²⁵⁶ As *Treatment Action Campaign* itself illustrated, litigants in socio-economic rights cases face great difficulties if it is not possible to ascertain with certainty what the state's measures entail. In a very basic sense, in order to be able to challenge the state's position, one has to be able to pinpoint what exactly it is. In this respect, the requirement of transparency is practically very important.²⁵⁷

*When taking a decision or designing a measure that will affect a constitutional socio-economic right, the state must engage with those whose rights will be affected by the decision or measure.*²⁵⁸ This final element of the reasonableness test was added in the most recent *Olivia Road* case, where Yacoob J held that section 26(2) of the constitution requires municipalities who seek to evict impoverished occupants of land or buildings in circumstances where the eviction will leave them homeless, must engage with them in a reasonable fashion.²⁵⁹ The engagement must be 'meaningful' in the sense that the response of a public authority to the engagement must be reasonable.²⁶⁰ This element of the reasonableness test was alluded to by

²⁵⁴ As above para 80.

²⁵⁵ *Treatment Action Campaign* (n 6 above) para 123.

²⁵⁶ As above para 123.

²⁵⁷ See also Liebenberg (n 8 above) 38.

²⁵⁸ *Olivia Road* (n 14 above) paras 17 – 18.

²⁵⁹ As above.

²⁶⁰ As above para 19.

Yacoob J only in the context of decisions to evict. Future cases will indicate whether or not it also applies in cases where other decisions or measures are at issue.

Within available resources

The state's duty to fulfil socio-economic rights must be exercised 'within available resources'. Liebenberg points out that this phrase both provides an excuse to and imposes a duty on the state: it allows the state to attribute its failure to realise a socio-economic right to budgetary constraints; and requires the state in fact to make resources available with which to realise a right.²⁶¹

The Constitutional Court has been circumspect in scrutinising budgetary issues. In some cases it has avoided them altogether. In *Soobramoney*, the Court simply accepted the state's contention that resources were limited as a given, and allowed that fact to determine its decision. The Court interrogated neither the allocation for health purposes from national government, nor in any rigorous way the manner in which it was used at provincial level.²⁶² In *Grootboom*, resource constraints were not a direct issue. Equally, in *Treatment Action Campaign*,²⁶³ with respect to the question whether provision of Nevirapine should be extended to public health facilities *where the necessary counselling and monitoring infrastructure already existed*, the question of availability of resources was obviated. The manufacturers of Nevirapine had undertaken to provide it for free for five years and no additional infrastructural spending was required to proceed with the extension to such facilities.²⁶⁴

In those instances where budgetary issues could not be avoided, the Court has required the state to persuade it of its financial constraint.²⁶⁵ It has then proceeded to scrutinise the state's assertions in this respect, but on its own

²⁶¹ n 8 above, 44, quoting from *Grootboom* (n 28 above) para 46.

²⁶² n 9 above, paras 24 - 28.

²⁶³ n 6 above.

²⁶⁴ As above para 19. This prompted the Court to hold that the extension of the programme to these sites 'will not attract any significant additional costs' (para 71).

²⁶⁵ That the onus in this respect is indeed on the state, rather than on the claimant (see sec 3.3.2 above) is most clearly established in *Khosa* (n 10 above).

terms - that is, taking the limits of the existing budget allocations as a given. The Court has not scrutinised initial budgetary decisions at macro-economic level. In *Treatment Action Campaign*,²⁶⁶ with respect to the extension of the programme to prevent MTCT of HIV to facilities *without the necessary counselling and monitoring infrastructure*, the state indeed objected that it did not have requisite resources. The Court engaged with and rejected this argument. First, since the litigation between the Treatment Action Campaign and the state had commenced, some provincial governments had proceeded with extending provision of Nevirapine to facilities other than the pilot sites,²⁶⁷ despite the asserted resource constraints. This demonstrated to the Court that in fact 'the requisite political will', rather than resources, was lacking.²⁶⁸ In addition, whilst the case was heard, the state announced that significant additional resources had been allocated to deal with the HIV pandemic.²⁶⁹ The Court could therefore find that whatever resource constraints had existed previously, existed no longer.²⁷⁰ Also in *Khosa*, the state objected that it would not have the resources with which to extend social assistance grants to indigent permanent residents.²⁷¹ Again, the Court considered and rejected this argument.²⁷² It could do so first because the state had not provided 'clear evidence to show what the additional cost of providing social grants to ... permanent residents would be'.²⁷³ As a result, the Court could not assess whether the additional cost would place an untenable burden on the state.²⁷⁴ In addition, the state provided the Court with evidence of current spending on

²⁶⁶ n 6 above.

²⁶⁷ As above para 118.

²⁶⁸ As above para 119.

²⁶⁹ As above para 120.

²⁷⁰ As above.

²⁷¹ *Khosa* (n 10 above) paras 60 & 61.

²⁷² The Court's willingness to do so is not insignificant. See by way of contrast Ncgobo J, dissenting as above para 128: 'Mr Kruger ... estimates that the annual cost of including permanent residents could range between R243 million and R672 million. Policymakers have the expertise ... to present a ... prediction about future social conditions. That is ... the work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.'

²⁷³ As above para 62.

²⁷⁴ *Khosa* is significant in that it clearly establishes that it is not for the claimant in a socio-economic rights case to show that the state is not constrained by lack of resources, but for the state to show that it is so constrained (paras 60 - 62). Precisely because the state was unable to make this showing satisfactorily, the Court rejected its objection, seemingly without requiring the claimants to make a contrary showing (para 62).

and projected increases in spending on social assistance.²⁷⁵ This enabled the Court to point out that, even at the most pessimistic estimate of the additional cost occasioned by an extension of social assistance to permanent residents,²⁷⁶ the additional burden on the state would in relative terms be very small.²⁷⁷

The Court's approach to scrutinising budgetary issues and to the consequences of that scrutiny is perhaps best captured in a remark from *Treatment Action Campaign*, where the Court indicated that its scrutiny is not in itself 'directed at rearranging budgets', but that its scrutiny 'may in fact have budgetary implications'.²⁷⁸ This remark seems clearly to indicate that the Court will neither directly interrogate, nor prescribe the state's initial allocational decisions at macro-economic level. At the same time, it will not be discouraged to interrogate the reasonableness of state measures according to the standard described above, even if a finding of unreasonableness would have the consequence that the state would itself have to rearrange its budget.²⁷⁹ This distinction between itself rearranging budgets and taking decisions that have the consequence that budgets must be rearranged by the state is of course - as with the distinction between effectiveness and relative effectiveness discussed above - at least sometimes a fiction. The effect of the decision in *Khosa*, although the Court does not present itself as 'rearranging budgets', is that the state has to allocate additional resources (however slight an amount in relative terms) to an item that it did not want to finance. However, as Roux has argued, this is perhaps a useful fiction, as it has the singular virtue of allowing the Court to interfere in allocational choices to the extent required to enforce a right, without directly admitting to it. As such, it avoids direct confrontation with the executive.²⁸⁰

²⁷⁵ As above para 60.

²⁷⁶ The state estimated that the additional cost would be between R243 million and R672 million. The wide range itself indicated to the Court the absence of clear evidence as to the possible resource consequences of a finding of inconsistency (as above para 62).

²⁷⁷ As above.

²⁷⁸ *Treatment Action Campaign* (n 6 above) para 38.

²⁷⁹ In *Khosa* (n 10 above), this is precisely what the Court did. Its finding of unreasonableness forces the state to expend resources on providing access to social assistance benefits, something that it has not budgeted for itself.

²⁸⁰ Roux (n 214 above) 98.

2.3.2.4 Remedies

In constitutional matters, including matters dealing with socio-economic rights, courts have wide remedial powers. Section 38 determines that courts must in such matters provide 'appropriate relief, including a declaration of rights', whilst section 167 empowers courts to declare invalid law or conduct inconsistent with the constitution, and in addition to provide any order that is 'just and equitable'.²⁸¹ The Constitutional Court has been clear that these powers allow it to fashion new remedies where necessary to 'protect and enforce the constitution'.²⁸² An important consideration for the Court in this respect is that the remedies it provides, whether new or existing, must be effective.²⁸³

In most of the kinds of socio-economic rights cases described above, providing 'appropriate relief' is unproblematic, requiring courts to do little else than they are used to do in cases decided on the basis of other rights or indeed cases decided on the basis of the common law or ordinary legislation. However, when courts are required to provide relief in cases where the state has been found to breach the duty to fulfil socio-economic rights, or where the state has been found to have interfered in the existing exercise of a socio-economic right and is under a duty to mitigate the impact of that interference, their position is often more difficult. In these cases, the Court's finding requires the state to act affirmatively in order to remedy its breach of the right; to amend its policy or adopt a new policy, or to provide a service that it is not currently providing or extend a service to people who do not currently qualify for it. Such cases necessarily involve 'amorphous, sprawling party structures, allegations broadly implicating the operations of large public institutions such as schools systems ... mental health authorities ... and public housing authorities, and remedies requiring long term restructuring and monitoring of

²⁸¹ Such 'just and equitable' orders could include but are not limited to orders limiting the retrospective effect of an order of invalidity or suspending the operation of an order of invalidity; sec 172(1)(b)(i) & (ii).

²⁸² *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.

²⁸³ As above para 69.

these institutions', policies and programmes.²⁸⁴ Courts are consequently faced with having to decide to what extent to prescribe directly to the state what it must do, and to what extent and in what manner to retain control of the implementation of their orders, to see that indeed they will be effective.

An obvious way for courts to retain control of the implementation of their orders is through so-called structural or supervisory interdicts.²⁸⁵ These orders would usually require the state to draft a plan for its implementation of the order, which could then be submitted to the court and the other party for approval, and then periodically to report back to the court and the other party with respect to its implementation of that plan. The court could manage the supervision on its own, through the other party to the litigation or through a court-appointed supervisor.²⁸⁶ In the two cases where such a supervisory interdict could perhaps have played a role, the Constitutional Court has elected not to make use of it. In *Grootboom*, the Court issued a simple declaratory order, leaving the remedy of the constitutional defect in its housing programme entirely to the state.²⁸⁷ In *Treatment Action Campaign*, the Court similarly issued a declarator, coupled with a mandatory order requiring the state to remedy the constitutional defect in its programme for prevention of MTCT of HIV.²⁸⁸ However, despite confirming that it did indeed have the power to do so, the Court again declined issuing a supervisory interdict, holding that there was no indication that the state would not implement its order properly.²⁸⁹

²⁸⁴ CF Sabel & WH Simon 'Destabilisation rights: how public law litigation succeeds' (2004) 117 *Harvard Law Review* 1016 1017.

²⁸⁵ See, in this respect, W Trengove 'Judicial remedies for violations of socio-economic rights' (1999) 1:4 *ESR Review* 8 - 11 9 - 10 and, in general, Sabel & Simon (n 284 above).

²⁸⁶ The Constitutional Court made use of such a structural interdict in *August v Electoral Commission* 1999 3 SA 1 (CC), to ensure that the state take the necessary steps to make it possible for prisoners to vote in general elections. The various High Courts have made quite regular use of such interdicts in socio-economic rights cases. See eg *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

²⁸⁷ *Grootboom* (n 28 above) para 99.

²⁸⁸ *Treatment Action Campaign* (n 6 above) para 135.

²⁸⁹ As above para 129.

Although the Court's failure in particularly *Grootboom* to make use of a supervisory interdict certainly trenched on the effectiveness of its order,²⁹⁰ it is understandable that the Court is circumspect in its use of these remedies. Structural interdicts have to be very carefully crafted indeed to be effective.²⁹¹ More importantly, structural interdicts have the potential to erode the legitimacy of the Court, both because they directly and on an ongoing basis place the Court in confrontation with the executive, and can involve the Court in the day to day management of public institutions, something at which it is almost bound to fail.²⁹² Whether or not a structural interdict would be appropriate in a given case would depend on the nature of the breach in question and particularly on the nature of that which is required for the remedy of that breach.²⁹³

In two eviction cases decided by the Constitutional Court, where the duty to mitigate an interference in the exercise of the right to housing was at issue because the Court was required to consider the duty of the state to provide to evictees alternative accommodation – *PE Municipality* and *Olivia Road* – the Court developed a promising new approach to remedies. In *PE Municipality*, having rejected an application for an eviction order on appeal and, in the process, having rejected the state's offer of alternative accommodation, Sachs J mentioned the possibility in passing of ordering parties in such circumstances to reach a solution amenable to both parties, within the limits set by the court's decision, through mediation.²⁹⁴ This suggestion was taken up by Yacoob J in *Olivia Road*, albeit in an importantly different fashion than suggested in *PE Municipality*. Before he had decided the case and handed

²⁹⁰ In a number of recent cases, courts have pointed out that the state has for all intents and purposes simply ignored the order in *Grootboom* and has put in place no discernible measures to take account of the plight of those in housing crises. See eg *Modderklip SCA* (n 69 above) para 22 and *Rudolph* (n 30 above) paras 77B - 84H. See also K Pillay 'Implementation of *Grootboom*: implications for the enforcement of socio-economic rights' (2002) 6 *Law, Democracy and Development* 255.

²⁹¹ Sabel & Simon (n 284 above) 1017.

²⁹² As above 1017 - 1018.

²⁹³ It remains an open question, for example whether or not a structural interdict would indeed have led to the findings in *Grootboom* being implemented effectively by the state, or whether, instead, the policy issue in *Grootboom* was so wide and amorphous and required such wide-ranging and complex adjustment on the side of the state, that the Court would simply have become bogged down in debilitating detail had it retained jurisdiction.

²⁹⁴ *PE Municipality* (n 27 above) paras 39 – 46.

down his judgment (indeed, before he had formulated the judgment) Yacoob J ordered the parties to the case (the occupiers and the City of Johannesburg) to engage with each other to resolve the case. The parties did so and reached an agreement which they submitted to the Court for approval. The Court approved the agreement, effectively resolving the dispute between the parties in this way, *without yet having decided the case*.²⁹⁵ I take issue below with Yacoob J's decision to issue his order for engagement before having decided the case.²⁹⁶ Nevertheless, the use of the engagement order in *Olivia Road* holds great promise, both because it potentially resolves the problems of institutional capacity and institutional relations attaching to remedies in socio-economic rights cases alluded to above and because it provides a mechanism for the powerful legitimization by courts of transformative political action.²⁹⁷

2.4 Conclusion

The overview above demonstrates the range and diversity of cases - both with respect to the manner in which these rights applied in the respective cases and with respect to the duties that were at issue in them - that have so far been decided by our courts involving socio-economic rights. My analysis that follows in Chapters 3 and 4 below cannot take account of all of these cases. For my analysis of the process of adjudication in those Chapters to be manageable requires a limited focus - I cannot consider all the cases. At the same time I cannot lose sight of the diversity of cases that have been decided to date. The manner in which I propose to limit my focus is therefore simple - I directly consider in my analysis below only cases decided by our two higher courts: the Constitutional Court and the Supreme Court of Appeal.

²⁹⁵ *Olivia Road* (n 14 above) paras 5 & 24 - 30.

²⁹⁶ See 162 - 165 below.

²⁹⁷ For two examples in other jurisdictions where engagement orders were used to great effect, see the Colombian Constitutional Court decision T-760/2008 (decision requiring dramatic restructuring of the health care system, which has to be effected in part through a participatory process involving a range of stake-holders) (for a discussion and evaluation of this decision see A Ely Yamin & O Parra-Vera 'How do courts set health policy? The case of the Colombian Constitutional Court' (2009) 6(2) *PLoS Medicine* 1); and the decision of the Argentinian Supreme Court in *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/dãnos y perjuicios (danã derivados de la contaminación ambiental del Río Matanza-Riachuelo)* (decision attributing responsibility for the degradation of a river, reached on the basis of a participatory process managed by the Court during which interested parties participated in determining the decision of the Court) (summary in English available at http://www.farn.org.ar/participacion/riachuelo/resumen_ingles.html, visited on 28 March 2009).

But this choice of focus is not entirely motivated by considerations of convenience. As will become clear below, my analysis considers issues of judicial attitude; assumption and professional sensibility. In order at all to be able to come to conclusions about these issues, I need to be able to identify trends in the manner in which courts decided cases. This will in turn only be possible if I focus on certain courts alone.

3 *Depoliticisation*

3.1 Introduction

In Chapter 1 I described different ways in which courts in deciding socio-economic rights claims can work to limit transformative political action. First, so I argued, courts can do so by operating in such cases on the basis of outmoded understandings of the nature of interpretation and adjudication, by seeing legal interpretation as a more or less mechanical process of application of self-evident legal materials to equally self-evident sets of facts or an argumentative free-for-all without any foundation in rule or text. I explore this theme further in Chapter 4.¹

Second, so I continued, courts could limit transformative politics by legitimating and confirming in their decisions the various strategies of depoliticisation employed by dominant participants in debates about impoverishment, need and deprivation to remove those issues from political contestation.² I explore this second theme in this Chapter – that is, I analyse the case law described in Chapter 2 and trace to what extent our courts have, consciously or inadvertently, relied on and so legitimated these depoliticising rhetorical or conceptual tropes.

In Chapter 1 I referred to a range of such depoliticising strategies that courts run the risk of replicating in their decisions. I described processes of *domestication* of needs talk (questions of need, impoverishment and deprivation are depicted as of domestic, familial concern only, rather than of public concern); *personalisation* of impoverishment (impoverishment is attributed to personality failings in poor people such as laziness and chronic dependence, so denying the broader social, economic and political causes); *naturalisation* (impoverishment and deprivation are depicted as somehow the natural order of things, caused by forces of nature or the impersonal market,

¹ See 46 – 61 above.

² See 61 - 72 above.

so that people can do nothing to address it) and *technicisation* (impoverishment is described as a highly technical and complex problem, unsuited for that reason for political debate and resolution).

As I point out in 3.2.1 below, all of these strategies have to a lesser or a greater extent operated at times in our courts' socio-economic rights case law. Nevertheless, in this Chapter I focus on only two depoliticising themes in the case law. First, in 3.2.2 below, I trace the extent to which the Court, in particular in its reliance on separation of powers logic to limit and describe its review powers, technicises issue of poverty, describing them as questions that impoverished people themselves – as opposed to the state – simply cannot engage with. In this way, I argue, the Court depicts impoverished people as passive recipients of pre-determined services from the state, rather than as active participants in the definition of their needs and in the fashioning of appropriate ways in which to address them. I focus here on cases such as *Soobramoney*,³ *Grootboom*,⁴ *Treatment Action Campaign*⁵ and, most recently, *Olivia Road*.⁶ At the same time I identify instances in the jurisprudence – in cases such as *Modderklip*,⁷ *PE Municipality*,⁸ *Khosa*⁹ and, again, *Olivia Road* – where the Court has instead acknowledged, rewarded and so legitimised the political agency of impoverished people, contradicting in the process its otherwise depoliticising rhetoric.

Then, in 3.2.3 below, I investigate the operation in the Court's jurisprudence of another form of depoliticising rhetoric, that I do not refer to directly in Chapter 1 – the *proceduralisation* of needs talk. I describe how the Court, in cases such as *Grootboom*, *Treatment Action Campaign* and, most importantly, *Modderklip*, has

³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) (*Soobramoney*).

⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*).

⁵ *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) (*Treatment Action Campaign*).

⁶ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*).

⁷ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA amicus curiae)* 2005 5 SA 3 (CC) (*Modderklip (CC)*). I also refer extensively in this Chapter to the decision of the Supreme Court of Appeal in this matter: *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) (*Modderklip (SCA)*).

⁸ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (*PE Municipality*).

⁹ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa*).

tended toward deciding socio-economic rights cases on the basis of structural good governance principles such as inclusivity, rationality, access to courts and rule of law, rather than on the substantive content of socio-economic rights. This tendency, so I argue, has the potential to legitimate dominant liberally inclined discourses in the political debate about how best to address impoverishment that tend to emphasise structural issues – the free operation of the market, for example – at the expense of the deeply political redistributive questions inherent in the debate.

3.2 Depoliticisation

3.2.1 Introduction

Certainly, taken as a whole, the socio-economic rights jurisprudence of our higher courts does not create the impression that our courts are unaware of the political content and context of their dealings with socio-economic rights or even that they tend, as a rule, to deny or subvert that political content and context.

As Sandra Liebenberg has pointed out, one way in which courts can resist dominant depoliticising strategies in their work is explicitly to 'locat[e] the needs in question within a broader historical and social context of systemic injustice.'¹⁰ This our courts have more or less consistently done, referring often and insistently to, for example, the historical causes of current impoverishment¹¹ and the extent to and manner in which the extreme levels of impoverishment and socio-economic inequality in South Africa are issues of 'political morality and ... collective social responsibility'.¹²

¹⁰ S Liebenberg 'Needs, rights and transformation: adjudicating social rights' (2006) 17 *Stellenbosch Law Review* 5 34.

¹¹ See, eg, *Grootboom* (n 4 above) para 6 (pointing out that the cause of the predicament of the Grootboom community and others in their situation lies in the Apartheid policy of 'influx control'); *PE Municipality* (n 8 above) paras 8 – 10 (describing the centrality of arbitrary eviction to the Apartheid project as background to an expansive interpretation of legislation giving effect to constitutional guarantees against arbitrary evictions).

¹² Liebenberg (n 10 above) 35. See, eg *PE Municipality* (n 8 above) para 37 (Sachs J arguing that constitutional housing rights and anti-eviction guarantees and the legislation giving effect to them are infused by and give expression to 'the constitutional vision of a caring society based on good neighbourliness and shared concern' and the 'spirit of ubuntu' which 'combines individual rights with a communitarian philosophy'; and *Khosa* (n 9 above) para 65 (Mokgoro J referring to a 'constitutional commitment to developing a caring society').

Nevertheless, at the same time as courts have in their explicit pronouncements so emphasised the political nature of the predicament of impoverished people, they have in other ways participated in and so legitimated dominant depoliticising discourses. Most often this has happened inadvertently, in their choice of conceptual categories or their doctrinal moves, rather than in their explicit pronouncements - in what they do, rather than what they say.

The most obvious example that springs to mind concerns the domestication of needs talk, evident in the first place in Sachs J's concurring opinion in *Soobramoney*. An inordinate portion of this opinion¹³ is devoted to an explanation why the Court was unable to intervene on behalf of Mr Soobramoney – not why in a substantive sense his claim must fail,¹⁴ but why the Court could not engage with the issues raised by his claim. Indeed the opinion can perhaps best be described as a decision not to decide – a rather extreme example of what Robert Cover has called 'the judicial can't'.¹⁵ Sachs J invokes the usual arguments of institutional incapacity and limited resources to justify his 'can't'. He argues, persuasively, that the issues with respect to Mr Soobramoney's medical treatment were technical medical questions that the Court is not equipped to decide¹⁶ and 'toll[s] the bell of lack of resources',¹⁷ pointing out that 'if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody.'¹⁸

¹³ 8 of the 11 paragraphs; *Soobramoney* (n 3 above) paras 52 - 59.

¹⁴ Substantive engagement with the claim is limited to a single paragraph, in which Sachs J expressed his agreement with Chaskalson P's finding for the Court that Mr Soobramoney's condition was not an emergency medical condition and did not qualify him for the protection of sec 27(3); *Soobramoney* (n 3 above) para 51.

¹⁵ R Cover *Justice accused: anti-slavery and the judiciary process* (1975) 119 - 120.

¹⁶ *Soobramoney* (n 3 above) para 58.

¹⁷ *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) 137c - d, quoted in *Soobramoney* (n 3 above) para 52.

¹⁸ *Soobramoney* (n 3 above) para 53.

But then he goes further still. Referring to US case law dealing with the right to die,¹⁹ he concludes that '[c]ourts are not the proper place to resolve the *agonising personal* ... problems that underlie these issues'²⁰ and that '[o]ur country's legal system simply "cannot replace the more *intimate struggle* that must be borne by the patient ... and those who care about the patient".'²¹ The message seems clear: because issues surrounding a person's death are intensely personal, the Court is powerless to address Mr Soobramoney's plight:

[C]onsiderations of the wisdom and utility of the actions that might have been taken are beside the point. Normative debate [about, for instance, whether or not the balance struck 'between the equally valid entitlements or expectations of a multitude of claimants'²² that had resulted in Mr Soobramoney being denied the treatment he required, was appropriate] is not invited.²³

Questions of death are private, not political.

What makes Sachs J's assertion of this rhetorical depoliticization strategy so startling, is that the US right to die case law he refers to so as to make his point is wholly inapposite. Certainly, when the question is whether or not the state should allow a person who does not want to live anymore to die, the issue whether or not or to what extent a court can prescribe the choice to a patient arises. But Mr Soobramoney was in the opposite position – he very much wanted to live, and the question in his case was whether or not the state is obliged to keep him alive. I fail to see how the issues that arise in determining that question are 'agonising personal problems' part of an 'intimate struggle' that Mr Soobramoney should be left to go through on his own – the essence of Mr Soobramoney's claim is after all that the state is obliged to get involved in his life and possible death. How does one make

¹⁹ *Cruzan v Director, Missouri Department of Health, et al* 497 US 261 (1990), quoted in *Soobramoney* (n 3 above) para 56.

²⁰ *Soobramoney* (n 3 above) para 58 (my emphasis).

²¹ *In re Jobes* 529 A2d 434 451 (NJ SCt, 1987), quoted in *Soobramoney* (n 3 above) para 58 (my emphasis).

²² *Soobramoney* (n 3 above) para 54.

²³ T Ross 'The rhetoric of poverty: their immorality, our helplessness' (1991) 79 *Georgetown Law Journal* 1499 1511.

sense of this mistaken analogy? Sachs J could have made his point relying only on the institutional capacity arguments, without having to go any further. Thomas Ross has said that ‘judges invoke the rhetoric of judicial helplessness most fervently when confronted with a problem of unjust and tragic dimensions’.²⁴ Perhaps it was precisely the acutely political nature of Mr Soobramoney’s predicament – the tragic fact that his position is compared to that of others, and that the state makes a choice not to intervene in his - that prompted Sachs J to go to such tortuous lengths to justify his and the rest of the Court’s inaction. As such this element of the opinion constitutes an extraordinary flight from politics.

A second example of the Constitutional Court’s domestication of needs talk occurs in *Grootboom*. The Grootboom-community’s claim for shelter was partly based on children’s section 28(1)(c) right to shelter. Although Yacoob J, for the Court, decided the case on the basis of the section 26(1) right of everyone to have access to adequate housing, he did provide an interpretation of section 28(1)(c). The linchpin of this interpretation is a conflation of section 28(1)(c) with section 28(1)(a), which proclaims children’s right ‘to family care or parental care, or to appropriate alternative care when removed from the family environment’. In Yacoob J’s words:

[Sections 28(1)(b) and 28(1)(c)] must be read together. They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care ... Subsection (1)(b) defines those responsible for giving care while ss (1)(c) lists various aspects of the care entitlement.²⁵

On this basis Yacoob J proceeds to argue that the state has only a residual duty to provide shelter to children – the primary duty to do so rests on parents and family and the state incurs the direct duty to do so only with respect to those children ‘who are removed from their families’.²⁶ Where children are cared for by their parents or families (are still with their parents or families) the

²⁴ As above.

²⁵ *Grootboom* (n 4 above) para 76.

²⁶ As above para 77.

only duty the state carries with respect to them is ‘to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28’.²⁷ From this Yacoob J’s conclusion follows ineluctably:²⁸

It was not contended that the children who are respondents in this case should be provided with shelter apart from their parents. Those of the respondents in this case who are children are being cared for by their parents; they are not in the care of the State, in any alternative care, or abandoned. [T]herefore, there was no obligation upon the State to provide shelter to those of the respondents who were children.

Yacoob J’s interpretative manoeuvring clearly ‘directs dependency away from the state [to the family] and [so] privatizes it’.²⁹ The result is profoundly depoliticizing. It allows Yacoob J simply to ignore the social fact that often children who are ‘properly’ with their parents or family are worse off than those who find themselves in some form of alternative care, because their parents or family are simply too poor ‘properly’ to care for them. It also allows him to ignore the question whether or not the state has a duty, where children are with their parents or family but in a situation of indigence, to provide forms of material care directly to those children. Finally, it allows him to skirt the deeply political question whether or not, in the social provisioning activities of the state, children’s needs should enjoy material priority over the needs of others. As with Sachs J’s opinion in *Soobramoney*, what makes Yacoob J’s depoliticising strategy in *Grootboom* all the more remarkable is that it was unnecessary – Yacoob J’s interpretation of sections 28(1)(b) and (c) is certainly not the only interpretation possible, nor even the most obvious. There is no textual reason to subsume subsection (1)(c) into subsection (1)(b) as Yacoob J did – the various entitlements listed in the subsections of section 28(1) (there are nine – (a) to (i)) are connected to each other with an ‘and’ and seem to be intended as separate entitlements. It is also a plausible interpretation to say that subsection (1)(b) refers to the emotional and other

²⁷ As above para 78.

²⁸ As above para 79.

²⁹ MLA Fineman ‘Masking dependency: the political role of family rhetoric’ (1995) 81 *Virginia Law Review* 2181 2205.

non-material aspects of care, whilst subsection (1)(c) lists elements of material care.³⁰ Yacoob J had to make a conscious choice to adopt the interpretation he did, it is not suggested by the text – and his employment of the depoliticizing strategy flowing from that interpretation was equally a conscious choice.

Striking as they both are, these two examples of the domestication of needs talk by the Court do not form the focus of this Chapter. Yacoob J's interpretation of section 28(1)(c) in *Grootboom* was reversed in *Treatment Action Campaign*. The Court still employed Yacoob J's view that the primary duty to provide shelter, health care, nutrition and social services rests on parents and family, with only an alternative duty falling on the state,³¹ but extended the circumstances under which this alternative duty would kick in. As the mothers with which the case was concerned were 'for the most part indigent and unable to gain access to private medical treatment which is beyond their means' for them and their children, '[t]hey and their children are in the main dependent upon the state to make health care services available to them.'³² As a result the state incurred a duty to provide health care services to their children, even though their children were still in their care. In addition, the two instances of domestication that I relate are isolated incidents and certainly cannot be used to indicate a trend. In particular Sachs J's description of Mr Soobramoney's predicament as 'deeply personal' seems an aberration without any replication in later cases. Rather than in these isolated instances of depoliticising rhetoric, I am interested in examples of depoliticisation that constitute a trend in the jurisprudence of our courts – that somehow are inevitably implied by or are an integral part of their general approach to deciding socio-economic rights cases. Such a trend one can ascertain in the Court's inadvertent complicity in two distinct trains of depoliticising thought:

³⁰ See, in general *Jooste v Botha* 2002 (2) BCLR 187 (T), where the claimant based a damages claim on the construction that section 28(1)(b) imposes duties of emotional care on parents. For a discussion see K van Marle & D Brand 'Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*' ('Some remarks about formal justice, substantive judgment and horizontality in *Jooste v Botha*') (2001) 12 *Stellenbosch Law Review* 408.

³¹ *Treatment Action Campaign* (n 5 above) para 75.

³² As above para 79.

the *technicisation* and the *proceduralisation* of needs talk. It is to these two examples that I now turn.

3.2.2 Technicisation: Soobramoney, Grootboom, Treatment Action Campaign and Olivia Road

... managerialism is the ism to make all isms wasms ...³³

3.2.2.1 Introduction

In Chapter 1 I referred, as one example of a depoliticising strategy that often operates in discourses about need, deprivation and impoverishment, to the rhetoric of ‘technicisation’: the tendency of ‘[o]fficial-economic capitalist system institutions’ to describe impoverishment ‘as [a complex of] technical problems for managers and planners ... in contradistinction to political matters’.³⁴

To describe impoverishment as such depoliticises in three related ways. First, it does so simply by bluntly depicting impoverishment as non-political, as something that must be dealt with on technical or efficiency grounds only and that does not implicate substantive political questions of redistribution or social justice. Depiction of impoverishment as first and foremost a technical problem for which technical solutions must be found can so be linked to what Margaret Radin has described as ‘complacent pragmatism.’³⁵ Complacent pragmatism elevates the ‘cold measure’³⁶ of efficiency – ‘what works’ - to the only relevant standard against which to test social policy. As Joseph Singer has pointed out, such an emphasis on ‘what works’, despite its obvious attractions, is potentially problematic from the perspective of a concern with transformative politics, for two related reasons. Complacent pragmatism works counter to transformative

³³ J Cronin ‘End of the century – which is why wipers’ from *More than a casual contact* (2006) 22.

³⁴ See 66 - 67 above. N Fraser ‘Talking about needs: interpretive contests as political conflicts in welfare-state societies’ (1989) 99 *Ethics* 291 299.

³⁵ M Radin ‘The pragmatist and the feminist’ (1990) 63 *Southern California Law Review* 1699 1710. For a South African discussion and application of this idea, see AJ van der Walt ‘Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law’ (2002) 17 *SA Publiekreg/Public Law* 258 271 – 274.

³⁶ R Berkowitz *The gift of science. Leibniz and the modern legal tradition* (2005) x (describing the modernist tendency to understand justice as efficiency, as ‘a cold measure that equates economic gain with moral rectitude’).

politics because it accepts that all the important substantive political questions have been answered, so that the only remaining questions are technical ones.³⁷ By focusing simply on efficiency, it often fails to interrogate who the 'we' is that a certain course of action 'works' for; what the material interests of that 'we' are; and why it is that 'we' believe that a certain course of action 'works' for 'us'.³⁸ In this way such an approach downplays conflict between different groups and people, presuming that everyone is in agreement about what the goals of social policy are.³⁹ An uncritical pragmatist, or technicised approach to issues of impoverishment also runs counter to a transformative politics because it is inherently conservative, in the sense that it favours retention of the *status quo* rather than transformation. Because the common sense standard of what works usually describes settled and existing practices in society, complacent pragmatism's acceptance of what works as the determining standard for social policy confirms the legitimacy of accepted social practices and institutions.⁴⁰ And further - because which practices and institutions are acceptable is usually determined by those in power, an uncritical acceptance of what is deemed to work fails to take account of the degree to which power shapes social institutions and arrangements.⁴¹

Second, the technicisation of impoverishment depoliticises by discouraging political engagement with issues of need and deprivation. Impoverishment is depicted as a complex technical matter that requires of those devising plans to address it technical expertise, experience and access to information that ordinary participants in the political process do not command. The message to impoverished people is that they are simply not capable of understanding the complexity of their predicament and can therefore not usefully engage it.

Third, and most importantly, the technicisation of poverty depoliticises by privileging certain participants in debates about impoverishment – indeed by depicting them as the only participants who may legitimately engage these

³⁷ JW Singer 'Property and coercion in federal Indian law: the conflict between critical and complacent pragmatism' (1990) 63 *Southern California Law Review* 1821 1824.

³⁸ Radin (n 35 above) 1710 – 1711.

³⁹ Singer (n 37 above) 1824 – 1825.

⁴⁰ Radin (n 35 above) 1709; Singer (n 37 above) 1826.

⁴¹ Singer (n 37 above) 1825.

issues. Impoverishment depicted as exclusively a technical problem becomes the province of the technically proficient alone, to the exclusion of other potential participants in the debate. In practical terms this means that the specialist administrative agencies of the state and the expert communities that support them (think tanks, academic advisers, researchers) establish a monopoly in debates about impoverishment. From the lofty heights of their technical expertise they determine what the problems are that impoverished people face, which of those problems must be solved according to which prioritisation and how to solve them. Predetermined solutions can then be presented to passive recipients who have no role in determining their fates.⁴²

This third depoliticising effect of the technicisation of issues of impoverishment is particularly insidious in South Africa. Government has over the last decade regularly and quite explicitly made the claim that the most effective (and in its idiom therefore the only legitimate) way in which to address impoverishment in South Africa is for the state to take a leading and controlling role, to the exclusion of other sectors of society. As Mirjam van Donk and Edgar Pieterse put it:

The premise is clear: the government sets the agenda for the progressive realisation of socio-economic rights, and other actors and stakeholders have to embrace and support the path chosen.⁴³

The fact that this approach leaves no space for the kind of agonistic political engagement from other groups or actors in the debate about impoverishment that I am concerned with has also been made quite explicit. The state has often described the political action of social movements engaged in, for example, service delivery protest as a threat to the stability required for socio-economic development and ultimately the eradication of impoverishment.⁴⁴

⁴² J Habermas 'Law as medium and law as institution' in G Teubner (ed) *Dilemmas of law in the welfare state* (1986) 204 210; Fraser (n 34 above) 307.

⁴³ E Pieterse & M van Donk 'The politics of socio-economic rights in South Africa. Ten years after apartheid' (2004) 5:5 *ESR Review* 12 13

⁴⁴ As above. See also B Boyle 'And now for real change' (15-05-2005) *Sunday Times*, available at <http://www.sundaytimes.co.za/articles/article.aspx?ID=ST6A120261>, visited on 20 May 2005. For a detailed overview of the Mbeki government's reaction to such 'ultra-leftist'

3.2.2.2 *Technicisation in the cases*

Our courts have consistently and explicitly engaged in the technicisation of issues of impoverishment in their socio-economic rights judgments, in a way that has in particular caused the third depoliticising effect of such technicisation that I described above.

As could be expected, one of the major concerns of the Constitutional Court thus far in its socio-economic rights cases has been to determine the scope of its review powers with respect to socio-economic rights. This was particularly so in its first three cases, *Soobramoney*, *Grootboom*, and *Treatment Action Campaign*, but the trend has continued in its most recent case, *Olivia Road*. In all these cases the Court has struggled with basic questions such as which kinds of issues that arose in socio-economic rights cases it is competent to engage with at all, what its standard of scrutiny should be there where it does engage with the issues, and what the scope of its power is to provide relief there where it has exercised its review power and found a breach of a socio-economic right.

What is interesting is the idiom that the Court has employed to justify the choices it has made in this respect. In its first three cases, the Court has, when engaging with the different questions related to the nature and scope of its review powers, relied in the first place on ‘institutional capacity’ arguments. That is, what motivates the Court’s decision to limit the scope of its review powers in a particular instance has been its perceived lack of the requisite technical expertise and institutional capacity properly to engage with the issues. The Court has utilized these institutional capacity arguments when seeking to justify its choice not to decide a particular question raised in the course of socio-economic rights litigation. In *Treatment Action Campaign*, for example, the Court explains its decision not to decide whether or not the state’s constitutional duties in terms of section 27(1) requires it to provide formula feed to HIV-positive mothers to prevent the transmission of HIV to their children through breast

political action, see D McKinley & A Veriava *Arresting dissent: state repression and post-apartheid social movements* (2005).

feeding by saying that this question ‘raises complex issues’ that it does not have the capacity or information on the basis of which to decide.⁴⁵ The Court’s rejection of the ‘minimum core content’ approach to deciding claims for access to basic resources has equally been motivated with reference to its institutional incapacity to access and analyse the kind and quantity of information that would be required to determine what the minimum core of any given right in any given set of circumstances entails.⁴⁶ Finally, the Court has justified its adoption of what it has called a ‘restrained role’ in reviewing state conduct in light of socio-economic rights, embodied in its ‘reasonableness review’ approach, also with reference to its institutional incapacity.⁴⁷

The Court’s reliance on these institutional capacity arguments in this respect is in itself uncontroversial. Certainly the Court, when it employs this rhetoric, enters into a depoliticizing discourse – it effectively technicises the questions that it is considering, describing them as ‘technical problems for managers and planners ... in contradistinction to political matters.’⁴⁸ However, although there is room for argument about the extent to which the Court is institutionally incapable in any given context,⁴⁹ it cannot be denied that it is indeed institutionally constrained and that the depoliticisation that it engages in on that basis alone is to some extent inevitable. What does make the Court’s use of this particular instance of ‘technicising’ rhetoric problematic, or more problematic than it would otherwise be, is not so much the fact that it defers, but what it is that it defers to.

Central to the Court’s self-limitation of its powers of review and remedy in the three early cases is a second set of arguments: ‘constitutional comity’

⁴⁵ *Treatment Action Campaign* (n 5 above) para 128.

⁴⁶ *Grootboom* (n 4 above) para 33; *Treatment Action Campaign* (n 5 above) para 37.

⁴⁷ *Treatment Action Campaign* (n 5 above) para 38: ‘Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community.’ See also the Court’s justification for the lenient standard of scrutiny adopted in *Soobramoney* (n 3 above) para 29: ‘A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters’.

⁴⁸ Fraser (n 34 above) 299.

⁴⁹ It has, for example, been pointed out that the Court is in fact capable of determining the minimum core with respect to a given right, despite its protestations to the contrary, provided that it understands correctly what the minimum core entails; D Bilchitz ‘Giving socio-economic rights teeth: the minimum core and its importance’ (2002) 118 *South African Law Journal* 484-487.

arguments. Equally as concerned as the Court is about its institutional incapacity, it is concerned about its institutional *illegitimacy*. When the Court defers, declining to decide a particular issue, or to apply a stringent standard of scrutiny, or to impose an intrusive order, it defers not only to the complexity of the issues at hand, recognizing that it is incapable of deciding them. It also, more importantly, defers to, or defers in favour of *the other branches of government* – the executive, the legislature or the state administration – on the understanding that it, in the context of institutional spheres of power, is the inappropriate forum to decide them. In short, the problem with defining the nature and scope of its review powers for the Court ‘comes down mainly, if not solely, to a matter of separation of powers’.⁵⁰

This is true in all the contexts within which the Court has had occasion to describe the limits and nature of its powers. In *Soobramoney*, Chaskalson P justifies his choice not to engage with the decisions made with respect to the rationing of health care resources that led to Mr Soobramoney’s exclusion from treatment as follows:

These choices involve difficult decisions [here is the reference to institutional incapacity] *to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.* [here is the deference to the other branches of government] A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities *whose responsibility it is to deal with such matters.*⁵¹

In *Grootboom* Yacoob J, in describing the reasonableness review test that the Court fashioned in that case, emphasizes that ‘a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.’⁵² Instead, he proceeds, ‘[t]he precise contours and content of the measures to be adopted are primarily a matter *for the legislature and the*

⁵⁰ FI Michelman ‘The constitution, social rights, and liberal political justification’ (2003) 1 *International Journal of Constitutional Law* 13 15.

⁵¹ *Soobramoney* (n 3 above) para 29 (my emphasis).

⁵² *Grootboom* (n 4 above) para 41.

Executive'.⁵³ Finally, in *Treatment Action Campaign* one of the primary motivations for the Court's decision not to impose structural injunctive relief on the government is its concern that in doing so it will have to prescribe particular policy and rationing choices to it, instead of determining only the contours of what is required and leaving the details of planning and implementation to government itself.⁵⁴

Certainly, one might argue in favour of the Court that at the heart of its concern with the constitutional comity of its engagement with socio-economic rights is a concern with democracy and so with transformative politics. The Court, acutely aware of its position as the least democratically accountable branch of government, defers to the other branches, because in doing so it believes it respects the democratic will of which the political branches are the repositories.⁵⁵ But the conception of democracy or of politics that underlies this concern is a peculiarly limited one. The Court's concern with constitutional comity evinces what Nancy Fraser has described as an *institutional* understanding of politics and democracy, in terms of which 'a matter is deemed political if it is handled directly in the institutions of the official governmental system, including parliaments, administrative apparatuses, and the like'⁵⁶ and in terms of which democracy occurs only within these institutions of the official governmental system. This understanding of democracy and politics stands in contrast to what Fraser describes as a discursive sense of politics, in which 'something is "political" if it is contested across a range of different discursive arenas and among a range of different publics' and in which democracy occurs not only in the institutions of the official governmental system, but in all of these (official and unofficial) 'discursive arenas' and 'publics'.⁵⁷ Stated differently, the Court's stance reflects a dependent conception of democracy and politics, according to which democracy and politics take place only in formally

⁵³ As above.

⁵⁴ *Treatment Action Campaign* (n 5 above) paras 96 - 114 & 129 - 133.

⁵⁵ See T Roux 'Legitimizing transformation: political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92, who explores the currency that this concern with democratic legitimacy has in the Court's conception of its review powers, and praises the Court for the extent to which it manages to remain appropriately respectful of democratic prerogatives in this respect.

⁵⁶ Fraser (n 34 above) 297.

⁵⁷ As above.

constituted democratic structures, where political questions of, for example, distribution of resources are decided for and the results presented to civil society. Again, this conception stands in contrast to a participatory model of democracy or politics, in which the focus is on creating and maintaining structures for the democratic process 'which maximize the allocation of equal political power to the citizenry' across the board of the different (official and unofficial) discursive arenas.⁵⁸ In my own terms, in other words, the understanding of democracy and politics underlying this aspect of the Court's approach, because it equates politics with the formal institutions of democracy, disregards the importance to transformative politics of the operation in particular of extra-institutional and extra-formal political action. In its focus on process and institution, it falls to be described as the liberal kind of understanding of politics that Chantal Mouffe decries in contrast to her own agonistic understanding of politics.⁵⁹

Against this background, it becomes clear that the Court's instrumentalising rhetoric that it employs to justify its choices with respect to self-limitation of its powers operates to depoliticise issues of poverty, need and social provisioning of the state in two respects. First, and most obviously, the Court's rhetoric depoliticises in that it describes the issues in question as of a technical rather than a political nature. As pointed out above, this can to some extent be seen as inevitable. However, second, the Court's rhetoric depoliticises in that it relegates the discourse about these issues, even in their technical sense, wholly to the formally constituted political branches of government 'whose responsibility [and right] it is to deal with such matters'.⁶⁰ The message to those other, unofficial 'publics' (social movements, NGO's, ordinary people) who operate democratically in those other, unofficial 'discursive arenas' is therefore not only

⁵⁸ DM Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475 488 - 489. See also Pieterse & Van Donk (n 43 above) 13: 'The realisation of socio-economic rights is an inherently political process, which needs to involve rights-holders ... in determining the desired outcomes, objectives, strategies and acceptable trade-offs so that they are enabled to take control of their own destinies. This inevitably implies a political process of negotiation, disagreement, conflict, occasionally consensus, and, at a minimum, forms of mutual accommodation.'

⁵⁹ C Mouffe *The return of the political* (1993) 3. See 19 - 23 above.

⁶⁰ *Soobramoney* (n 3 above) para 29.

that the issues that they deal with are difficult ones in a technical sense, requiring of them sustained, informed engagement⁶¹ which they, like the Court, might not have the capacity for. It is also that the issues are, as with the Court, simply not their business. The Court's rhetoric casts them not as active participants in the process of interpretation of their needs, engaged in political action, but as the passive recipients of services – their needs, predefined by the political branches of government, are administered to them through a process of therapeutic assistance.⁶²

3.2.2.3 Khosa, Modderklip, PE Municipality and Olivia Road: recognising and legitimating political agency?

In socio-economic rights decisions of the Constitutional Court and the Supreme Court of Appeal subsequent to *Soobramoney*, *Grootboom* and *Treatment Action Campaign* it is possible to see the beginnings of a countervailing trend in the Court's rhetoric that is more closely allied to an agonistic conception of democracy and so to a transformative politics and that can in this respect be contrasted to the Constitutional Court's technicising rhetoric in the earlier three cases.

(a) Emphasising political agency

In the first place, in the cases in question (*Khosa*, *Modderklip* (both the Constitutional Court and Supreme Court of Appeal decisions), *PE Municipality* and *Olivia Road*) the Constitutional Court and Supreme Court of Appeal have emphasised the political agency of the impoverished people involved *vis-à-vis* government by taking its operation into account in interpreting the rights in question. In *Khosa* Mokgoro J, for example, in finding that the state had a constitutional duty to provide social assistance to indigent (non-citizen) permanent residents in South Africa, placed great stock in the fact that permanent residents had through their conduct in effect thrown in their lot with South Africa. In this respect Mokgoro J points out that permanent residents intend to become South African citizens, that they have made their homes

⁶¹ S Wilson 'Taming the constitution: Rights and reform in the South African education system' (2004) 20 *South African Journal on Human Rights* 418 447.

⁶² Habermas (n 42 above) 210; see also Fraser (n 34 above) 307.

here and have brought their families here, that for many their children have been born here, that they owe a duty of allegiance to the state⁶³ and that they pay taxes in South Africa.⁶⁴ As a result, although not yet formally citizens, they have claimed their membership of our community through the exercise of their political agency and deserve to be treated equally as fully fledged such members.⁶⁵

In *Modderklip* (SCA) Harms J for the Supreme Court of Appeal equally emphasizes the role of the political agency of the property owner and the squatters in determining the resolution of the case. In this respect Harms J points out that the landowner had at all times acted within the law and had throughout sought to effect an amicable solution that would vindicate both his and the squatters' rights.⁶⁶ He also points out that the squatters had occupied the land without intending to force the hand of the state to provide them with land in preference to others and had also sought to reach an amicable solution both with the landowner and the state.⁶⁷ The state, by contrast, had failed diligently to pursue a settlement and had reneged on agreements reached,⁶⁸ despite the fact that it had itself caused the predicament of the squatters and the landowner by previously evicting the squatters from state land without providing alternative accommodation.⁶⁹ These indications of an attitude of political engagement with each other and with the state on the side of the squatters and landowner and of recalcitrance by contrast on the side of the state, play an important role in eventually persuading the Court to find in favour of both the landowner and the squatters against the state.⁷⁰

⁶³ *Khosa* (n 9 above) para 59.

⁶⁴ As above para 74.

⁶⁵ As above.

⁶⁶ *Modderklip* (SCA) (n 7 above) paras 33, 37 & 38. See also *Modderklip* (CC) (n 7 above) paras 31 & 38.

⁶⁷ As above para 25. See also *Modderklip* (CC) (n 7 above) paras 35 & 37.

⁶⁸ As above paras 35 - 38. See also *Modderklip* (CC) (n 7 above) paras 32 - 34.

⁶⁹ As above para 35. See also *Modderklip* (CC) (n 7 above) paras 27 - 38, where the Constitutional Court similarly recognises the attitude of political engagement of the property owner and the squatter in contrast to the recalcitrant attitude of the local authority in order to reject an argument by the state that the property owner was to blame for the predicament he found himself in.

⁷⁰ As above paras 35 - 38.

Similarly, in *PE Municipality*, the Constitutional Court emphasises the political agency of the group of squatters that the state sought to evict there. Again the Court points to the fact that they had occupied the land in question not in order to force the municipality to provide to them, in preference to others, alternative land when they are eventually evicted, but because they had been evicted from elsewhere and had nowhere else to go.⁷¹ Again the Court emphasises that they had attempted to negotiate with the property owners and the state whilst the municipality had made no serious effort to reach an amicable conclusion to the matter, but had rushed to apply for an eviction order and had acted unilaterally.⁷² And again these factors taken together played an important part in driving the Court to the conclusion that an eviction order could not be granted unless suitable alternative land or accommodation was provided. Indeed, in *PE Municipality* these factors, together with others, were seen as so important that the Court took the surprisingly intrusive step of rejecting the municipality's offer of two possible alternative sites, finding that they were not suitable to the squatters' needs.

The focus on the political agency of impoverished people involved in socio-economic rights litigation in *Khosa*, *Modderklip* and *PE Municipality* and, in particular, the implicit recognition in *Modderklip* and *PE Municipality* that whether a public authority seeking to evict impoverished people from their homes had sought to engage them politically will play a role in a court's decision whether to order eviction, culminate in the Constitutional Court's decision in *Olivia Road*. In this case (decided directly on the basis of section 26(3) of the constitution in this respect) Yacoob J, in the process of setting aside the Supreme Court of Appeal's granting of an application for an eviction order, explicitly pronounces that whether or not a public authority seeking to evict impoverished people from their homes had sought to reach a solution with those people through political engagement would be an important factor in determining whether the eviction order should be granted.⁷³ In the process he confirms the existence of a constitutional duty on public authorities to

⁷¹ *PE Municipality* (n 8 above) paras 49 & 55.

⁷² As above 45, 55 - 57 & 59.

⁷³ *Olivia Road* (n 6 above) para 22.

engage with squatters before seeking to evict them, in an effort to find an amicable solution to their predicament.

Certainly one has to sound a note of caution here. As with any form of community-oriented rhetoric, the Court's emphasis in particular in the first three of these cases on the 'proper' political action of the permanent residents, the property owner and the squatters runs the risk of being read in an exclusionary fashion. So, for example, Mokgoro J explicitly uses this rhetoric to distinguish permanent residents from other non-citizens in South Africa and then, on the basis of that distinction to deny other non-citizens membership of the South African community.⁷⁴ Equally, the two Courts' reference in both *Modderklip* (SCA and CC) and *PE Municipality* to the fact that the squatters in question had occupied land illegally not with the intention to 'jump' the housing queue by forcing government to provide them with alternative accommodation when they were evicted, effectively marks the conduct of squatters who have indeed acted with that purpose as 'improper' and excludes their conduct (certainly equally born of desperation) from the realm of 'proper' political action. In this respect the two Courts run the risk of creating an idea of acceptable civic action that one has to comply with in order to form part of the South African political community, excluding other forms of political action.⁷⁵ Nevertheless, this aspect of the cases is important because at least it casts the permanent residents, property owner and squatters in the role of political actors, actively (and legitimately) engaging in the interpretation of their needs together with the state, who is in turn cast as just one more (albeit particularly authoritative) such participant in the process of need interpretation. In this way it avoids the depoliticising effect of the Constitutional Court's earlier unqualified separation of powers rhetoric.

⁷⁴ *Khosa* (n 9 above) para 59: 'For these reasons, I exclude temporary residents ...'.

⁷⁵ See in this respect K van Marle 'Love, law and the South African community: critical reflections on "suspect intimacies" and "immanent subjectivity" ' in H Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and democracy in a transformative constitution* (2004) 231-246.

(b) Transformative politics-friendly remedies

This new concern with transformative politics shows also in the manner in which the Constitutional Court and the Supreme Court of Appeal exercised and described their remedial powers in the four cases. This is evident first in *Modderklip* (SCA). *Modderklip* was presented by the state as an intractable situation. The state argued that it could not enforce *Modderklip*'s eviction order against the squatters, because it did not have the resources to do so, particularly as it would have to provide alternative land to the squatters were it to evict them.⁷⁶ This it would not be able to do also because it did not have the requisite resources, but, more importantly, because to provide the squatters with alternative land would allow them to jump the housing queue, thus legitimating unacceptable social behaviour.⁷⁷ This stance of the state's is a particularly clear example of the strategy of naturalisation referred to above: the state throws its hands in the air, overwhelmed by the intractable nature of the problems facing it and so attempts to remove the issues in question from the arena of political contestation. Harms J is unambiguous in his rejection of this strategy. Holding that 'Courts [and by implication the state] should not be overawed by practical problems' but should instead 'mould an order that will provide effective relief to those affected by a constitutional breach'⁷⁸ he proceeds to find a solution where the state said there was none, ordering the state to pay damages to the property owner and to allow the squatters to remain on the land in question until alternative accommodation is found. This order was in essence confirmed on appeal by the Constitutional Court, albeit on grounds different to Harms J's.⁷⁹ Harms J's 'can do' rhetoric powerfully counteracts the state's attempts at depoliticisation and places the kinds of issues that were dealt with in the case (homelessness, land invasion and eviction) squarely back in the domain of political contestation. In addition, because it amounted to the implementation of a proposal that both the property owner and the squatters had made in the course of their attempted

⁷⁶ *Modderklip* (SCA) (n 7 above) para 13.

⁷⁷ *Modderklip* (SCA) (n 7 above) para 29.

⁷⁸ *Modderklip* (SCA) (n 7 above) para 42.

⁷⁹ See *Modderklip* (CC) (n 7 above) para 68. Although the Court decided the case not on the basis of the rights to property and to have access to adequate housing, as did Harms J, it confirmed the order in substance, changing it only to reflect the different bases upon which its decision rested.

negotiations with the state,⁸⁰ it emphasises the involvement of these non-official political actors in the process of defining their needs and finding ways to satisfy them.⁸¹ As such, it underscores an agonistic understanding of democracy and a transformative understanding of politics and counteracts the idea that it is only the state who can engage politically with the issues and then hand down solutions from on high.

The repoliticising trend continues in the Constitutional Court's description of its remedial powers in *PE Municipality* and in the remedy used to resolve the dispute in *Olivia Road*. Both *Grootboom* and *Treatment Action Campaign* have been criticised for the Court's failure to employ structural injunctive relief. In *Grootboom*, the Court issued a simple declaratory order, leaving the remedy of the constitutional defect in its housing programme entirely to the state.⁸² In *Treatment Action Campaign*, the Court similarly issued a declarator, coupled with a mandatory order requiring the state to remedy the constitutional defect in its programme for prevention of MTCT of HIV.⁸³ However, despite confirming that it did indeed have the power to do so, the Court again declined to issue a supervisory interdict, holding that there was no indication that the state would not implement its order properly.⁸⁴ The critiques of the two cases in this respect have focussed on the extent to which the failure to employ such structural relief trenched on the effectiveness of the Court's remedies.⁸⁵ However, Dennis Davis has recently instead emphasised the role of such structural relief in promoting democratic accountability. To him, the failure of the Court to employ structural relief has caused it to miss an opportunity to allow those affected by its judgments to be involved in their implementation as active political agents and as such has undermined the idea of participatory democracy (read, for my purposes, transformative politics).⁸⁶

⁸⁰ *Modderklip* (SCA) (n 7 above) para 14.

⁸¹ See also *Modderklip* (CC) (n 7 above) para 55.

⁸² *Grootboom* (n 4 above) para 99.

⁸³ *Treatment Action Campaign* (n 5 above) para 135.

⁸⁴ As above para 129.

⁸⁵ See eg K Pillay 'Implementation of *Grootboom*: implications for the enforcement of socio-economic rights' (2002) 6 *Law, Democracy and Development* 255.

⁸⁶ DM Davis 'Socio-economic rights in South Africa. The record of the Constitutional Court after ten years' (2004) 5:5 *ESR Review* 3 6 - 7.

In *PE Municipality* Sachs J seems to heed this call. Although in the event declining to do so,⁸⁷ Sachs J raises the possibility that a court, in providing a remedy in an eviction case such as the one the Constitutional Court was faced with could order compulsory mediation between the parties. That is, a court could make a normative finding, in the sense of describing the outcomes that the constitutional and other legal duties at play in the case required, but could then order the parties to enter into a process of mediation in order to agree upon the most appropriate means with which to reach those outcomes.⁸⁸

As Charles Sabel and William Simon have pointed out,⁸⁹ this kind of ‘experimentalist’⁹⁰ structural injunctive relief combines the virtues of the Court requiring constitutional duties to be met in a practically effective way, whilst remaining respectful of its own institutional incapacity with respect to the substantive issues involved in the implementation of its normative findings. For my purposes it shows a further important virtue. Courts employing such relief would certainly, as Sabel and Simon argue, remain appropriately respectful of their own institutional incapacity by deferring to another forum than themselves with respect to the implementation of their orders. However, they will defer in this respect not in favour of the political branches of government only, as the Constitutional Court has been wont to do, but to the *political process* in the wider, transformative sense of the word outlined above. In this way courts would be able to subvert the technicising rhetoric that they seem inevitably to have to engage in when adjudicating socio-economic rights claims and give effect to a transformative, rather than institutional understanding of politics.

⁸⁷ *PE Municipality* (n 8 above) para 47.

⁸⁸ As above para 39 - 46.

⁸⁹ CF Sabel & WH Simon ‘Destabilisation rights: how public law litigation succeeds’ (2004) 117 *Harvard Law Review* 1016 1019 & 1053 - 1056.

⁹⁰ As opposed to ‘command-and-control’ injunctive regulation; Sabel & Simon (n 89 above) 1019.

Again, it is in *Olivia Road* that Sachs J's *obiter* remarks regarding engagement in *PE Municipality* bear fruit. As I outline in Chapter 2 above,⁹¹ in *Olivia Road* Yacoob J did what Sachs J only spoke about in *PE Municipality*: he resolved the case by ordering the parties to engage with each other to reach a mutually acceptable solution. This they did, reaching an agreement that was subsequently approved by Yacoob J and became an order of court. At first glance, this decision is unalloyed good news for someone like me concerned about the Court's relationship with transformative politics – Yacoob J seems in a simple and concrete fashion to have recognised the importance of fostering transformative politics in deciding socio-economic rights cases. However, two rather troubling features of the judgment go a long way to dispelling this first impression.

(c) *Olivia Road's* instrumentalisation

... have you heard, she said

Solidarity's clenched fist
Just turned
Into a competitive elbow?⁹²

First: when Sachs J wrote about the possibility of ordering engagement or mediation to find a practical solution to the eviction application before him and when Sabel and Simon wrote about structural relief requiring engagement between the parties before a court they all clearly had in mind that such orders would issue as remedies *only once a case has been decided*. The reasons for this seem obvious. Parties to a dispute approach a court presumably because they have themselves been unable to resolve that dispute amicably. They want, and can legitimately expect the court to determine authoritatively which of their conflicting claims are valid, so that a practical solution to their dispute can be found on that normative basis. The engagements orders contemplated by Sachs J and Sabel and Simon will issue only once the court has set a normative framework within which engagement can operate – once the court has decided what the rights and

⁹¹ See 136 - 137 above.

⁹² J Cronin 'Switchback' from *More than a casual contact* (2006) 10.

duties of the parties are and what the results of the engagement must be.⁹³ Not only does this set the limits within which engagement may operate, it also, importantly, places the parties to the negotiation, with their rights and duties now authoritatively determined and with the end goals of the negotiation clear, on an equal footing.

Yacoob J in *Olivia Road*, however, issued his order that the parties should engage long before he had decided the case – shortly after argument for leave to appeal had been heard in the Court, but with judgment long still pending.⁹⁴ This had a number of unfortunate consequences. It meant that the parties had to negotiate a solution without an authoritative indication of what the legitimate goals of their engagement are – in the dark, as it were. The fact that, in this case, they were able to reach an agreement that accorded with constitutional requirements is neither here nor there. It may not be the same in other cases. This problem is exacerbated by the fact that Yacoob J failed to provide clear reasons for his approval of the agreement, stating only that ‘there was no doubt that the agreement represented a reasonable response to the engagement process’⁹⁵ and listing as reasons for this conclusion that the City and the occupiers had entered into engagement and submitted the agreement ‘in compliance with’ the Court’s order; that the City had incurred considerable expense in implementing the agreement; and that ‘the City and the occupiers would have been in an invidious position if this Court had later held that the agreement was not a reasonable response to engagement’.⁹⁶

Yacoob J’s pre-decision engagement order also allowed him to escape the need to decide important points of law raised by the case – for example, whether the Prevention of Illegal Eviction from and Unlawful Occupation of

⁹³ In fact, both Sachs J and Sabel & Simon contemplate that courts would hold that either of the parties before them are entitled to certain things and would then order engagement as a way in which they can work out how best to acquire those things. See *PE Municipality* (n 8 above) paras 39 - 46; Sabel & Simon (n 89 above) 1019 (courts should decide on ‘governing norms’ for the negotiation that will ensue – those ‘governing norms ... express the *goals* the parties are expected to achieve’).

⁹⁴ *Olivia Road* (n 6 above) para 4. The engagement order itself is reproduced in the judgment at para 5.

⁹⁵ As above para 28.

⁹⁶ As above para 29.

Land Act⁹⁷ applied to the kind of eviction at issue. This, of course, dilutes the broader significance of the case, in significant part rendering it a narrow, instrumental decision that affects the interests only of the specific parties before the Court. This aspect of the decision significantly undercuts the gains for transformative politics occasioned by the engagement order. It both plays into and confirms the narrow liberal understanding of politics as the pursuit of individual interest without regard to a public good that I distinguished from my understanding of transformative politics in Chapter 1 above,⁹⁸ and reduces the extent to which the decision can affect the broader, systemic (political) causes of impoverishment and homelessness.⁹⁹

The decision to require engagement to take place before the case had been decided also meant that the clear imbalance in bargaining power that existed between the City and the occupiers was not addressed as it would have been had the case first been decided and engagement ordered after that. Fresh from a Supreme Court of Appeal decision holding that they were entitled to much less than they had initially claimed from the City,¹⁰⁰ the occupiers were expected to negotiate a solution to their dire situation without any indication from the Court what they could validly claim from the City. In short, litigation had not placed them in a stronger position in their negotiations with the City than they had been in before they approach the courts for relief – if anything their position had become weaker after the Supreme Court of Appeal's decision. Again, the fact that they were able to negotiate an acceptable and constitutionally consistent solution in this case is neither here nor there. It might not be so in other cases.¹⁰¹

⁹⁷ Act 19 of 1998 (PIE).

⁹⁸ See 23 – 26 above.

⁹⁹ For my own elaboration on this point, see 169 - 176 below.

¹⁰⁰ *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA) (*Olivia Road* (SCA)). The Supreme Court of Appeal granted an order to evict the occupiers, subject only to the condition that the City provide to those of the occupiers 'desperately in need of housing assistance' temporary alternative shelter once they were evicted (para 74).

¹⁰¹ It is not clear from Yacoob J's judgment whether or not he sees *Olivia Road* as an exception, in the sense that there were exceptional circumstances indicating that the engagement order should issue pre-judgment, rather than only after the case had been decided. If anything, there are indications that he holds the contrary view – he seems to contemplate that there would be many cases in which engagement would be ordered while judgment is still pending (see eg para 30). In addition, the Constitutional Court, in the very next socio-economic rights matter to be heard by it – *Mamba v Minister of Social*

The second troubling feature of Yacoob J's decision is that, having resolved the dispute between the parties before him by ordering them to engage with each other, he declined the invitation of the parties also to consider the City's housing plan in general and the provision it makes for other people who find themselves in the same predicament as the occupiers before the Court. Yacoob J's reason for declining to consider the City's housing plan and the related question of the position of those inner city dwellers in the same position as the occupiers before the Court (some 72 000 people on a conservative estimate) was first that the housing plan was a new one that had not been considered by either the High Court or the Supreme Court of Appeal and that it was undesirable for the Constitutional Court to sit as Court of first and last instance on the question of its constitutional consistency, without the benefit of the opinion of the lower courts on that question.¹⁰² Yacoob J also indicated that the predicament of other groups of inner city dwellers in a similar position to the occupiers before the Court can and should be addressed on a case by case basis through the same kind of engagement that had occurred in this matter and that there was no reason to believe that the City would not negotiate with such other groups in good faith and on a reasonable basis.¹⁰³

Yacoob J's decision to resolve only the dispute between the specific parties before him and to leave the broader question raised by their dispute for another day is surprising. First, although it certainly is good policy for the Constitutional Court as a rule not to consider matters as court of first and last instance, the Court cannot be absolutely barred from doing so. Most obviously, the Court does in exceptional cases allow for direct access, which

Development Case no: CCT 65/08 – issued a similar pre-judgment engagement order (see Case no: CCT 65/08, order dated 21 August 2008). This case concerned the plight of victims of the xenophobic violence that rocked South Africa in the middle of 2008, who had been placed in refugee camps by the state. The state wanted to close these refugee camps and the refugees objected that they would then have nowhere else to go. The case was never decided by the Constitutional Court, as the applicants withdrew the matter shortly after the Court had heard argument on leave for direct access. The order which I refer to, which was initially available on the Court's website, has since been removed. The author has a copy on file.

¹⁰² *Olivia Road* (n 6 above) paras 34 – 35.

¹⁰³ As above.

requires it to consider both questions of law and questions of fact as court of first and last instance.¹⁰⁴

Also, the Court has certainly not in other cases, and in particular in other socio-economic rights cases, been averse to changing the legal basis upon which a case is decided *mero motu*, so that, at least as far as questions of law are concerned, it sat as court of first and last instance. Here one need think only of *Soobramoney*, where Chaskalson P opted to decide Mr Soobramoney's claim on the basis of the section 27(1) right of everyone to have access to health care services rather than only on the basis of the section 27(3) right not to be refused emergency medical treatment.¹⁰⁵ Similarly, in *Grootboom*, which in the High Court was decided on the basis of section 28(1)(c) read with section 28(2), the Constitutional Court elected to decide on the basis of section 26(1) and (2).¹⁰⁶ Although in both these cases the Court, strictly speaking, considered only new points of law without the benefit of the contribution of the lower courts, its change in tack with respect to law inevitably required it to consider much new factual information also. This is so because the legal questions were through the change in legal basis placed in a much broader socio-political context than that which was considered by the lower courts.

Finally, and to me most tellingly, the Court has on a number of occasions in the past allowed – indeed invited – new parties to enter the fray for the first time when a case reached it and has so itself opened the door for both new points of law and new factual material to be presented to it.¹⁰⁷ This has happened where the Court has extended a general invitation to interested

¹⁰⁴ Section 167 of the constitution allows a person 'when it is in the interest of justice and with leave of the Constitutional Court' to bring a case directly to the Constitutional Court. For a recent interpretation of this section see *Dudley v City of Cape Town* unreported, case no CCT 5/04, [2004] ZACC 4, 20 May 2004.

¹⁰⁵ *Soobramoney* (n 3 above) para 22.

¹⁰⁶ *Grootboom* (n 4 above) para 20.

¹⁰⁷ My thanks to Stu Woolman for alerting me to this point and to Ann Skelton, of the Centre for Child Law at the University of Pretoria for pointing me to fruitful examples of where this has occurred.

parties to join as *amici curiae*.¹⁰⁸ In such cases, of course, the role of such *amici* is mostly restricted to presenting new points of law to the Court, with limited opportunity to present new information. But the Court has also invited specific entities to join litigation when a case has already reached it as parties to the litigation. In such cases the newly joined parties are not equally restricted in the extent to which they can place new facts before the Court in their affidavits – and indeed, in a case such as *AD v DW* the minister of social development, who had joined before the Constitutional Court as a party at the Court's invitation presented extensive such information that the Court had to consider as court of first instance.¹⁰⁹ The point is that, although it is of course always preferable for the Constitutional Court to have the benefit of the decisions of lower courts with respect to issues of both law and fact that it considers, it is clearly not barred in absolute fashion from deciding issues raised for the first time before it.

There seems to be ample reason why the Court could in *Olivia Road* have made an exception to the general rule and considered the new facts that were placed before it. The legal issue of the constitutional consistency of the City's general approach to dealing with the problem of inner city homelessness and inadequate housing was not raised for the first time before the Constitutional Court – it was raised before and dealt with by both the High Court¹¹⁰ and the

¹⁰⁸ See, for example *S v M* 2008 3 SA 232 (CC). In this case, which concerned the constitutionality of the imposition of a term of imprisonment for fraud on a primary care-giver of minor children, the Court issued an invitation to interested parties to address it as *amici curiae* on a number of specified issues (para 5). The Centre for Child Law at the University of Pretoria joined as *amicus* and 'made wide-ranging written and oral submissions on the constitutional, statutory and *social context* in which the matter fell to be decided' (para 6) (my emphasis). The Court also appointed a *curator ad litem* who, with the aid of a social worker, compiled a report that was considered by the Court. Finally, counsel for the department of social development and the department of justice and constitutional development also submitted an extensive report on the position of children whose primary care-givers were sentenced to terms of imprisonment, compiled by a group of social workers. Both the submissions of the *amicus* and reports of the *curator ad litem* and counsel for the various state departments contained extensive new factual information. That the Court indeed carefully considered this new information is clear from Sachs J's remarks complimenting the parties on the comprehensiveness and quality of the information thus presented and indicating that the information was of great help in reaching his conclusions in the case (para 9).

¹⁰⁹ *AD v DW* 2008 3 SA 183 (CC).

¹¹⁰ The High Court declared the City's housing plan inconsistent with the constitution, ordered the City to devise a plan to meet the housing needs of the occupiers and those other inner city dwellers in dire housing straits, and interdicted the eviction of the occupiers pending the

Supreme Court of Appeal.¹¹¹ What was new before the Constitutional Court was not the legal issue, but the plan that the City had newly fashioned and submitted to the Court. Also, both parties wanted the Court to deal with this matter and presented argument on it. Finally, Yacoob J's decision not to decide the question of the constitutional consistency of the City's housing plan leads to nothing short of an absurd conclusion. When appearing before the High Court the City had no plan to deal with inner city homelessness – for this reason its housing plan was found to be in breach of the constitution.¹¹² In response to this holding the City then fashioned a plan to deal with inner city homelessness, which was submitted to the Constitutional Court when the parties appeared before it. Yacoob J's decision not to consider that housing plan because it was not considered by either the High Court or the Supreme Court of Appeal, means that, under similar circumstances - that is, where a claimant complains to a lower court that a public body's response to, for example, a housing problem is constitutionally deficient *because the body has no plan to deal with that problem* - all that the public body has to do to get that issue off the table when the case reaches a higher court is then to place a plan, of whatever kind and quality before the higher court. The higher court would then, if Yacoob J's reasoning is taken to its logical conclusion, be precluded from considering it, because it was never considered by the lower court!¹¹³

finalisation of such a plan (*City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) (*Olivia Road* (High Court)) para 67).

¹¹¹ The Supreme Court of Appeal declined to interrogate the City's housing plan on separation of powers grounds – on the argument that it, as opposed to the City, did not have the expertise to do so (*Olivia Road* (SCA) (n 100 above) para 45).

¹¹² *Olivia Road* (High Court) (n 110 above) para 67.

¹¹³ The same would apply where, in the High Court, an existing plan is found to be *inadequate* and the public authority then adopts a wholly new plan, which it submits only at the Constitutional Court stage. A further point, along the same lines: the Supreme Court of Appeal also declined to deal with the challenge to the City's housing plan, but on a ground different than the Constitutional Court's. As outlined in n 111 above, it held that it would not consider the plan because it was not institutionally capable of doing so, and had to defer to the superior capacity of the City in this respect (*Olivia Road* (SCA) (n 100 above) para 45). Had the City submitted its inner city housing plan already to the Supreme Court of Appeal and not for the first time in the Constitutional Court, Yacoob J's reasoning would have led to a further absurd conclusion: because the Supreme Court of Appeal, *even though the plan was before it*, declined to deal with its substance, the Constitutional Court would not be able to consider it, because with respect to the substance it would then sit as court of first and last instance.

But Yacoob J's decision not to consider the constitutional consistency of the City's housing plan is also surprising for another reason, more germane to my concern with transformative politics. A strength of the Constitutional Court's socio-economic rights jurisprudence leading up to *Olivia Road* was precisely the manner in which it was able to negotiate the apparent friction that often – in fact almost invariably – arises in socio-economic rights cases between the interests of the individual people or the specific group of people who bring a case to court in the first place of course to alleviate their own plight on the one hand, and broader collective interests and systemic issues that arise in the course of deciding the case on the other – described in slightly different terms, the need for a court in a socio-economic rights case to account for both the plight of the particular people before it and the structural causes of the broader social problem that the case before it is only one example of.¹¹⁴

One of the main features of the Constitutional Court's socio-economic rights jurisprudence before *Olivia Road* is the extent to which that jurisprudence moves on a general rather than a particular or specific plane. Although this approach was already evident in *Soobramoney*¹¹⁵ (where the potential for conflict between individual and collective interests was of course illustrated very starkly), it was first clearly articulated in *Grootboom*. Here the Court was faced with a claim of a specific group of impoverished people that the state was constitutionally bound to provide them with temporary shelter to tide them over after an eviction until such time as they could find their own permanent accommodation. The Court, instead of deciding the claim as presented to it – a claim of a particular group of people for a specific form of concrete relief – decided it as a challenge to the state's housing policy in its entirety. The relief it provided was also general – a declarator that the policy was unconstitutional to the extent that it failed to make provision for the interests of the completely homeless.

¹¹⁴ For accounts of this problem in the South African context, see LA Williams 'Issues and challenges in addressing poverty and legal rights: a comparative United States/South African analysis' (2005) 21 *South African Journal on Human Rights* 436.

¹¹⁵ The Court took great care to indicate that Mr Soobramoney's claim should be judged in light of the health care needs of the broader society and the scarcity of resources to meet those more general needs. See in particular Sachs J's concurring judgment in *Soobramoney* (n 3 above) paras 53 – 54.

Of course, there was first and foremost a practical reason why it did this – the case as far as the interests of the particular group of people was concerned had been settled before the Constitutional Court heard it, so it was left only with the general concerns raised in the matter. However, the Court’s decision to depart from the High Court’s reliance in that case on the right of children to shelter and to decide the case on the basis of the right of everyone to have access to housing, coupled with the focus throughout the judgment on the fact that there were large numbers of people who faced at the time the same difficulties as the Grootboom community to me indicate strongly that the Court consciously generalised its approach to the case to make sure its collective, structural implications were also addressed. This point is further underscored by the fact that in the only other socio-economic rights case similar to *Grootboom* – that is, a case in which policy, rather than a specific decision or legislation was considered by the Court – *Treatment Action Campaign* – this same general policy review approach was also employed and explicitly asserted as the approach that the Court would use to decide such cases.¹¹⁶ Equally, in the only other non-eviction socio-economic rights case to date decided by the Court, the generalised reasonableness standard was applied.¹¹⁷

For this generalisation of its approach to deciding the *Grootboom/Treatment Action Campaign* kinds of socio-economic rights cases the Court has been roundly criticised. Essentially the objection has been that the Court has converted what are rights of real people to real things into rights of everyone (but of no one in particular) to reasonable policies – in other words, that the Court has over-emphasised the collective/systemic issues raised in these cases at the expense of the individual/particular.¹¹⁸ This criticism has been

¹¹⁶ *Treatment Action Campaign* (n 5 above) paras 30 – 39.

¹¹⁷ *Khosa* (n 9 above) para 43. See also para 35, where Mokgoro J rejects an attempt by the state to settle the matter *inter partes* only, because ‘the impact of the settlement would have been too limited and would not resolve the unconstitutionality of the impugned provisions *and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants*’ (my emphasis).

¹¹⁸ It is necessary at the outset to distinguish this particular strain of criticism from another – a critique of the effectiveness of the Court’s orders in socio-economic rights cases. The critique I am concerned with here focuses on the need to generate through socio-economic rights

implicit and at times explicit in academic writing urging the Court to adopt the 'minimum core content' approach to deciding socio-economic rights cases.¹¹⁹ It has also directly played a role in litigation subsequent to *Grootboom*. In *Treatment Action Campaign* the first and second *amici curiae* (the Institute for Democracy in South Africa (IDASA) and the Community Law Centre of the University of the Western Cape) urged the Court to depart from the generalised review method established in *Grootboom* and to adopt an interpretation of section 27(1) of the constitution in terms of which that section 'establishes an individual right vested in everyone'.¹²⁰ This individual right, so it was argued, would entitle impoverished people to be provided with at least the most basic levels of access to health care (and presumably other basic resources implicated by section 27(1) and the similar section 26(1)). This entitlement would not be subject to the qualifications of resource constraint and time and the reasonableness standard contained in section 27(2) and section 26(2). On this interpretation sections 27(2) and 26(2) (and the generalised standard of review the Court derived from section 26(2) in *Grootboom*) would apply only to cases where the most basic levels of access to resources (the minimum core content) was not at issue.¹²¹ In the event the Court rejected this interpretation, holding that the positive duty described in section 27(2) clearly refers to and describes the content of the right established in section 27(1); that this right and duty were qualified in the manner described in section 27(2); and that claims based on this right are to be decided on the basis of the reasonableness review standard enunciated in *Grootboom*.¹²²

litigation concrete relief for specific impoverished people. The critique of the effectiveness of the Court's orders is not necessarily linked to the idea that socio-economic rights should in the first place be seen as individual rights generating concrete individual benefit for impoverished people and to the accusation that the Court has too broadly generalised its approach to deciding socio-economic rights cases. Rather, it focuses on finding ways in which the relief in such cases, whether of a generalised or a specific nature, can be effectively implemented. For representative examples of this 'effectiveness' critique (which, it has to be said, poses its own problems, ones that I won't engage with here), see M Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215; and Pillay (n 85 above).

¹¹⁹ See as a representative example of this kind of criticism S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2002) 6 *Law, Democracy and Development* 159-176.

¹²⁰ *Treatment Action Campaign* (n 5 above) para 26.

¹²¹ As above paras 28 – 29.

¹²² As above paras 30 – 39.

The criticism that the Court has over-emphasised collective interests to the detriment of the urgent, concrete individual needs of particular impoverished people is, I believe, misplaced, or has at least been overstated. Broader collective and specific individual interests are inevitably both at play in socio-economic rights cases. The predicament facing a specific impoverished litigant who approaches a court for relief, in a country such as South Africa where there continues to exist wide-spread impoverishment, with limited resources to deal with it, is inevitably only one example of the predicament faced by many, many other people – one manifestation of a systemic problem. Just as a court neglecting the individual interests of the litigants who appear before it would be shirking its duty, a court that does not take account of the broader systemic problems raised by a case in some way would do the same. Courts deciding these cases, whatever their nature, inevitably have to take account of both the collective and the individual interests at issue, trying to find a way best to address both.

To my mind the Constitutional Court has by and large managed, whether by design or accident, to maintain a proper balance between the individual and collective interests, the particular and the systemic at play in the socio-economic rights cases it has decided. This is most obvious in *Grootboom*, where the parties' settlement of the particular claims of the Grootboom community before the case was argued dealt with the individual interests at stake,¹²³ so leaving the Court free to deal in its judgment with the collective, systemic issues that arose. In the other cases in which the reasonableness test played a role - *Treatment Action Campaign* and *Khosa* - the issue did not arise in the acute manner that it did in *Grootboom*.

Treatment Action Campaign was never a case only about the interests of a specific group of people. The Treatment Action Campaign brought the case

¹²³ I am for the moment not concerned here with the question whether or not the terms of the settlement order were indeed complied with and whether the Grootboom community indeed received the shelter they required. Clearly, there were problems with the implementation of the settlement order, such that the community's predicament was never satisfactorily resolved. See in this respect Pillay (n 85 above) 264 – 265.

not on behalf of a specific group of indigent, HIV-positive women about to give birth at a specific public health facility, but on behalf of all such women, with respect to all public health facilities.¹²⁴ At the same time, the Court's judgment and order in that case also, whilst applying generally to all indigent HIV-positive women giving birth at any public health facility, once the problems with its enforcement were sorted out, generated concrete individual benefit for particular such women, precisely because it was aimed at all of them.

Khosa, which was indeed brought by a particular group of people, also could never be only about their interests. In *Khosa* the challenge was of course to statutory provisions that excluded the claimants and others like them from access to social assistance benefits. The Court's judgment that these provisions were inconsistent with the constitution and its reading in of words to remedy that inconsistency inevitably generated concrete benefit for the group of people who brought the case and at the same time for everyone else in their position. Indeed, it was to ensure that the case also had this more general impact that Mokgoro J rejected an offer by the state to settle the matter *inter partes*, holding that '[t]he impact of the settlement would have been too limited and would not resolve the unconstitutionality of the impugned provisions *and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants*.'¹²⁵

In the eviction cases – *Modderklip* and *PE Municipality* – the interplay between individual and collective or systemic interests played out in a slightly different fashion. Of course, these cases were always first and foremost about the specific interests of the squatters that the property owner in *Modderklip* and the property owner in concert with the state in *PE Municipality* sought to evict. The decision in *Modderklip* to allow the squatters to remain on the disputed land until the state presented them with suitable alternative

¹²⁴ Unlike in *Khosa* (n 9 above), where the state challenged the standing in the public interest of the specific group of impoverished permanent residents who brought the case to court (para 36), standing was in *Treatment Action Campaign* never an issue – in fact, it is unclear in what capacity, in formal terms, the Treatment Action Campaign acted there. The best guess would be that they acted on behalf of a group or class of persons (sec 38(c)) and/or that they acted in the public interest (sec 38(d)).

¹²⁵ *Khosa* (n 9 above) para 35 (my emphasis).

accommodation and to pay constitutional damages to the property owner to compensate him for the breach of his property right clearly benefited those particular parties in the first place. Equally, in *PE Municipality*, the Constitutional Court's decision to confirm the denial of the eviction order, in spite of the offer of alternative accommodation by the state, clearly and concretely benefited the specific group of squatters that the state sought to evict. Nevertheless, despite the centrality of individual interests in these cases, broader collective, systemic issues were not left aside. In both cases the broader, collective or systemic context was taken into account through the creation of law, which would apply in similar cases in the future. In *Modderklip* the most important such principle was the idea, first, that an eviction dispute between a property owner and impoverished people unlawfully inhabiting her land is a public rather than a private matter that, second, the state was duty-bound to resolve.¹²⁶ In *PE Municipality* this point was also emphasised,¹²⁷ and further important conclusions were reached about the manner in which to interpret the PIE Act,¹²⁸ and about factors that play a role in determining

¹²⁶ See AJ van der Walt 'The state's duty to protect property owners v the state's duty to provide housing: thoughts on the *Modderklip* case' (2005) 21 *South African Journal on Human Rights* 144 147 – 150, but in particular 148. In *Modderklip* (SCA) (n 7 above) this conclusion was reached on the basis of the state's duty to promote and fulfil the right to have access to adequate housing and the state's duty to protect the right to property; in *Modderklip* (CC) (n 7 above) the Court reached the same conclusions on the basis of the principle of rule of law and the right of access to court. See however Van der Walt's (above) problematisation of the Supreme Court of Appeal's reliance in this respect on the duty to protect rights (160 – 161) (noting that the theoretical basis for this construction is not clearly thought through in *Modderklip* (SCA) and that its origin is also not clearly indicated, such that the construct's theoretical coherence potentially suffers). A second important aspect of the decision is the Court's conclusion that that property rights and the right to have access to adequate housing inevitably implicate each other and that the solution to the apparent conflict between these rights that arises in eviction cases is to focus on the state's duty to protect rights. In eviction cases, the state's duty to protect property rights, so the argument proceeds, can only be properly met if the state's duty to protect the right to have access to adequate housing is also met in the sense that the state ensures in some way that the evictees/occupiers are not left out in the cold (see Van der Walt (above) 59). For my own problematisation of the shift between the two decisions in the basis for these conclusions, see 180 - 187 below.

¹²⁷ *PE Municipality* (n 8 above) paras 16 – 19, referring with respect to this point to *First National Bank of South Africa Limited t/a Westbank v Commissioner for the South African Revenue Services; First National Bank of South Africa Limited t/a Westbank v Minister of Finance* 2002 4 SA 768 (CC) paras 50 – 52. See in this respect, in general, also AJ van der Walt 'Exclusivity of ownership, security of tenure and eviction orders: a critical evaluation of recent case law' (2002) 18 *South African Journal on Human Rights* 371, cited with respect to this point by Sachs J in *PE Municipality* (paras 20 & 23).

¹²⁸ The Court, per Sachs J, emphasised the importance of the historical and current socio-political context in interpreting the provisions of the PIE Act (n 97 above) (*PE Municipality* (n 8 above) paras 8 – 23, but in particular para 11). See in this respect also AJ van der Walt 'Exclusivity of ownership, security of tenure, and eviction orders: a mode to evaluate South

whether or not a court should grant an eviction order in circumstances where impoverished people inhabit private property.¹²⁹

The apparent negotiation that our higher courts by hook or by crook seem to have managed in their socio-economic rights cases between individual interests and collective/systemic issues is potentially turned on its head in *Olivia Road* by the Court's decision not to evaluate the constitutional consistency of the City's plan to deal with inner city homelessness. In contrast to earlier decisions where the Court consciously emphasised the collective/systemic issues raised and insisted that they be addressed, in *Olivia Road* the Court, by deciding not also to consider the City's inner city housing plan, seems consciously to have decided to focus only on the specific, concrete, individual interests at stake in the case. Indeed, Yacoob J's remarks justifying his decision not to deal with the housing plan present a picture of socio-economic rights litigation as purely an instrument through which individuals or specific groups of people can engage the state to advance their particular interests and of court-driven transformation as something that must occur on an incremental, case-by-case basis only:

[T]he desperate situation of the [Olivia Road] occupiers has been alleviated by the reasonable response of the City to the engagement process.

...

The City has undertaken to negotiate permanent housing solutions for the occupiers in consultation with them. It is not unreasonable to expect that the City will, in the ordinary course, adopt a similar approach in respect of other people who are affected in the future. ... A case can always be brought in the High Court in relation to particular occupiers with specific allegations as to the respects in which the housing obligations imposed by the Constitution have not been complied with.¹³⁰

As with the Court's decision to order engagement before the case had been decided, the Court's failure to address also the systemic/collective issues

African land-reform legislation' 2002 *Tydskrif vir Suid-Afrikaanse Reg* 254 259 – 263, cited in this respect by Sachs J in *PE Municipality* (para 10).

¹²⁹ The Court held that an eviction order should not be granted under the PIE Act (n 97 above) unless the state could show that it had seriously attempted to resolve the dispute through discussion and mediation (as above paras 39 – 47).

¹³⁰ *Olivia Road* (n 6 above) para 35.

raised in *Olivia Road* works to the detriment of transformative politics. In rejecting the invitation to consider the housing plan and so the plight of the 70 000 or so other people in the same position as the occupiers who came to court, the Court renders the process of (potentially political) engagement that it had set in motion an instrumental process through which narrow individual interests are advanced without regard to any conception of the public good. In this respect the Court confirms an individualist liberal conception of politics at odds with the transformative politics that I outline in Chapter 1 above.¹³¹ At the same time the Court manages to avoid the systemic or structural aspects of the problems of homelessness at issue in the case – stated differently, it manages to avoid the *substantively political* aspects of the case.

3.2.3 Proceduralisation: *Soobramoney*, *Grootboom*, *Treatment Action Campaign*, *Modderklip* and *Olivia Road*

Our enclave ship, best-world, benchmarked, stirs,
years for venture

There'll be, we'd concede, the inevitable
left behinds

The unspoken, the stigmatised, the castaways
nursing their stuttering fir

From our crow's nest their stranded looks
will soon dwindle

To less than a smudge
on the south horizon

As we bound now,
bound away, bound for global

Our lyrical sails billowing with
the winds of denial¹³²

3.2.3.1 Introduction

In Chapter 1 above, I briefly described the depoliticising rhetoric of *naturalisation* – the tendency to describe impoverishment as somehow part of the natural order of things, either because it is a problem of such overwhelming proportions that we simply cannot do anything about it, or

¹³¹ See 24 – 25 above.

¹³² J Cronin 'The tide has turned' from *More than a casual contact* (2006) 58.

because it is caused by natural factors (drought; floods; naturally determined scarcity of resources) over which we have no control.¹³³

One manifestation of such naturalising rhetoric posits impoverishment as something over which we have no control because it is determined and maintained by the impersonal, inexorable forces of the market. In this view the market is depicted as a 'natural construct', a mechanism with a life and logic of its own, something that it is impossible to control, or at least something that we should not interfere with, lest we upset that internal life and logic.¹³⁴

This kind of naturalising market-rhetoric is of course closely linked to a particular view of proper economic ordering – what Sampie Terreblanche describes as 'liberal (or free market) capitalism'.¹³⁵ For those holding this view the best mechanism through which to ensure general social welfare is the free market. Citing Adam Smith's description of the market as controlled by an 'invisible hand' that, if left to operate freely, would ensure that 'the attempts of individuals and corporations to maximise their profits will be miraculously and perfectly "coordinated" ... to the benefit of all ...',¹³⁶ liberal capitalists hold that impoverishment will be best addressed if dominant market participants (the corporate sector) are left to operate freely and without restriction to generate wealth. This wealth, so they continue, will, through the creation of jobs and in other ways 'trickle down' to impoverished people over time.¹³⁷ The role of the state, in this view, is procedural, limited to providing the regulatory framework - the procedures and institutions - within which market participants can pursue

¹³³ See 65 – 66 above.

¹³⁴ S Terreblanche *A history of inequality in South Africa 1652 – 2002* (2002) 61.

¹³⁵ As above 56. Patrick Bond uses the term 'social-contract capitalism' – see his *Elite transition* (2d ed 2005) 53 and further.

¹³⁶ As above 58. Terreblanche points out that the notion of Smith's 'invisible hand' that liberal capitalists rely on is a 'vulgarised' rendition. Smith, so he continues, claimed only that under certain very specific and strict conditions – the existence of 'an open, well-organised, and civilised society in which all individuals would be disciplined and educated to pursue their self-interest with circumspection, and with due regard for the interests of others, and with the necessary prudence; ... a sound judicial system for protecting property and contract rights and preventing all forms of fraud and corruption; and ... the existence of competitive markets in which nobody has monopolistic power to influence market prices and wages or to hamper the tendency of market prices and wages to move to their natural level or true values' – would the 'invisible hand' operate to coordinate individual and corporate pursuit of self-interest such as to operate for the benefit of all.

¹³⁷ As above 62.

their self-interest without restriction and the market can arrange the distribution of resources freely and ‘naturally’.¹³⁸

This liberal capitalist understanding of economic ordering is problematic first from a descriptive point of view. In short, it is highly abstract and so fails to take account of the role of power in structuring society and its economic realities. The linchpins of this view are first the idea of neutrality – the idea that the market is an ideologically neutral ‘natural construct’, controlled within a minimal and ideologically neutral framework of ‘rules of the game’ – and, second, the assumption of equality (that the ‘playing field’ – the market – is level in the sense that it provides to all an equal opportunity for self-advancement). It is only on the basis of these two assumptions that the idea that the market, if left to operate freely, will render a just distribution of resources holds any currency.

Both these assumptions are, of course, false. The market and the rules according to which it operates are not ideologically neutral. Indeed, a major preoccupation of critical legal theory over the last three decades has precisely been to show how seemingly neutral ‘rules of the game’, such as the common law background rules of property and exchange are not natural or neutral, but are ideologically determined and serve and entrench particular interests – and in this it has succeeded, to the extent that this point is probably trite.¹³⁹

¹³⁸ As above 59 – 62. This liberal capitalist view of economic ordering is reflected neatly in liberal views of politics. As I briefly outline in Chapter 1 above (24 – 25), liberal conceptions of politics are procedural rather than substantive. That is, just as liberal views of economic ordering advocate leaving substantive distributive question to the free operation of the market, where the pursuit of self-interest will inevitably result in the most just ordering of resources, liberal views on politics do not attempt to achieve any form of collective truth or any conception of the common good. Rather, such conceptions of politics focus on creating the procedures and institutions within which individuals can freely pursue their self-interest, without direct concern for collective truth or the common good (Mouffe (n 59 above) 128 – 129). Politics is reduced in this view to a set of procedures and institutions, and to the pursuit of self-interest. Importantly, politics is presented as ideologically neutral, precisely avoiding the pursuit of a common good or collective truth. See C Mouffe ‘For an agonistic model of democracy’ in N O’Sullivan (ed) *Political theory in transition* (2000) 113 114, where she refers to the liberal ‘aggregative’ understanding of politics and democracy mooted by Joseph Schumpeter in his *Capitalism, socialism and democracy* (1947) (viewing politics as nothing but the aggregation of self-interest). See also, in general, A Downs *An economic theory of democracy* (1957).

¹³⁹ See in this respect WH Simon ‘Rights and redistribution in the welfare system’ (1986) 38 *Stanford Law Review* 1431 1433 - 1436 and LA Williams ‘Welfare and legal entitlements: the

The assumption of equality is also unrealistic. The liberal capitalist idea that the 'invisible hand' of the market, if left free of state interference, will coordinate individual pursuit of self-interest such as to achieve general welfare quite obviously fails to take account of the extent to which, particularly in South Africa, the ability to participate in the market (and indeed the ability to determine the rules according to which it operates!) is curtailed by entrenched, systemic inequality in access to basic resources such as education, information, livelihood and political voice and power. As Sampie Terreblanche puts it:

... South African society was (and still is) a divided and conflict-ridden one. It was (and still is) a "closed" society in which whites (always less than 20 percent of the total population) were (and still are) in a privileged position and powerful and educated enough to dominate, manipulate, and exploit the majority of people other than white. These features of domination, manipulation, and exploitation lasted for the greater part of the 20th century ... Many of these features are perpetuated in subtle ways in the "new South Africa".¹⁴⁰

In this light it is clear that liberal capitalist understandings of economic ordering are also highly problematic from a transformative politics-oriented point of view. This is so in the first place because, through their focus on the free pursuit of self-interest, these approaches render the debate about impoverishment and efforts to address it wholly instrumental, geared toward advancing the interests of specific, discrete groups of people.¹⁴¹ In this way it disregards collective interests and systemic issues. Second, and more importantly for purposes of this section, this is so because these understandings, by pretending to leave deeply political questions of

social roots of poverty' in D Kairys (ed) *The politics of law: a progressive critique* (1998) 569 575 - 577. See also A Sen *Poverty and famines. An essay on entitlement and deprivation* (1981) 166 (detailing the extent to which access to a basic resource such as food is determined by politically constructed legal background rules). For an account of the extent to which basic rules of contract law in South Africa, such as the maxim *pacta servanda sunt*, despite being depicted as neutral, in fact reflect very specific ideological positions, see AJ Barnard-Naudé ' "Oh what a tangled web we weave ..." Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract' (2008) 1 *Constitutional Court Review* (forthcoming).

¹⁴⁰ Terreblanche (n 134 above) 58 – 59.

¹⁴¹ See 24 - 26 above.

distribution of wealth and resources to the 'natural' play of the market, 'proceduralise' issues of impoverishment, need and deprivation. That is, these approaches disregard political questions of distribution of wealth and side-step the deep conflict, competition and political contestation, negotiated through entrenched currents of power and inequality that in fact continually occur around these questions, by pretending that impoverishment can best be addressed by creating the framework of procedures and institutions within which the market can work its distributive magic.

It is this proceduralisation of impoverishment that I trace in the socio-economic rights case law of the Constitutional Court in the rest of this section. Focussing on the decisions in *Soobramoney*, *Grootboom*, *Treatment Action Campaign* and, most importantly, *Modderklip* (CC), I trace the extent to which the Court, motivated by entirely appropriate separation of powers concerns, has relied in these judgments on seemingly neutral 'good governance principles' and argue that this tendency replicates the depoliticising proceduralist rhetoric of liberal capitalist approaches to economic ordering outlined above. At the same time, I point to counter-currents in cases such as *Khosa*, where the Court did not shy away from politically imbued distributive questions.

3.2.3.2 Taking refuge in structure: Soobramoney, Grootboom, Treatment Action Campaign and Modderklip

Earlier in this Chapter, I described the solution that Harms JA fashioned in *Modderklip* (SCA) to the conundrum facing him in that case (an order that the unlawful occupiers be allowed to remain on the land until the state finds suitable alternative land for them and that the state pay compensation to the landowner for the breach of his property right that it had failed to protect against) as a powerful legitimisation of transformative politics.¹⁴² Undaunted by the seeming intractability of the problem brought before him Harms J found a practical solution where at first there seemed to be none. In this way he counteracted the helplessness professed by the state in the case,

¹⁴² See 159 - 160 above.

demonstrating in the process that problems of impoverishment are indeed not so overwhelming as to be part of the natural order of things. Further, Harms J, by basing his decision on the right to have access to adequate housing and the right to property, also squarely confronted and dealt with the political aspects of the case: the conflict between the basic housing interests of the occupiers and the property interests of the landowner, the distributive issues related to that conflict and the question where the responsibility lies to solve such conflicts.

In *Modderklip (CC)* the Constitutional Court confirmed Harms J's order, so replicating its politicising effect. However, a 'surprising'¹⁴³ aspect of the decision in the highest court is the change in tack with respect to the basis of the decision. The Constitutional Court did not follow Harms J in deciding the case on the basis of the right to property and the right to have access to adequate housing.¹⁴⁴ It invoked instead the section 34 right of access to court and the section 1(c) constitutional principle of rule of law.¹⁴⁵ It held that the right of access to court would be illusory if court orders were not enforced. This means that the right imposes on the state a duty to have in place the infrastructure necessary for court orders to be enforced.¹⁴⁶ Further, however, the state is obliged, in cases where a court order cannot be enforced without assistance from the state to provide such assistance as could reasonably be required of it. On the facts of this case, it meant that the state was obliged reasonably to assist *Modderklip* in implementing the eviction order.¹⁴⁷ At the same time, so the Court continued, the principle of rule of law requires that the state ensure that court orders are not enforced in such a way that 'large-scale disruptions in the social fabric' result.¹⁴⁸ Here, where the enforcement of the eviction order would result in the displacement of upwards of 40 000 impoverished people this meant that the state would have to enforce the eviction order whilst ensuring that the evictees have access to alternative

¹⁴³ Van der Walt (n 126 above) 159.

¹⁴⁴ *Modderklip (CC)* (n 7 above) para 26.

¹⁴⁵ As above para 39.

¹⁴⁶ As above para 41.

¹⁴⁷ As above paras 47 – 48 & 51.

¹⁴⁸ As above para 43.

land.¹⁴⁹ In sum, the Constitutional Court reached exactly the same substantive conclusions as the Supreme Court of Appeal – that the state was obliged both to protect the property rights of the landowner by enforcing the court order and to protect the right of the occupiers to have access to adequate housing by ensuring that they would have alternative land to find shelter on if they were evicted – without relying on the most obvious legal mechanisms for that purpose – the rights to property and to have access to adequate housing. Why would the Court so ‘studiously avoid’ reliance on property and housing rights whilst reading into section 34 and the principle of rule of law constitutional duties ‘remarkably similar-looking’ to those obviously imposed on the state by these rights?¹⁵⁰

The Court’s opting for the structural principle of rule of law and right of access to court in *Modderklip* presents the high point of a tendency of the Court to rely in socio-economic rights cases on similar structural good-governance principles rather than substantive rights. This is clearly illustrated in three such cases decided before *Modderklip*: *Soobramoney*, *Grootboom* and *Treatment Action Campaign*. In *Soobramoney*, and *Grootboom*, the Court’s actual review¹⁵¹ clearly was motivated by procedural or structural rather than substantive concerns and in *Treatment Action Campaign* those same concerns, although not predominant, loomed large.

In *Soobramoney* the only standard used by the Court to evaluate, in terms of section 27(1) and (2), the policy guidelines for admission to the renal dialysis programme and the way it was applied in the applicant’s case was a standard of rationality and good faith.¹⁵² The Court explicitly eschews delving into the questions of prioritisation of access to treatment and allocation of resources, holding that, as long as the choices made by the public authorities responsible for these decisions were taken in terms of a rational set of criteria, applied in good faith, a court could not interfere with them. Perhaps not directly in point,

¹⁴⁹ As above paras 44 – 47 & 51.

¹⁵⁰ Van der Walt (n 126 above) 159.

¹⁵¹ Rather than its rhetoric.

¹⁵² *Soobramoney* (n 3 above) para 29 (‘A court will be slow to interfere with rational decisions taken in good faith ...’).

but also significant is the Court's description of the section 27(3) right not to be refused emergency medical treatment as no more than a right not to have existing emergency treatment withheld arbitrarily.¹⁵³ The underlying value that drives the Court's review in both instances is not in the first place the need for access to essential medical treatment, but the good governance standards of rationality and good faith – the Court confines its review to the manner in which the state's policies are conceived and applied, rather than to the question what they are likely to achieve.

The same seems true of *Grootboom*. Despite the fact that the Court's reasonableness policy review standard is potentially a quite strict and substantive standard for government conduct to be tested against,¹⁵⁴ in actually applying it in *Grootboom* the Court hardly flexed its muscles, and reached its decision on the basis of the more structural, rather than substantive elements of that test. The Court presented *Grootboom* as a decision based on reasonable inclusivity – government policy was found to be unreasonable because it excluded particularly vulnerable or destitute groups from its scope.¹⁵⁵ The Court invalidated the state's housing policy 'to the extent that it *fail[ed] to recognise* that the state must provide for relief for those in desperate need'¹⁵⁶ and because '*no provision was made for relief to . . . people in desperate need.*'¹⁵⁷ The Court's order required that the state's housing policy '*must include* reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.¹⁵⁸ This finding of 'unreasonable exclusion' could have meant that some measure of priority concern was owed to desperately impoverished people, requiring the state to take steps urgently to alleviate their plight. But, as Theunis Roux persuasively

¹⁵³ *Soobramoney* (n 3 above) para 20.

¹⁵⁴ See Roux (n 55 above), arguing that the reasonableness review standard is 'clearly stricter than the rational-basis standard applied under sec 9(1) of the 1996 constitution' and likening the standard to the standard of review applied by the Court in assessing unfair discrimination under s 9(3) of the 1996 constitution (97).

¹⁵⁵ In *Grootboom* the 'truly homeless' (Judge Dennis Davis's term – see *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) 280D/E) and in *Treatment Action Campaign* indigent HIV-positive mothers and their newborn children.

¹⁵⁶ *Grootboom* (n 4 above) para 66 (my emphasis).

¹⁵⁷ As above para 69 (my emphasis).

¹⁵⁸ As above para 99(2)(b) (my emphasis).

points out, this is exactly what is missing from the finding and order: any indication that the Court's reasonableness standard requires a substantive prioritisation (temporally or otherwise) of effort and expense in favour of those 'living in intolerable conditions or crisis situations'. It is not clear whether it requires anything more substantive of government than to be inclusive – that is, to include in its policies some reference to, or some consideration of the needs of those most desperate. Roux himself puts it as follows:

Although it undoubtedly pushes out the boundaries of socio-economic rights adjudication, the decision falls short of obliging the South African Government to order its spending priorities in any particular way. Rather, the decision is authority for the more limited proposition that socio-economic rights of the kind contained in the South African constitution may require the diversification of affected policies so as to cater for particularly vulnerable groups.¹⁵⁹

If this (to my mind entirely plausible) reading of the Court's order is accepted, it becomes clear that the Court's concern in *Grootboom* was quite narrow: it seems to have been concerned in some sense only with the logical consistency of the state's housing policy, the fact that it made no reference to those who had nowhere to live. This is a structural concern only. It did not seem to be concerned with posing a substantive standard, that effort and expenditure should be prioritised in time according to differing degrees of need.¹⁶⁰

In *Treatment Action Campaign*, although the reasons for the Court's decision are nowhere stated succinctly, the finding of unconstitutionality seems to have been based on the proposition that government's policy position regarding provision of Nevirapine was not flexible enough to provide for all eventualities and unreasonably excluded indigent HIV-positive mothers and their newborn

¹⁵⁹ T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12:2 *Constitutional Forum* 41–42.

¹⁶⁰ See also C Sunstein *Designing democracy: what constitutions do* (2001) 224–237 (arguing that *Grootboom* was decided on the basis of standards such as arbitrariness and rationality alone).

children outside the pilot sites from access to the drug.¹⁶¹ However, on closer inspection it again seems that the standard of rational coherence played an important role in the decision. Discussing government's objections to the safety and efficacy of Nevirapine, the Court makes the following illuminating statement:

The decision by government to provide nevirapine to mothers and infants at the research and training sites is consistent only with government itself being satisfied as to the efficacy and safety of the drug. These sites cater for approximately 10% of all births in the public sector and it is unthinkable that government would gamble with the lives or health of thousands of mothers and infants. . . . The risk of nevirapine causing harm to infants in the public health sector outside the research and training sites can be no greater than the risk that exists at such a site or where it is administered by medical practitioners in the private sector.¹⁶²

In this excerpt the Court indicates an evident flaw in the state's argument in that runs along the following lines:

There were no valid concerns about the efficacy and safety of Nevirapine for use in prevention of mother-to-child transmission of HIV at birth – had there been the state would not have used it at the pilot sites in the first place. There were no significant cost implications involved in broadening access to Nevirapine. The only remaining reason that the state could conceivably advance to restrict the use of Nevirapine to the pilot sites would be the absence of capacity to administer and monitor the use of the drug effectively outside the pilot sites. The evidence had shown that significant capacity to administer and monitor the use of the drug did exist outside the pilot sites. In this light there was no reason, and it was simply irrational, to refuse to extend the provision of Nevirapine to public health facilities outside the pilot sites where the capacity to administer and monitor the use of the drug did exist.

¹⁶¹ *Treatment Action Campaign* (n 5 above) paras 70 & 95. See also D Bilchitz 'Towards a reasonable approach to the minimum core: Laying a foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1 4.

¹⁶² *Treatment Action Campaign* (n 5 above) para 62.

Against this background it does not seem outlandish to suggest that an important element of the Court's eventual finding in *TAC* was this lack of sense, this simple irrationality in government's policy position. Again, the decision can plausibly be explained as motivated at least partly by concern for the most basic of the structural good governance principles enunciated in the Court's reasonableness test – rational coherence.

The Constitutional Court's 'flight from substance'¹⁶³ into the arms of procedure or structure explicitly articulated in *Modderklip* and implicit in *Soobramoney*, *Grootboom* and *Treatment Action Campaign* is not entirely unexpected and, to an extent, understandable. The Court falls back on these seemingly neutral good-governance principles in politically contested cases in an attempt to present itself as politically neutral – as, in the Courts own words, able to 'cut through the overlay of [political] contention' present in all the cases and to 'arrive at straightforward and unanimous conclusions'.¹⁶⁴ It does this primarily to manage its institutional relations with the executive and legislature and so to ensure its institutional security, by avoiding the impression that it takes ideologically informed sides in these disputes. This motivation one cannot dismiss out of hand. The protection of the institution of judicial review as a building block of constitutional democracy can certainly in itself be seen as a transformative endeavour, so that the Court's self-protective impulse evidenced by its reliance on structure rather than substance is an entirely appropriate transformative strategy.¹⁶⁵

¹⁶³ I borrow the phrase from JE Flemming 'Constructing the substantive constitution' (1993) 72 *Texas Law Review* 211, who uses it (211 – 214) to describe American constitutionalism's retreat into 'process and original understanding' in reaction to the *Lochner* era. See the sources he refers to at 213 n 12.

¹⁶⁴ *Treatment Action Campaign* (n 5 above) para 21.

¹⁶⁵ Just such a claim, although it is nowhere made explicitly, can be distilled from the various contributions of Theunis Roux that deal with the process of judicial review within a constitutional democracy. Roux is consistent in claiming that an important aspect – perhaps the foundational aspect – of the role of courts operating in the context of a transformative constitution, is to maintain their institutional security, so that they can continue to operate in the exercise of their constitutional review powers, so that constitutional democracy can in that way be maintained. See in this respect, in general, Roux (n 55 above) and T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

However, this transformative gain is attained at a not insignificant transformative cost. Consider for a moment from a bird's eye view the role that the Court scripts for itself in socio-economic rights cases by relying on such structural good-governance principles. The Court paints itself in this way as an impartial referee, and no more than that. It depicts its role in enforcing socio-economic rights as regulatory only - it must set down the limits within which the real actors (the state, market forces, individuals) may move, but it may not tell them how and where to move within those limits. The central theme in this image of itself is the Court's impartiality, its steadfast refusal to adopt a particular political point of view, or a particular political philosophy. In short, the role the Court scripts for itself in this way is a mirror image of the role attributed to the state in the liberal capitalist understandings of economic ordering outlined above. In doing so the Court participates in and confirms the depoliticising rhetoric characteristic of those understandings. It buys into the descriptions of impoverishment as something that is not politically determined and that cannot be addressed through political contestation, as something that is natural, that must be addressed through the unfettered operation of the ideologically neutral market. It also manages in this way to avoid and so to subsume the deeply political questions of distribution of resources and the operation of power that are implicated by impoverishment, need and deprivation.

3.2.3.3 Counter-currents

Although a trend can be detected, it can certainly not be said that the proceduralisation that I outlined above characterises the Court's socio-economic rights jurisprudence as a whole. First, in all of the cases I have cited, with perhaps the exception of *Soobramoney*, counter-currents conflict with the Court's depoliticising reliance on structure and procedure. So, for example, as Murray Wesson has argued, although *Grootboom* can plausibly be described as having been decided purely on a principle of rational coherence, there are strong indications that the Court in fact had applied a much more substantive test to evaluate the state's housing policies. In his words,

Far from [only] emphasising that the [state's housing] programme is “arbitrary” or “irrational” ... the Court expressly states that “[a]llocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard, but represents a systematic response to a pressing social need.”¹⁶⁶

Also, in the strongest proceduralist case – *Modderklip* (CC) – the Court's confirmation of the order of the Supreme Court of Appeal¹⁶⁷ and its implicit recognition that the matter was not simply a private matter to be resolved by the parties themselves but a public matter implying extensive responsibilities for the state,¹⁶⁸ constitute strong re-politicising moments.

Finally, in cases decided subsequent to the line of cases I discuss above – in particular *PE Municipality* and *Khosa* – the Court has avoided relying on structural good-governance principles only, and has instead immersed itself in the political dimensions of the issues before it. In *PE Municipality* this is evident both from the fact that the Court in that case emphasised the role of historical and current political context in interpreting socio-economic rights and the legislation enacted to give effect to them;¹⁶⁹ and in the Court's rejection of the offer of alternative accommodation as unsuitable, so that the eviction order was refused (an aspect of the decision that clearly involved the balancing of conflicting interest and implicated questions of distribution of resources).¹⁷⁰ In *Khosa* Mokgoro J for the Court equally emphasised historical and current socio-political context.¹⁷¹ In addition, she articulated a particular vision of social ordering that to her mind was implicated by the constitution and relied on that conception to influence her interpretation of the rights in question.¹⁷² She also did not shy away from distributive questions, scrutinising and in the event rejecting the state contentions about resource constraints.¹⁷³

¹⁶⁶ M Wesson 'Grootboom and beyond: reassessing the socio-economic rights jurisprudence of the South African Constitutional Court' (2004) 21 *South African Journal on Human Rights* 284 291 – 292, quoting *Grootboom* (n 4 above) para 54. See also, in general, C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264.

¹⁶⁷ *Modderklip* (CC) (n 7 above) para 68.

¹⁶⁸ As above para 39 – 49.

¹⁶⁹ *PE Municipality* (n 8 above) paras

¹⁷⁰ As above para 54 – 55.

¹⁷¹ *Khosa* (n 9 above) paras 49, 59, 63 – 65 & 76 – 77.

¹⁷² As above para 74.

¹⁷³ As above paras 58 – 62.

3.3 Conclusion

In this Chapter I described a particular way in which the work of courts adjudicating socio-economic rights claims can inhibit transformative political action. I focussed on instances in which our higher courts have in their decisions participated in and so confirmed and legitimated depoliticising rhetorical strategies at play in socio-political debates about impoverishment, need and deprivation.

Although I identified a number of isolated instances of such participation, my focus was on identifying and analysing trends in the courts' jurisprudence. In this respect I focussed on two instances of depoliticising rhetoric at work in the jurisprudence.

First, I analysed the extent to which our courts have participated in discourses of *technicisation* of impoverishment – have dealt with impoverishment as though it is a technical problem to be solved on the basis of standards of efficiency, by technically proficient institutions and people. I pointed out that courts routinely engage in this kind of technicising rhetoric in order to take account of their own technical incapacity when it comes to deciding socio-economic rights cases. This technicisation, so I continued, is in itself not problematic. However the link made by our courts between its technicising rhetoric and separation of powers concerns – in other words the idea that courts, because of their technical incapacity, should defer exclusively to the other branches of government ran the risk of establishing the state as the only legitimate institution to engage issues of impoverishment and rendering impoverished people themselves not as politically active participants in the shaping of their lives, but as passive recipients of services from departments of state.

I continued by identifying some countervailing trends that contrasted with the courts' depoliticising rhetoric in this respect. I pointed, for example, to instances where the political agency of impoverished people was confirmed

and legitimated by courts, and to certain developments with respect to remedies in socio-economic rights cases – the handing down of orders requiring resolution of socio-economic rights disputes through mediation. To conclude this section, I pointed to a number of problems with the decision of the Constitutional Court that most obviously gives expression to these transformative politics-friendly remedial developments – *Olivia Road*. I argued that the decision of the Court in that case to hand down its order for engagement between the parties before it had formulated or handed down its judgment, coupled with its decision not to evaluate for constitutional consistency the inner city housing plan of the City of Johannesburg but to decide only the application for an order for the eviction of the particular group of impoverished people before it, rendered its decision individualised and instrumental and so diluted its transformative politics-friendly impact.

Second, I traced the operation in the socio-economic rights jurisprudence of our higher courts of the depoliticising rhetorical strategy of *proceduralisation* – that is, the tendency to describe issues of impoverishment in procedural rather than substantive terms in order to avoid the deeply political questions inevitably at issue in debates and disputes about impoverishment, its causes and ways in which to address it. I linked this particular depoliticising strategy to a particular – liberal capitalist - view of economic ordering in terms of which impoverishment is best addressed through a neutral state that, through providing only a minimal framework of regulation and infrastructure, allows the ‘natural’ processes of the market to order distribution of resources. I then pointed out how our higher courts tended to rely in a number of socio-economic rights cases on supposedly ‘empty’ or neutral good governance principles such as non-arbitrariness, rationality, access to courts and rule of law instead of on substantive rights provisions, or the substantive aspects of socio-economic rights. They did so in an attempt to depict themselves as neutral arbiters in often hotly contested socio-economic rights disputes in order to maintain their relationship with the other branches of government and so ensure their institutional security. However, this – admittedly transformative – motivation came at the transformative cost that the courts at the same time mirrored and so legitimated and confirmed the liberal capitalist, transformative

politics-unfriendly understandings of political ordering that I outlined at the start of the section.

I concluded this section by again pointing to a number of cross-currents present in the cases that mitigated this proceduralist tendency and its depoliticising consequences. First, I pointed out that in the very same cases in which the proceduralist tendency was most obvious, there was evidence of more substantive engagement by the courts with the political dimensions of impoverishment. Second, I pointed to other cases – most notably *PE Municipality* and *Khosa* - in which the Constitutional Court's focus on historical and socio-political context and its willingness in particular to engage with questions of distribution of resources powerfully counter-acted the depoliticising proceduralist tendencies identified elsewhere.

4 *Problematizing certainty and finality*

4.1 Introduction

In Chapter 1, while considering different ways in which adjudication can work to limit transformative political action, I investigated three related critiques in South African legal writing of the tendency of law and, in a narrower sense, adjudication to pursue certainty and finality.¹

I recounted how Karl Klare, drawing on Duncan Kennedy, shows that South African lawyers and judges, in the grip of a conservative legal culture, tend to over-emphasise the extent to which legal materials constrain legal outcomes.² Klare criticises this tendency first because it is inaccurate – he points out that, although judges are indeed constrained (by the legal materials; by their professional sensibilities and habits of mind; by their concern for their own reputation of professionalism; and by their capacity for creative interpretation), constraint is not an innate characteristic of legal materials, but an experience.³ Because constraint is culturally constructed in this manner, he continues, it can be resisted and formed by judicial work – constraint is a pliable construct. He therefore characterises adjudication and legal interpretation as a play between freedom and constraint, where judges are sometimes able to overcome their initial experience of constraint when confronted with a legal text, and through the application of intellectual effort, are able to achieve their preferred outcomes without disregarding the materials completely and so jeopardising both their professional and their broader public legitimacy.⁴ To see adjudication thus, Klare continues, first has

¹ See 46 - 72 above.

² See 48 - 51 above, discussing K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 drawing on D Kennedy *A critique of adjudication: {fin de siècle}* (1997) (Kennedy *Critique*); 'Strategizing strategic behavior in legal interpretation' (1996) *Utah Law Review* 785 (Kennedy 'Strategizing'); 'The stakes of law, or Hale and Foucault!' in *Sexy Dressing Etc.* (1993) 83 (Kennedy 'Stakes'); and 'Freedom and constraint in adjudication: a critical phenomenology' (1986) 36 *Journal of Legal Education* 518 (Kennedy 'Freedom').

³ Klare (n 2 above) 160.

⁴ As above 163.

the signal virtue that it would alert judges to the fact that they are able to attain possibilities with their work that are not immediately evident in the materials, so that an easy reversion to the status quo is resisted and the possibility for transformative outcomes is enhanced. Second, and more importantly for my purposes, it also has the virtue that, if judges are able to achieve results, through judicial work, not evident in the materials and if they acknowledge that they are able to do so, they become responsible for the results generated through their work – responsible and therefore accountable. This, so Klare concludes, opens judicial work up to political contestation and enhances transformative politics.⁵

I also considered Henk Botha's related analysis of Duncan Kennedy's various metaphorical depictions of the process of adjudication.⁶ Botha points to three different ways in which metaphorically to depict the operation of legal rules within the process of adjudication discussed by Kennedy. The first, traditional depiction presents legal rules as straight lines or clear borders. Constraints imposed by legal rules on judging are seen in this view as 'physical objects, as innate properties of legal materials'. Freedom in judging is seen as the exception and occurs only where there are gaps or 'clearings in the forest' of constraint. The role of a judge is seen as simply subjecting herself to constraint, mechanically applying legal rules as these are presented in the common law or legislation. Thus the political content of judging and responsibility for judicial work product are denied – this operates to discourage transformative political engagement.⁷ The second depiction presents legal rules as argument sound-bites, assertions coupled with counter-assertions. Law inheres in this depiction in the ritualistic exchange of sound-bites. This account, in contrast to the view of law as straight lines,

⁵ As above 162 - 163.

⁶ See 55 – 61 above, discussing H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249 (Botha 'Freedom') drawing on Kennedy 'Freedom' (n 2 above) and *Critique* (n 2 above). See also Botha's 'Metaphoric reasoning and transformative constitutionalism (part 2)' 2003 *Tydskrif vir die Suid-Afrikaanse reg /Journal for South African Law* 20; 'Metaphoric reasoning and transformative constitutionalism (part 1)' 2002 *Tydskrif vir die Suid-Afrikaanse reg/Journal for South African Law* 612 and 'Democracy and rights. Constitutional interpretation in a postrealist world' (2000) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561.

⁷ Botha 'Freedom' (n 6 above) 260.

focuses on the indeterminate and contradictory nature of legal rules and emphasises the exercise of judicial choice in adjudication. However, to see law thus also discourages transformative political action, as it 'ultimately results in an instrumental and cynical view of adjudication, in which constraints are seen as illusory and the possibility of a sincere normative dialogue is ruled out'.⁸

Botha then turns to a third metaphor in terms of which to present the process of adjudication – that of law as 'field of action'. In this view, judges do experience constraint in legal interpretation. However, constraint is not seen as an innate property of the legal materials that is either there and absolute or not there at all. Rather, constraint here is seen as culturally constructed, an experience judges have of the nature of the materials.⁹ This means that they can, through interpretation, work through constraint and find solutions in the materials that did not at first glance present themselves. Judicial work is therefore presented as a 'field of action' upon which interplay between freedom and constraint takes place. This view of the matter has the virtue that it recognises the political nature of the search for legal meaning (judges construct rather than find in the legal materials the outcomes of their work, so that they become responsible for those outcomes) without depicting law as wholly political so that normative dialogue becomes impossible (judges remain constrained by the materials, by their own professional habits of mind and sensibilities and by their need to have their outcomes accepted by the professional culture of which they are a part).¹⁰ Botha's final move is his most significant. He identifies the use and fashioning of general, flexible standards in adjudication as one way in which judges can be true to the view that judging occurs on a field of action rather than in terms of straight lines or borders.¹¹

⁸ As above. See 56 - 58 above.

⁹ As above 261. See 58 above.

¹⁰ As above 262. See 60 above.

¹¹ As above 275 and what follows. See 61 above.

Finally, I turned to André van der Walt's work on the prospects for the transformation of South African land law.¹² Van der Walt considers two cases in which courts were confronted with two plausible interpretations of the materials, one the application of which would lead to a reversion to the status quo; the other the application of which would lead to transformation or change. In both cases courts opted for the status quo affirming interpretation rather than the (equally plausible) transformation generating one. Van der Walt explains this with reference to the phenomenon of 'structural inertia': given the prominence of the values of certainty and finality in legal thinking, courts, where they could equally plausibly in terms of standards of legal professionalism generate transformation or revert to the status quo, would always choose the interpretation that doesn't unsettle the existing scheme of things.¹³ Van der Walt then asks whether a solution to the problem of structural inertia would be to fashion and adopt a whole new system of law, so that there is no status quo to fall back upon. His answer is no: he points out that the linear conception of transformation underlying such an attempt in terms of which the old is rejected and replaced by the new simply results in the imposition of a new orthodoxy. Not only would this mean the end of transformation, as a linear conception of transformation always has an end in mind – it would also, operating as any orthodoxy does in a hierarchical fashion, suppress other voices and possibilities and so stifle the diverse energies required for real transformation.¹⁴

In this, the final substantive chapter of the dissertation, I trace the operation in the socio-economic rights jurisprudence of the Constitutional Court of the two themes that are the focus of the three accounts again related above – the

¹² See 52 - 55 above, discussing AJ van der Walt 'Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law' (2002) 17 *SA Publiekreg/Public Law* 258 ('Orthodoxy') who draws in this respect on R Cover 'Violence and the word' (1986) 95 *Yale Law Journal* 1602 and 'The Supreme Court, 1982 term - foreword: Nomos and narrative' (1983) 97 *Harvard Law Review* 4 (Cover 'Narrative'). See also Vander Walt's 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258 and 'Tentative urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court' (2001) 16 *SA Publiekreg/Public Law* 1.

¹³ Van der Walt 'Orthodoxy' (n 12 above) 264 267 - 268. See 53 above.

¹⁴ As above 271. See 53 - 54 above.

search for legal certainty (Klare and Botha) and the tendency toward finality (Van der Walt) in adjudication.

4.2 Certainty/flexibility, finality/openness

4.2.1 Introduction

My concern in studying the operation of the two themes of certainty and finality in South African socio-economic rights jurisprudence remains to determine in which ways these two themes have affected and formed the relationship between the adjudication of socio-economic rights claims and transformative politics. Before I turn to the cases to trace the operation of these themes there, I first describe different ways in which the two ideas of certainty and finality can be problematised in adjudication.

I use the term problematised advisedly. Following Kennedy, Klare and Botha, I intend that term to convey the idea that certainty and finality, despite their uncomfortable relationship with transformative politics, remain important ideals to pursue in adjudication. As Botha argues so persuasively, a complete abandonment of these two ideals would militate as effectively against transformative politics as an unthinking embrace of them would.¹⁵ In what follows, therefore, I describe ways in which these two ideals can be problematised, without being abandoned altogether.

First, in section 4.2.2, I unpack Botha's suggestion that the proper use of broad and flexible standards as the basis for adjudication, rather than rules, is potentially one way in which to move in the space in-between complete certainty (absolute constraint) and complete freedom (absolute flexibility). Then, in section 4.2.3 I explore the use of context sensitivity in the application of standards, and the use of innovative remedies as ways in which a measure of openness in the face of finality and closure can be maintained in adjudication.

¹⁵ Botha 'Freedom' (n 6 above) 260.

4.2.2 Certainty

The possible import of the distinction between rules and standards was first introduced into South African legal writing through the work of Duncan Kennedy on the structure of private law adjudication. In his 'Form and substance in private law adjudication', Kennedy describes how a preference in private law adjudication for rules – seen as he later described it as straight lines – reflected and tended to give effect to an individualist ethic, whilst a preference for flexible and general standards instead reflected and gave effect to an altruistic ethic.¹⁶ Kennedy's analysis in this respect was first utilised in South Africa by Alfred Cockrell in an early (pre-constitutional) critique of the rule-boundedness of the South Africa law of contract.¹⁷ Most recently, it has been taken up by Jaco Barnard-Naude, again in a critique of South African contract law – in a series of articles Barnard-Naude has criticised the penchant of South African courts to eschew broad standards of good faith as operative rules of contract law and has pointed out how that continued choice for rules and against standards reflects an individualistic, capitalist inspired ethic inconsistent with the transformative character of the constitution.¹⁸

South African public lawyers are of course much more used to the application of broad and flexible standards than their private law colleagues. Much of South African administrative law, for example, has long operated on the basis of standards instead of rules – one needs think in this respect only of procedural fairness standards, which have always been held for their content to depend on the circumstances of individual cases.¹⁹ Constitutional and administrative law jurisprudence developed after the advent of the new constitutional order has seen an explosion in the fashioning and use of such standards. In administrative law, for example, the conception of reasonableness enunciated by O'Regan J in *Bato Star* is explicitly described

¹⁶ D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1658.

¹⁷ A Cockrell 'Substance and form in the South African law of contract' (1992) 109 *South African Law Journal* 40.

¹⁸ AJ Barnard-Naude '“Oh what a tangled web we weave ...” Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract' (2008) 1 *Constitutional Court Review* (forthcoming).

¹⁹ See eg C Hoexter *Administrative law in South Africa* (2007) 362.

as a flexible standard, dependent for its exact content and for the stringency of its application on the circumstances of each case.²⁰ Examples of such standards from constitutional law include the standard for determining unfair discrimination in terms of section 9(3) of the constitution adopted by the Constitutional Court in *Hugo*;²¹ the test for determining whether a breach of a constitutional right is legitimate in terms of section 36(1) of the constitution;²² and more relevant to this dissertation, of course, the reasonableness test fashioned by the Constitutional Court in *Grootboom* with which to determine whether or not the state has met its duty to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation'²³ of socio-economic rights.²⁴

The use by our courts of such general standards has been the object of some debate. Some have criticised the manner in which some of these standards have been applied, arguing that they are used by courts to mask the absence of clear, substantive reasoning as basis for judicial decision²⁵ and that, as such, they potentially also mask the operation of judicial choice.²⁶ Others have welcomed the use of such standards, pointing out that they potentially accord well with the constitution's transformative ethos and a constitutional 'culture of justification'.²⁷ In this section, I explore this debate about the merits and demerits of the use by our courts of broad standards in constitutional adjudication, as precursor to my analysis in the section to follow of the socio-economic rights reasonableness test of our courts as an example of such a standard.²⁸ In the background remains my basic concern with the relationship

²⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) (*Bato Star*).

²¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (*Hugo*).

²² '36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...'

²³ Section 26(2) and sec 27(2) of the constitution.

²⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*).

²⁵ A Cockrell 'Rainbow jurisprudence' (1996) 12 *South African Journal on Human Rights* 1.

²⁶ IJ Kroeze 'Doing things with values: the role of constitutional values in constitutional interpretation' (2001) 12 *Stellenbosch Law Review* 265. See also, in this respect, H Botha 'Rights, limitations and the (im)possibility of self-government' in H Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and democracy in a transformative constitution* (2005) 13.

²⁷ For an overview of such accounts, see Botha 'Freedom' (n 6 above) 275 - 277.

²⁸ See 217 and further below.

between adjudication – and specifically adjudication of socio-economic rights claims – and a transformative politics.²⁹ That is, first and foremost in my consideration of broad standards here I am interested in the extent to which the use by courts of such standards has the potential either to enhance or to erode such transformative politics.

Writing in 2003, Stu Woolman and I, in a piece investigating the changes wrought to constitutional jurisdiction in the cases of *Ex parte Minister of Safety and Security: In re S v Walters*³⁰ and *Afrox Healthcare v Strydom*³¹ noted the emphasis placed by Brand J in his opinion in *Afrox* on the distinction between rules and standards.³² It will be recalled that the case was about the assertion by a private hospital of a disclaimer in their contract with a patient, in response to a damages claim arising from breach of contract (the patient lost his foot due to negligence of the hospital's nursing staff), and about the patient's challenge to that disclaimer. The distinction between rules and standards is evident at two places in the judgment. First, in response to an argument of the respondent's that the disclaimer is unenforceable because it is unreasonable, unfair and in conflict with the principles of good faith, Brand JA responded as follows (my translation from the Afrikaans):

Regarding the place and role of abstract ideas such as good faith, reasonableness, fairness and justice ... although these considerations underlie our law of contract, they do not constitute an independent, or "free –floating" ground for the invalidation or non-enforcement of contractual terms; stated differently, although these abstract considerations form the basis and underlying justification for legal rules and can lead to the forming and changing of legal rules, they are not legal rules themselves. When

²⁹ I discuss the nature of such a politics and the problematic of the relationship between such a politics and socio-economic rights adjudication in Chapter 1. See in particular 15 – 26 above.

³⁰ 2002 4 SA 613 (CC).

³¹ 2002 6 SA 21 (SCA) (*Afrox*).

³² S Woolman & D Brand 'Is there a constitution in this courtroom? Constitutional jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Publiekreg/Public Law* 37. For another discussion of this feature of *Afrox* see Botha 'Freedom' (n 6 above) 267 – 271. For critiques of the judgment more generally see D Brand 'Disclaimers in hospital admission contracts and constitutional health rights' (2002) 3:2 *ESR Review* 17; P Carstens & A Kok 'An assessment of the use of disclaimers against medical negligence by South African hospitals in view of constitutional demands, foreign law, medical ethics and medical law' (2003) 18 *SA Publiekreg/Public Law* 430; D Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*' (2002) 17 *SA Publiekreg/Public Law* 473.

it comes to the enforcement of contractual terms the Court has no discretion and does not act on the basis of abstract considerations but rather on the basis of crystallised and established legal rules.³³

Second, the distinction arose also with respect to the point that interested us in the case – the SCA's holding with respect to the constitutional jurisdiction of the High Courts. Brand JA had, in the process of rejecting the respondent's challenge to the disclaimer that it was out of step with constitutional values underlying the right to have access to adequate health care, held that High Courts, although they had jurisdiction to test and invalidate common law rules against constitutional rights, had no jurisdiction to develop the common law as laid down in the prior judgments of higher courts in light of constitutional values as mandated by section 39(2) of the constitution, whether the rule in question was laid down before or after the interim constitution entered into operation.³⁴ How to explain this seeming anomaly, that High Courts had jurisdiction to apply the constitution directly to pre- and post constitution precedent, but not indirectly? We speculated that it may have had something to do with Brand AJ's distinction between rules and values. Brand JA makes it clear in the judgment that he holds that High Courts do not have jurisdiction indirectly to apply the constitution to pre- and post constitutional South African law in part because indirect application involves evaluating existing law against constitutional *values* rather than constitutional rules. He is uncomfortable with values, so he continues, because the content given them by individual judges depends on their 'individuele beskouinge' (individual views).³⁵ If he were to allow High Court judges to develop the common law on the basis of constitutional values, the subjective nature of the value judgments that would arise would render the resultant law uncertain and unstable.³⁶ On this basis we speculated that Brand JA was willing to allow High Court judges the power to depart from precedent through direct application of the constitution, because direct application required the evaluation of common law rules not against values, but against other rules – specific provisions of

³³ *Afrox* (n 31 above) para 32. See Woolman & Brand (n 32 above) 65 n 104.

³⁴ As above para 29. See Woolman & Brand (n 32 above) 47 – 48.

³⁵ As above para 30. See Woolman & Brand (n 32 above) 64 47 – 48.

³⁶ As above. See Woolman & Brand (n 32 above) 64 47 – 48.

the bill of rights, rather than the values underlying them. Were this so, we concluded, it would reflect a particularly fundamentalist (but not uncommon) version of formalism, in terms of which legal rules (the specific provisions of the constitution) have a fixed, neutral and self-evident content, while legal values (constitutional values) are infinitely mutable, their meaning determined by the subjective perspective of the individual interpreter.³⁷

The different ways related above in which Brand JA presents the distinction between rules and standards and the implications of that distinction in *Afrox* provides an entry point for Henk Botha into his discussion of the operation and significance of this distinction in South African law more generally, and South African constitutional law specifically, and his appraisal of the merits of and problems attached to the use of standards in constitutional adjudication.³⁸ Botha notes that a penchant for rules and a suspicion of standards, based upon the traditional view related above of legal rules as long straight lines that mechanically predetermine outcomes in adjudication ‘still exerts a powerful hold on the South African legal imagination.’³⁹ The distinction between rules and standards, he argues, reflects a range of other ‘dichotomies’ prevalent in our legal imagination: those between ‘law and politics, law and morality, legislation and common law, objectivity and subjectivity, and stability and progress.’⁴⁰ In the traditional view, rules, so Botha points out, have self-evident meaning, so that their application during adjudication to decide cases involves a mechanical exercise of finding the right rule and applying it to the facts at hand. Standards, on the other hand, are vague and open-ended, so that their meaning is determined through a process of interpretation by each individual interpreter. Reliance on rules, on this account, is presented as having the signal virtue of avoiding the instrumentalisation of law – the subjugation of law to the personal political and other preferences of the individual interpreter - and of maintaining the distinction between law and politics. Although broad standards inform and provide legitimacy to legal rules, elevation of these standards to rules upon which cases can be decided,

³⁷ Woolman & Brand (n 32 above) 64 – 65.

³⁸ Botha ‘Freedom’ (n 6 above) 267 and what follows.

³⁹ As above 267.

⁴⁰ As above 271.

would render the process of adjudication akin to the legislative process: the law would then be developed according to an instrumentalist ethic, its content determined by whatever the individual interpreter, driven by her subjective political and other leanings, prefers as a just outcome to a specific case.⁴¹ This would threaten the 'generality, predictability and certainty associated with the rule of law'.⁴²

This traditional depiction of the nature of legal rules and standards as binary opposites and of the implications of this fact for their respective use in adjudication, is problematic, both because it is descriptively inaccurate and because it is normatively undesirable, particularly in a South African context of transformative constitutionalism.

4.2.2.1 Descriptive accuracy

To see rules as absolutely constraining in the sense that their meaning is self-evident and that they therefore predetermine the outcome of case (judges simply have to find and apply the law to the facts, and the legally correct answer will pop out) and standards as infinitely mutable, with their meaning dependent on the subjective will of the specific interpreter, so that they operate in an instrumentalist and ultimately arbitrary fashion, is first and foremost simply incorrect descriptively.

The idea that legal rules are clear and self-evident fails to take account of the fact that legal rules are texts that, in order to have any use, have to be interpreted by those who apply them. Stated differently, legal rules are in the process of being used, being applied to a given set of facts, inevitably interpreted and moulded.⁴³ As such the traditional depiction also fails to take account of the nature of the process of interpretation – of the role of 'context, purpose and imagination in the construction of meaning'.⁴⁴ In short, the constraining nature of rules, their determinate character, is hopelessly over-estimated in the traditional account.

⁴¹ As above.

⁴² As above 271 – 272.

⁴³ Klare (n 2 above) 157.

⁴⁴ Botha 'Freedom' (n 6 above) 273.

At the same time, the description of standards as wholly unconstraining, dependent for their meaning on the instrumentalist preferences of their interpreters, under-estimates the extent to which standards can be constraining. Botha, for example, argues persuasively that standards, despite their vague and open-ended appearance, may very well under some circumstances be more constraining than seemingly clear and certain rules. With the knowledge that constraint is always a cultural construct rather than an innate characteristic of the materials, says Botha, comes the understanding that the extent to which not only rules, but also standards, are constraining, 'depends on a host of factors'.⁴⁵ He then refers to the 'concepts and categories employed in a rule or standard and their capacity (within the context of a particular legal culture and set of sedimented background understandings) to generate interpersonal agreement; the relative homogeneity or heterogeneity of a particular legal community; [and] the views on law and the judicial function that are embedded in a given legal culture'⁴⁶ as some of the factors determining the extent of constraint. One can think, for example, that the task of justification or explanation that broad and vague standards impose on their interpreters and those that apply them, can significantly constrain interpreters, particularly if the professional community to which they have to explain or justify their interpretations and applications of a standard accept – as do lawyers and judges – only a quite specific repertoire of such justifications and explanations.⁴⁷

4.2.2.2 Normative desirability

More important than that the bright line distinction between rules and standards described above is descriptively inaccurate, is the fact that the depiction of rules and standards respectively in that distinction is normatively problematic. In short, the penchant for rules as seen in the traditional view does not square easily with the transformative ethos of the constitution, whilst

⁴⁵ As above 274.

⁴⁶ As above 274 – 275.

⁴⁷ Klare (n 2 above) 166 - 167.

standards, if freed of the negative connotation attached to them in the traditional view, seem capable of a better fit.

Botha argues that rules seen as determinate, self evident in meaning and constraining, as in the traditional view, do not fit well with the transformative nature of the constitution in the following ways. First, the idea of formal equality of treatment that underlies the quest for predictability, finality and certainty that drives the traditional view of rules seems to be at odds with the ideal of substantive equality that permeates the constitution, which requires precisely the sensitivity to context and the particular that the traditional view of rules explicitly eschews.⁴⁸ That is, the very attempt to apply rules in an even-handed fashion to all cases that is in the traditional view regarded as necessary for the 'generality' of law and to avoid arbitrariness,⁴⁹ militates against the sensitivity for context and the particular that the constitution's vision of substantive equality seems to demand. Brand JA's refusal in *Afrox* to accept and even to consider whether the interests that were at stake in the contract concluded between the parties in that case (access to quality health care on the one hand and commercial viability - profit - on the other) worked to establish important inequality in bargaining power is telling in this respect.⁵⁰

Second, in an echo of Duncan Kennedy's coupling of rules with individualism and standards with communitarianism,⁵¹ Botha points out that the application of rules according to the traditional view, because it seeks to exclude any formative role for the interpreter, often results in singularly inequitable results.⁵² *Afrox* again provides a good example: the attempt of Brand JA in that case to present the process of adjudication as a mechanical 'finding' and 'application' of clear, 'crystallised' rules evidently results in him standing indifferent to the impact of his findings on the parties before him.⁵³

⁴⁸ Botha 'Freedom' (n 6 above) 272.

⁴⁹ A Scalia 'The rule of law as a law of rules' (1989) 56 *University of Chicago Law Review* 1175 1182.

⁵⁰ *Afrox* (n 31 above) para 12.

⁵¹ Kennedy (n 16) above.

⁵² Botha 'Freedom' (n 6 above) 272.

⁵³ Of course, I cannot and do not suggest that Brand JA on a personal level was indifferent to the plight of Mr Strydom, the patient in *Afrox* whose foot had to be amputated because of negligence of the hospital's nursing staff. But it is the very judicial instinct to, *in spite of such*

Third, the attempt to present as neutral rules that are in fact informed by the highly contested and politically specific ideas of freedom, equality and the rule of law that underlie the traditional view, and in that way to attempt to insulate these rules from constitutional scrutiny seems to breach the supremacy of the constitution and the constitutional mandate to subject all law to transformative leavening.⁵⁴ Again, *Afrox* is instructive – consider Brand JA’s uncritical acceptance of the ‘reading in’ of the principle of freedom of contract into the constitution by Cameron JA in the earlier case of *Brisley v Drotsky*,⁵⁵ on the basis of which he then holds it to be unnecessary – indeed, undesirable – to re-evaluate the rules of contract law pertaining to the validity of disclaimers of liability.⁵⁶ Compare this to his suspicion of the supposedly uniquely subjective content of ‘vague’ and ‘abstract’ constitutional principles and open-ended concepts of good faith.⁵⁷ The principle of freedom of contract is no less vague and open-ended than the concept of good faith that Brand JA rejects – no less open to different and conflicting interpretations reflecting the different social philosophies implicitly supported by different individual judges.⁵⁸ The fact that its content appears to Brand JA to be fixed, concretised and ideologically neutral has much to do with the fact that the dominant interpretation that has been given to that principle expresses a social philosophy that is so entrenched and hegemonic that it *appears* neutral.⁵⁹ Brand JA’s non-reflexive acceptance of the principle of freedom of contract as neutral, simply indicates his own implicit acceptance of that social philosophy. As such it indicates an implicit preference for that which is settled and long-accepted (common law principles understood according to dominant interpretations) to the detriment of that which is new and potentially unsettling (constitutional principles).⁶⁰

(possible) personal concern, ‘apply’ the ‘law as it stands’, whatever its consequences, that concerns me here.

⁵⁴ Botha ‘Freedom’ (n 6 above) 273.

⁵⁵ 2002 4 SA 1 (SCA); referred to in *Afrox* (n 31 above) para 22 in this respect.

⁵⁶ *Afrox* (n 31 above) para 24.

⁵⁷ As above para 32.

⁵⁸ Barnard-Naudé (n 18 above).

⁵⁹ As above.

⁶⁰ Woolman & Brand (n 32 above) 65 – 66. See also Barnard-Naudé (n 18 above).

Just as there are good reasons to suggest that an understanding of rules as certain, self-evident in meaning and determinate runs counter to the transformative ethos of the constitution and the openness to transformative politics that it suggests, Botha also points out, there are a number of good reasons to suggest that an understanding of rules reconceptualised as flexible standards is better suited to that ethos and the openness to transformative politics that it suggests.

First, an understanding of law consisting of a series of open-ended and flexible standards, open – within limits, of course – to be moulded and re-moulded through interpretive work, squares better with the widely adopted idea that the constitution presents a shift from a culture of authority to a culture of justification.⁶¹ Despite the admitted problems attached to this metaphor of justification,⁶² it does powerfully depict the fact that, in our constitutional democracy, judges may not make decisions with consequences for people without explaining why they decided in a particular way. As Karl Klare has illustrated: the realisation that rules are not clear boundaries that allow for mechanical application, yielding pre-determined outcomes, but are instead flexible entities, formed through a process of interpretation and in every act of their application, highlights the responsibility of judges for the results of their work.⁶³ In such a conception judges cannot divest themselves of responsibility for the outcomes they generate by simply saying that they apply the law as it stands. Knowledge of their interpretive role brings responsibility for it. An approach to adjudication that acknowledges this responsibility and attempts to give effect to it is patently more capable of engagement with transformative politics than one that pretends otherwise. Of course, the use of broad standards in constitutional adjudication will not necessarily lead to this kind of openness to scrutiny. Much depends on how such standards are conceived of and applied by courts. South African courts have, for example, been criticised for using broad constitutional values in an

⁶¹ E Mureinik 'A bridge to where: introducing the interim bill of rights' (1994) 10 *South African Journal on Human Rights* 3.

⁶² See H Botha & JWG van der Walt 'Democracy and rights in South Africa: beyond a constitutional culture of justification' (2000) 7 *Constellations* 341.

⁶³ Klare (n 2 above) 164.

unreflexive, almost ritualistic manner, so that the use of such broad standards, rather than that it encourages substantive reasoning, takes it place.⁶⁴ When done in this mechanical way, the use of constitutional values in constitutional interpretation has also been criticised as indeed masking controversial assumptions from critical scrutiny rather than opening them up to evaluation.⁶⁵

In addition, even where broad standards are applied in the reflexive manner described above, with an awareness of interpretive responsibility and a consequent willingness to explain substantively how and on what bases a particular case was decided, it might run into another line of critique questioning its transformative credentials. Much has been written in South African constitutional scholarship about the merits of a strategy of 'judicial avoidance' – that is, a conscious strategy to avoid substantive reasoning in decision-making, both to avoid deciding matters unless it is absolutely necessary to do so and, when deciding matters, to do so on as narrow a basis and as shallow a reasoning as possible.⁶⁶ This strategy of avoidance is justified in transformative terms with the argument that, in a society such as South Africa, a strategy of deciding as few issues as possible and deciding, where it is inevitable to do so, on as narrow a basis as possible has the virtue of allowing courts to 'keep open a space in which different constitutional imaginations and interpretive visions can contend with each other'.⁶⁷ In addition, a strategy of avoidance has been punted as enabling courts, by avoiding decision on politically contentious issues, to avoid confrontation with the other branches of government and so to safeguard its own institutional legitimacy – something which in itself has been depicted as in line with the constitution's transformative vision.⁶⁸

⁶⁴ See eg Cockrell (n 25 above).

⁶⁵ Kroeze (n 26 above).

⁶⁶ H Klug *Constituting democracy: law, globalism and South Africa's political reconstruction* (2000) Chapters 7 – 8; I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

⁶⁷ Botha 'Freedom' (n 6 above) 280.

⁶⁸ Klug (n 66 above) chapter 7 - 8; Currie (n 66 above); T Roux 'Legitimizing transformation: political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92.

Botha responds to the judicial avoidance charge against substantive reasoning in a characteristic way: its not that simple, he says. First, he argues, while a strategy of avoidance might sometimes indeed work to keep open political contestation around socially contentious issues, this is not necessarily the case – that ‘there comes a point where a clever rhetorical device to cut through some of the political controversy surrounding an issue, looks more and more like a manifestation of a lack of commitment and a denial of judicial responsibility.’⁶⁹ In addition, he points out, it is inaccurate to depict the substantive reasoning engendered by the application of broad standards as necessarily leading to normative closure. Instead, while a substantively reasoned judgment might certainly close off some lines of inquiry and exclude certain interpretive possibilities, ‘it does not preclude a careful interpretation – or re-interpretation – of the grounds for the decision in subsequent cases, or an analysis of the meaning of the norm announced in that case within the concrete context of later cases.’⁷⁰ In short: avoidance does not always engender openness (in fact, it sometimes has the opposite effect); and proper substantive reasoning can, instead of necessarily closing out different constitutional voices on contentious social issues, simultaneously focus and broaden the scope of subsequent political engagement.

Botha’s second reason for preferring, in the context of a transformative constitution, a flexible, culturally determined notion of legal rules embodied in the use of broad standards to an understanding of rules as straight lines, imbued with self-evident meaning, has to do with the extent to which the constitution requires a fundamental break with the past - ruptures in the ‘seamless web’ of the common law. Botha points out that the straight line view of legal rules tends to emphasise the continuity between past and present and to de-emphasise the extent of the rupture required by the constitution – to privilege stability over change.⁷¹ One is reminded here of André van der Walt’s identification of the problem of ‘structural inertia’ related above – the problem that, in a legal culture that emphasises certainty and finality as

⁶⁹ Botha ‘Freedom’ (n 6 above) 281.

⁷⁰ As above 280.

⁷¹ As above 276.

foundational values, where a court is presented with two equally plausible interpretations of the materials, one that confirms the status quo and the other that engenders change, courts will more often than not opt for the status quo affirming one. It does seem that the emphasis on the plasticity of legal material and the culturally constructed nature of legal meaning that potentially operates in the application of broad legal standards is one way of overcoming such structural inertia, without falling into the trap Van der Walt warns against of imposing a 'new orthodoxy' as exclusionary as the current.

To recapitulate: a variety of commentators have warned against the tendency in adjudication for judges to seek certainty and finality in their decision making. The view of legal rules as self-evident in meaning and determinate of the results they generate that underlies such a traditionalist search for certainty and finality, so the arguments go, is both an inaccurate depicting of the nature of legal materials and, in a normative sense, fails to give effect to the transformative nature of the constitution – most importantly because the normative closure that such a view of legal rules invites closes off judicial work product from transformative political engagement. Instead of this view of legal rules a depiction of legal rules as flexible and dependent on interpretive work for their meaning and for the results that they generate is proposed, both because such a view more accurately depicts the nature of legal rules and because such a view squares better with the transformative aspirations of the constitution – most importantly for my purposes because it emphasises judicial responsibility for the results generated by adjudication and so potentially opens judicial work product to transformative political evaluation and engagement.

One way in which this more flexible view of the nature of legal rules can be given effect to or operationalised is through the use in constitutional adjudication of broad, flexible, multi-part standards. Because such standards for their proper application invite a judicial method aware of the plasticity of legal material they potentially also share the fit with the constitution's transformative ethos that such a method engenders. Importantly, however, this remains subject to a proviso: broad standards can only operate in the

transformative politics-friendly manner described above if they are applied in a flexible and open manner, *without completely abandoning certainty and finality*. Complete flexibility and openness would instrumentalise adjudication and so again denude it of transformative politics.

4.2.3 Finality

Finality is a good thing, but justice is better.⁷²

In Chapter 1, relying on André van der Walt, I pointed out how the tendency in adjudication to seek finality or closure works to limit or discourage transformative politics. Finality does so in the first place by bringing an end to change, settling a previously contended matter once and for all. Secondly, finality or closure works against transformative politics by presenting a particular view of a contentious matter as authoritative and so excluding alternative voices and visions.⁷³

In this section I briefly recount two ways in which finality or closure in adjudication can be problematised so that continuing change is not foreclosed and diverse voices and visions not excluded – rendering legal rules or standards more sensitive to particular context in their application, and developing remedies that, whilst setting out a normative framework clear enough to resolve specific disputes, does not prescribe a specific solution that would bind also future cases and so exclude possible alternative views.

4.2.3.1 Context

[I]ndeterminacy of outcome is not a weakness. A truly principled ... approach requires a close and individualised examination of the precise real-life situation of the particular [person] involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the [person] concerned.⁷⁴

⁷² Lord Atkin in *Ras Behari Lal v King-Emperor* 60 IA (1933) 345 361.

⁷³ Van der Walt 'Orthodoxy' (n 12 above) 271.

⁷⁴ Sachs J in *S v M (Centre for Child Law as amicus curiae)* 2008 3 SA 232 (CC) para 24.

The modest position is not weak, it is responsible.⁷⁵

A central aspect of the objection in traditional legal thought to the use of broad and flexible standards is, as recounted above, that the uncertainty of the content of such standards renders law and adjudication arbitrary, as the outcomes generated by such standards cannot be predicted with any level of certainty.⁷⁶ These objections are based on a view that legal rules, to qualify as such, must achieve a certain measure of generality – must be capable of even-handed application to a range of different but similar cases. Only in this way, so the argument goes, can arbitrariness be avoided.⁷⁷

Viewed from the perspective of someone concerned about the relationship between transformative politics and adjudication, however, the traditional emphasis on generality of legal rules is problematic. On this view – the one I espouse – the application of a generally applicable, ‘predetermined formula’ to different fact situations in order to achieve predictable results, although certainly in itself desirable, holds the disadvantage that it invites, indeed imposes normative closure or finality. In short, so the objection goes, the fashioning and application of abstract, generalised rules to decide a range of different cases predetermines the outcomes of cases according to a certain dominant view and so prevents the assertion of alternative understandings, solutions and visions. As such, the conclusion follows, it occludes further transformative political engagement with such issues. Paul Cilliers, writing about what he calls a ‘modest’ approach to understanding complex systems that remains wary of the reduction that inevitably occurs when we attempt to provide a certain description of such systems, puts it as follows:

...[A] self-assured [read ‘certain’] position is deeply problematic since its complacency forecloses further investigation. Modest [read ‘context-sensitive’] claims are not

⁷⁵ P Cilliers ‘Complexity, deconstruction and relativism’ (2005) 22 *Theory Culture Society* 255 260.

⁷⁶ See eg Scalia (n 49 above) 1182.

⁷⁷ As above.

relativistic and, therefore, weak. They become an invitation to continue the process of generating understanding.⁷⁸

One way in which to avoid this danger, without at the same time abandoning generality wholesale, is for courts, operating within a settled broad normative framework, to pay greater attention to the particular circumstances and context of each case, and to allow that context and those circumstances to influence the interpretation and the application of legal rules – in part to determine it anew in each case.⁷⁹

In South African public law, this kind of sensitivity to context has most clearly operated in the manner in which courts have applied broad standards, and particularly in the manner in which courts have determined the intensity of scrutiny with which they would apply such standards in specific cases. Two examples from administrative law will suffice. First, the extent of the burden that procedural fairness standards in the administrative law impose on administrators has always been held to vary from case to case, depending on circumstances. In some cases, for example, the requirement of a pre-decision hearing to affected parties is satisfied if affected parties are simply allowed to make written representations, whilst, at the other end of the spectrum, it is only satisfied if a personal appearance before the administrator is allowed, with the opportunity to make oral representations, to question witnesses and to rely on legal representation. What determines the level of procedural fairness required in any particular case is the context of each case – in general terms, for example, the more onerous the impact of a decision potentially is for an affected party, the more substantive the procedural fairness entitlement becomes.⁸⁰

Similarly, the intensity of the administrative law requirement of reasonableness has been held to differ from case to case, depending on context. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, for

⁷⁸ Cilliers (n 75 above) 260.

⁷⁹ See eg AJ van der Walt & H Botha 'Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*' (1998) 13 *SA Publiekreg/Public Law* 17 35.

⁸⁰ See eg Hoexter (n 19 above) 362.

example, O'Regan J famously held that '[w]hat will constitute a reasonable decision will depend on the circumstances of each case'.⁸¹ She then proceeded to list a range of factors as examples of the kinds of circumstances that will determine the content of reasonableness as a standard in any given case. This holding of O'Regan J's has been read to indicate that the reasonableness test potentially comprises a number of discrete legal tests – at a minimum a basic rationality test (itself comprising a number of components) and perhaps a proportionality test. Whether in a given case only the more basic and less stringent rationality test will apply to a decision, or that together with the proportionality requirement, is determined by the circumstances of each case.⁸²

A similar shifting standard of scrutiny operates also in another context – constitutional property law. In *First National Bank of South Africa Limited t/a Westbank v Commissioner for the South African Revenue Services; First National Bank of South Africa Limited t/a Westbank v Minister of Finance*⁸³ the Constitutional Court formulated a test with which to determine whether or not a deprivation of property is 'arbitrary' as meant in section 25(1) of the constitution. This test is explicitly formulated by Ackerman J as a) a test that varies in its intensity from case to case – as Theunis Roux puts it, it 'will vacillate between two fixed poles: rationality review at the lower end of the scale, and something short of a review for proportionality at the other'⁸⁴ - depending on b) the circumstances of each case, but with the circumstances relevant to the enquiry specified by the Court.⁸⁵

These examples from administrative and property law have the virtue that they seem to allow courts, in applying them, to decide cases with a measure of generality so as to avoid arbitrariness, but with enough sensitivity to context

⁸¹ n 20 above, para 45.

⁸² See eg Hoexter (n 19 above) 318 – 321; JR De Ville *Judicial review of administrative action in South Africa* (2003) 211 - 216.

⁸³ 2002 4 SA 768 (CC) (*FNB*).

⁸⁴ T Roux 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2d ed OS) (2003) ch 46 24.

⁸⁵ *FNB* (n 83 above) para 100. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) paras 34 – 35.

that cases are not predetermined by rigid, abstract and wholly generalised rules. All three standards – procedural fairness and reasonableness; and arbitrariness – pose a settled basic normative framework that applies in the same way from case to case (a requirement of notice, a hearing and a post decision notification in the case of procedural fairness; a basic rationality test and a proportionality test in the case of reasonableness; a set list of factors to consider in the property context) but the intensity with which that content applies in any given case is determined by the specific context. As such, all three tests potentially problematise, without abandoning, finality and closure.⁸⁶

4.2.3.2 Open remedies

Potentially the moment in the process of adjudication where finality operates most obviously comes with the handing down of an order. There is every reason for courts to pursue finality in the remedies it provides. Remedies are the mechanisms with which courts dispose of disputes – with which they are practically resolved. Also, parties to litigation, having approached a court precisely because they want a final resolution to a dispute that they themselves cannot get past, have every right to expect courts to hand down orders that are indeed final. For these reasons the handing down of an order is probably also potentially the most transformative politics-unfriendly moment in the process of adjudication. A final order handed down in a case quite graphically closes down political contestation around the issues that were at stake in the case and imposes, to the detriment of other visions and imaginations, an authoritative view of things.⁸⁷

To deal with this problem, courts have developed remedies that, whilst still giving effect to the decision in a case, avoid the finality and closure described above. So, for example, courts may hold a state programme to be unconstitutional, but simply issue a declaratory order to that effect, leaving the fashioning of the solution to the problem to the state agencies involved.⁸⁸ This retains a measure of openness in that the court does not dispositively

⁸⁶ But see Roux (n 84 above) 23, who criticises the property arbitrariness test as retaining for the Court ‘an almost absolute discretion to decide future cases in the manner it deems fit’.

⁸⁷ Cover ‘Narrative’ (n 12 above) 1602.

⁸⁸ The Constitutional Court handed down precisely such an order in *Grootboom* (n 24 above).

describe one authoritative solution to the problem, to the exclusion of others. In a slightly more structured and intrusive fashion, courts may also attach to such declaratory order a supervisory interdict, managing the openness that results from the simple declaratory order, but retaining jurisdiction over the case to ensure that a suitable solution is indeed found by the state agencies involved. Both these approaches to remedies hold the advantage that political discussion and contestation around the issues decided in the case are not foreclosed – the specific solution to the problem is left undetermined by the court. However, both these approaches hold the disadvantage that they privilege the political agency of the state to the detriment of the transformative politics that I am concerned with – the fashioning of a solution to the problem is explicitly left to the state and the state only.

A further refinement of this open approach to remedies also has the potential to resolve this problem. It is possible for courts to resolve cases through the use of open-textured declaratory orders bolstered with supervisory interdicts, but in a way that also involves and legitimises transformative political action. That is, a court could make a normative finding, in the sense of describing the outcomes that the constitutional and other legal duties at play in the case required, and embody that in a declaratory order. Then, instead of leaving the fashioning of a particular solution to the problem within that normative framework to the state, the court could then order the parties (the state and those challenging its measures) to enter into a process of mediation in order to agree upon the most appropriate means with which to reach those outcomes. This kind of ‘experimentalist’ approach, as Charles Sabel and William Simon have termed it,⁸⁹ holds a number of advantages. First, it retains the openness that was attractive about the simple declarator – it establishes only a normative framework, without prescribing a particular solution. Second, it remains mindful of institutional sensitivities, both paying due regard to the institutional incapacity of courts to resolve complex technical problems and to monitor the enforcement of their orders and paying due respect to the political branches of government, so maintaining good institutional relations. But third,

⁸⁹ CF Sabel & WH Simon ‘Destabilisation rights: how public law litigation succeeds’ (2004) 117 *Harvard Law Review* 1016 1019 1053 - 1056.

and most importantly, it manages to remain mindful of institutional concerns without in the process privileging the political agency of the state at the expense of transformative politics. As I also point out in Chapter 3, an order requiring the state to negotiate a solution to an intractable problem with ordinary people potentially has a powerful legitimising effect on the political agency of the state's subjects.⁹⁰

4.3 The cases

4.3.1 Introduction

The reasonableness test explicitly adopted by the Constitutional Court in *Grootboom* with which the Court evaluates state conduct for compliance with constitutional socio-economic rights potentially is a good example of the kind of broad standard that allows for the flexibility and openness required by sensitivity to transformative politics that I describe above.

As I explain in Chapter 2 above, the test is in essence a means-end effectiveness test. That is, the Court asks the basic question with it whether the state measure under consideration is reasonably capable of achieving the realisation of the right at issue, over time and given the strictures of available resources.⁹¹ To aid itself in that inquiry, the Court announced in *Grootboom* a number of 'elements' of the test and developed an additional few in subsequent cases. At this stage in the development of the Court's jurisprudence it seems that, in deciding whether or not a measure is reasonable, the Court will consider at least the following factors: the extent to which the measure is comprehensive in the sense that it deals with all aspects of the realisation of the right in issue;⁹² the extent to which implementation of the measure is coordinated, such that it involves all relevant institutions of state at all different levels of government necessary to make its successful implementation reasonable possible;⁹³ whether or not sufficient financial and human resources have been allocated to the implementation of the plan for its

⁹⁰ See 159 and further above.

⁹¹ *Grootboom* (n 24 above) para 41.

⁹² As above para 39.

⁹³ As above.

successful implementation to be a reasonable possibility;⁹⁴ the extent to which the measure existing on paper is in fact being implemented and plans and timelines have been set for its complete implementation;⁹⁵ the extent of the flexibility of the measure, such that it is capable of responding to short-term crises and changes in circumstances;⁹⁶ the extent to which the measure is 'reasonably inclusive' in the sense that it caters for the needs of all members of South African society;⁹⁷ the extent to which the measure takes account of differing degrees of need with respect to the right at issue;⁹⁸ and the extent to which the state can show that both the conceptualisation and implementation of the measure occurred with a sufficient measure of transparency and – were one to take the most recent decision in *Olivia Road* to its logical conclusion – engagement with those that stand to be affected by it.⁹⁹

As with any such broad, multi-element test or standard, the extent to which the socio-economic rights reasonableness test in fact operates as an example of the understanding of legal rules as fields of action and so engenders transformative politics depends on the manner in which it is applied. As I pointed out above in section 4.2, the application of a broad standard can lapse into the imagery of law as a set of straight lines and the denial of the political nature of adjudication first if it is reduced to a set of fixed elements or requirements that are applied mechanically by courts, without sufficient substantive reasoning or attention to the particulars of each case – if certainty overtakes flexibility.¹⁰⁰ Second, application of a broad standard can revert to straight line thinking if it occurs without enough care being taken to limit its application in each case to that case alone without laying down too many general rules for future cases – if finality overtakes openness. In what follows below, I explore the extent to which our courts have managed to apply the

⁹⁴ As above.

⁹⁵ As above para 42.

⁹⁶ As above para 43.

⁹⁷ As above.

⁹⁸ As above para 44.

⁹⁹ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 13, 21 & 22.

¹⁰⁰ See pp 194 - 195 above.

reasonableness test with the requisite degree of flexibility and openness to ensure that its application does not work to discourage transformative politics.

4.3.2 Certainty

One of the central objections to the inclusion in constitutions of justiciable socio-economic rights has always been that they are too vague - that is, that their content is not sufficiently determinate for them to pose justiciable standards that courts can use to decide actual cases.¹⁰¹

Perhaps not surprisingly in this light, despite the nature of its first socio-economic rights case – *Soobramoney* – where the Court reached its decision focussing on the case at hand alone, without creating broad swathes of law, in *Grootboom* the Court was at pains to describe in quite concrete and comprehensive terms its chosen approach, the reasonableness test.¹⁰²

Indeed, the Court's description was so comprehensive and occurred in such abstract terms that, in retrospect, it raises concerns that the Court was tending toward the kind of certainty warned against above. At the same time, and equally unsurprisingly, one of the main critiques of the Court's reasonableness test as enunciated in *Grootboom* and other early socio-economic rights cases was precisely that the test was too vague, that it provided too little in the line of clear standards for the state to arrange its conduct by and for courts to decide cases with any measure of generality. Were these critiques to prove accurate that would also raise the spectre of a transformative-politics unfriendly approach. A standard without any clearly constraining content would lapse into the kind of normative instrumentalism in its application that I, following Botha's critique of Kennedy's description of law

¹⁰¹ See eg C Courtis *Courts and the legal enforcement of economic, social and cultural rights. Comparative experiences of justiciability* (2008) 15.

¹⁰² The extent to which *Grootboom* still, 5 cases later, represents the authoritative and comprehensive description of the Court's chosen approach is reflected in the fact that in the 5 subsequent cases, only one, perhaps two additional elements of the reasonableness test have emerged: the requirement of transparency mentioned in passing in *Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC)* para 123 and – were one to accept that *Olivia Road* (n 99 above) indeed referred also to the reasonableness test and not only to evictions – the requirement of engagement laid down in that case. Equally telling is the extent to which the Court clearly regards *Grootboom* as the touchstone-case in socio-economic rights matters: subsequent cases are invariably peppered with references to *Grootboom* to the effect that in that case, the Court laid down its approach in an authoritative manner. See, eg, in the most recent case *Olivia Road* (n 99 above) para 10 and what follows.

as a series of sound-bite pairs, warn against above.¹⁰³ As such it would deny the political nature of the process of socio-economic rights adjudication as effectively as normative closure would. In between these two seemingly contradictory depictions of the Court's chosen approach, where does the truth lie?

In what follows I explore this question by investigating two aspects of the Constitutional Court's socio-economic rights reasonableness test: the manner in which the Court has interpreted and applied the 'within available resources' qualification found in section 26(2) and 27(2) of the constitution; and the extent to which the Court has applied its reasonableness test using substantive reasoning rather than either/or logic. I conclude this section with a brief consideration of the implications for the tension between certainty and flexibility of the Court's most recent socio-economic rights decision – *Olivia Road*.

4.3.2.1 '[W]ithin available resources'

*Soobramoney*¹⁰⁴ – the Court's very first socio-economic rights decision – although it does not explicitly introduce the Court's reasonableness test, nevertheless established a number of important points that have kept returning in the Court's later decisions where this test was applied.

Perhaps the most important of these is the interpretation the Court gave in that case of the term 'within available resources' found in section 27(2) of the constitution. This aspect of the Court's decision appears so often in subsequent decisions that it is worth quoting it here in full. In the process of describing the content of section 27 of the constitution the Court, per Chaskalson J, says the following:

What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given

¹⁰³ See 57 – 58 above.

¹⁰⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed.¹⁰⁵

This excerpt, if read only within the context of *Soobramoney*, speaks of straight line thinking that excludes transformative politics in two ways.

(a) The negative interpretation of section 27(3)

The first relates to the last sentence in the quote: ‘This is the context within which s 27(3) must be construed’.¹⁰⁶ As will be recalled, in *Soobramoney* the applicant relied on section 27(3) of the constitution – the right not to be refused emergency medical treatment. The Court rejected the claim on this basis, holding that the section 27(3) right was only a right not to be refused emergency medical treatment arbitrarily *there where it is available*, and that, in any event, the applicant’s predicament was not an emergency as contemplated in section 27(3).¹⁰⁷ The throw-away reference to section 27(3) in the quote above prefigures the first element of the Court’s rejection of the section 27(3) claim related above – that section 27(3) provides for a prohibition only on the arbitrary refusal of emergency medical services that are available. This negative interpretation is significant – and controversial – because it summarily excludes an entirely plausible affirmative reading of section 27(3) – that it seeks to prioritise emergency medical treatment (however that is defined) above other forms of medical treatment and requires that it *be made available* wherever needed. The reference in the quotation above – that the resource limitation on section 26 and 27 constitutes the ‘context’ within which section 27(3) should be understood – lays the groundwork for the negative reading of section 27(3) that the Court adopts. Although it is not stated explicitly, the argument seems to be that the phrase ‘within available resources’ found in section 27(2) applies also to section 27(3); that this implies that the content of section 27(3) is determined also by the fact of limited resources; and that section 27(3) can for that reason not be

¹⁰⁵ As above para 11.

¹⁰⁶ As above.

¹⁰⁷ As above paras 20 & 21.

read to impose also a positive duty to provide emergency medical treatment also there where it is not readily available.

In light of the structure of section 27 as whole, this reading is at best strained. Section 27(2) follows directly on section 27(1), which provides for the right of everyone to have access to health care services. Section 27(2) determines that 'the State must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of *this right*'. Section 27(3) follows only after section 27(2). The most obvious reading seems clearly to be precisely that the qualifications contained in section 27(2) are meant to apply only to the right proclaimed in section 27(1) and not to the right not to be refused emergency medical treatment found in section 27(3). Nevertheless, the Court adopts this strained reading without any substantive argument to support it – it simply states as a fact that section 27(2)'s qualification is the 'context' within which section 27(3) must be interpreted, as though this self-evidently appears from the text.

In doing so the Court disregards virtually the entire body of scholarship about the content of the socio-economic rights in the constitution extant at the time *Soobramoney* served before it.¹⁰⁸ It also, more importantly, simply brushes aside the difficult and important political questions involved in the interpretation of section 27(3). An affirmative reading of that section holding that the state incurs a priority duty in terms of it to create the structures and capacity necessary to provide emergency medical treatment wherever it is needed reflects a muscular view of the social provisioning role of the state in terms of which the state, regardless of resource constraints, must provide in certain basic survival needs of its people. Such a reading inevitably holds strong redistributive implications - it reflects an understanding of social justice that is at least partly distributive in content. This is a much thicker conception of social justice than the emaciated vision of a state simply required not to

¹⁰⁸ For a critique along these lines, see D Brand 'Introduction to socio-economic rights in South Africa' in D Brand & CH Heyns *Socio-economic rights in South Africa* (2005) 1 33; P Alston & C Scott 'Adjudicating constitutional priorities in a transnational context: a comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16 *South African Journal on Human Rights* 206 245 - 248.

withhold services that are already available without good reason reflected in the Court's interpretation of section 27(3). Such a reading reflects what can be called a liberal vision of the role of the state and a proceduralist vision of social justice, devoid of distributive content.¹⁰⁹

The difficulty here, seen from a perspective emphasising the need for sensitivity to transformative politics in the Court's work is two-fold. First, the Court simply brushes aside, without substantive argument, a vision of social justice alternative to its own. In doing so, it denies 'different constitutional imaginations and interpretive visions' and closes down a space within which such imaginations and visions can contend with one another.¹¹⁰ Second, and perhaps more importantly, the Court presents this move as if its reading is not informed by any particular social vision – as if it is neutral, dictated by the self-evident terms of the provision. In doing so the Court enacts precisely the kind of straight line thinking warned against above, where its role is reduced to mechanically finding and applying self-evident meaning. The result is that it denies that it makes a choice in presenting the reading that it does and so denies its responsibility for that interpretation. Presenting the holding in such neutral terms works to discourage political engagement with it.

(b) Resource constraints and section 27(1)

The second way in which the excerpt from *Soobramoney* quoted above speaks of straight line thinking insensitive to transformative politics relates to the manner in which the Court dealt with the claim on the basis of section 27(1).

Having found that the claim for access to renal dialysis treatment could not succeed on the basis of the section 27(3) (the right not to be refused emergency medical treatment), the Court, it will be recalled, considered whether or not the claim would have succeeded had it been brought on the basis of section 27(1) – the right of everyone to have access to health care

¹⁰⁹ C Mouffe *The return of the political* (1993) 128 – 130.

¹¹⁰ Botha 'Freedom' (n 6 above) 280.

services.¹¹¹ The Court holds that it would have failed on this basis also.¹¹² Central to this holding is the Court's findings about the extent to which the state was financially constrained with respect to the health care services it could provide. The Court kicks off its consideration of the claim on this basis, by characterising the right provided for in section 27(1) and (2) as a right of everyone to 'have access to health care services provided by the state "within its available resources"'.¹¹³ On this basis it then proceeds simply to recount as fact the state's assertion that the KwaZulu-Natal health ministry does not have sufficient funds at its disposal to meet all of the needs it should cater to.¹¹⁴ This leads to the conclusion that the ministry is forced to ration the limited resources at its disposal.¹¹⁵ The Court then finds that it did so showing a legitimate preference for preventative and curative treatment, rather than treatment simply prolonging life, a choice that the Court did not have the capacity to question.¹¹⁶ Because the specific decision to deny the applicant the treatment he sought was taken in terms of a rational set of criteria designed to give effect to this preference, so the Court concludes, that specific decision must be left to stand.¹¹⁷

This whole line of argument, presented by the Court as inexorable, rests on the Court's unquestioning acceptance of the state's assertion of a lack of resources. This acceptance has been criticised, and rightly so.¹¹⁸ The applicant had argued that, although it was certainly so that the provincial ministry had a large shortfall on resources with which to provide health care services, this was not the level at which questions should be asked. Instead, so it was argued, the question is why more resources were not allocated to it from national government. The Court acknowledges this argument, but fails to deal with it substantively in any way.¹¹⁹ This simple acceptance by the Court of the constraint under which the provincial health ministry operated as an

¹¹¹ *Soobramoney* (n 104 above) para 22 and what follows.

¹¹² As above para 36.

¹¹³ As above para 22.

¹¹⁴ As above para 23.

¹¹⁵ As above para 24.

¹¹⁶ As above paras 24 & 28 – 29.

¹¹⁷ As above para 24.

¹¹⁸ See in particular Alston & Scott (n 108 above) 245 – 248.

¹¹⁹ *Soobramoney* (n 104 above) para 23.

accomplished fact again speaks of traditional straight line thinking – both in respect of the interpretation of section 27(2) implicit in it and the manner in which the Court engages with the information regarding resource availability that the state placed before it.

The Court's unquestioning acceptance of the fact that the provincial government did not have enough resources at its disposal implies a certain understanding of section 27(2). In simply accepting without question the state's reliance on that section as an excuse for why it could not provide in the applicant's health care needs, the Court endorses the limited reading of section 27(2) that it operates only as such an excuse. That is, it implies that the only function of the phrase 'within available resources' is to allow the state – if the simple fact of limited resources is asserted – to escape responsibility for a failure in the provision of health care services.

This is perhaps a plausible reading of section 27(2), but it certainly is not the only plausible one, nor, I would venture, even the most plausible one. Although section 27(2) does operate as a mechanism allowing the state to escape responsibility for health care service delivery failure, it seems to be, much more importantly, also a device for calling the state to account. That is, in attempting to use the existence of limited resources as an excuse, section 27(2) requires the state not only to assert the fact, however true, that it operates within limited resources (that will always be the case). It also requires the state to account for why it has only such limited resources at its disposal for the provision of health care services and why it chose to expend the limited resources it has at its disposal in the manner that it did.

The limited reading instead attributed to the resource constraint aspect of section 27(2) by the Court indicates straight-line thinking discouraging transformative politics in two ways. First, the Court's reading unabashedly depicts section 27(2)'s resource constraint phrase in straight-line, either/or terms – it seems to say that the phrase requires only that the state assert resource constraint, and if that assertion (the simple assertion 'we do not have enough money') is true, the Court has no choice but to accept it as an excuse.

This scripts for the Court a mere mechanical role of applying clear law to clear facts and rendering a pre-determined result – simply giving voice to a conclusion dictated by the brutal facts. As such it can be seen as an attempt by the Court to escape responsibility and accountability for accepting the state’s resource constraint excuse – a transformative politics-limiting moment in the Court’s decision

Second, the Court accepts the province’s factual assertion of resource constraint as though it is self-evident, incontrovertible. And, on its own terms, it certainly is: it is clear that the provincial health department has a large shortfall on its budget. But that fact on its own is unremarkable. The Court’s acceptance of it operates as a – conscious or unconscious – device to avoid the really difficult and really important political question lurking in the background: why is it that the province does not have enough resources to meet the health care needs of its inhabitants? The answer to this question is of course that ideologically informed political choices were made at the national level to allocate to the province a limited budget for health care services – choices that are not set in stone and that, if informed by different ideologies and political aims, could have been different. The Court’s complete disregard of this question hides the politically and ideologically charged nature of the ‘fact’ that the province’s resources are limited. In short, it denies the human and political agency that shaped the predicament of the provincial government. In doing so, it also denies responsibility for and discourages transformative political contestation of those choices.¹²⁰

This is true also in a more practical or concrete sense. In simply, without more, accepting the province’s assertion that it was operating under severe resource constraints, the Court failed in the real sense of the term to call the province to account – that is, to explain its predicament. Instead, the Court seems to think that, once such a bald assertion of resource constraints is made, it is up to the applicant to challenge it and to show that it does not hold.

¹²⁰ Note that my concern here is not that our courts should arrogate themselves the power to *prescribe* allocational choices to the legislature or executive. Rather, I suggest that they should not be unwilling to *scrutinise* such choices – as was done in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

In the absence of such a challenge, so the Court seems to think, the state's assertion will simply be accepted.¹²¹ This, as Sandra Liebenberg has argued, is a wholly unrealistic way of doing things.¹²² There is an absolute imbalance of power between the state and an impoverished claimant such as Soobramoney when it comes to the question whether or not the state is indeed constrained by limited resources to such an extent and in such manner that it cannot provide in the claimant's needs. The state has all the information, expertise and infrastructure needed to prove such a claim at its disposal (indeed, it controls the information necessary to interrogate such a claim) – the typical claimant in a socio-economic rights claim has none. In short, it is highly unlikely, if not impossible, that an individual claimant, or even a large group of claimants, would be able to marshal the resources and access the information necessary to challenge such an assertion successfully.¹²³ This failure effectively to call the state to account again discourages political engagement – or at least misses an opportunity for political engagement to take place.

Soobramoney, the Court's first socio-economic right case, reflects in the two ways indicated above, in its engagement with the issue of resource constraints, the kind of straight line depiction of legal rules that tends to disregard the political nature of interpretation and so to discourage political engagement with judicial work product that I set out above. How has the theme of resource constraints, if read through a concern with transformative politics, fared in the later cases?

In *Grootboom* resource constraint was not in issue – it was not raised by the state and there was therefore no need to engage with the problem. It is only in *Treatment Action Campaign* that the issue rears its head again – and after that in *Khosa*.¹²⁴

¹²¹ *Soobramoney* (n 104 above) para 23.

¹²² S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?' (2003) 6 *Law, Democracy and Development* 159 177.

¹²³ As above.

¹²⁴ *Khosa* (n 120 above).

In *Treatment Action Campaign* in relation to the question whether Nevirapine should be provided at all public health facilities *where the necessary counselling and monitoring infrastructure already existed*, the question of availability of resources did not arise, as the manufacturers of the drug had undertaken to provide it for free for five years and no additional infrastructural spending was required to proceed with provision at such facilities.¹²⁵ However, with respect to the provision of Nevirapine to prevent transmission of HIV from mother to child at birth at facilities *without the necessary counselling and monitoring infrastructure*, the issue did arise, as the state objected that such infrastructure had to be put in place before Nevirapine could be provided. Here, different from in *Soobramoney*, the Court engaged with and rejected the state's reliance on resource constraints. It did so on the basis, first, that since litigation in the case had commenced, some provincial governments had proceeded with extending provision of Nevirapine to facilities other than the pilot sites,¹²⁶ despite the fact that at the time no counselling and monitoring infrastructure existed at these sites (such infrastructure was then put in place). For the Court, this showed that it was the 'the requisite political will', rather than resources, that was lacking.¹²⁷ Second, the Court took account of the fact that at the time of the hearing before it, the state had announced the allocation of substantial additional resources to fight HIV/AIDS,¹²⁸ so that it could conclude that, even if resource constraints limited the capacity for extension of provision of Nevirapine previously, this was no longer the case.¹²⁹

In this respect, therefore, *Treatment Action Campaign* presents a significant improvement on *Soobramoney*. Clearly, the Court was willing to interrogate the state's assertion of resource constraints and, if it was found wanting, to reject it – this surfaces the politically determined rather than inevitable nature of resource constraints and so encourages transformative political engagement in a powerful manner.

¹²⁵ *Treatment Action Campaign* (n 102 above) para 19. This prompted the Court to hold that the extension of the programme to these sites 'will not attract any significant additional costs' (para 71).

¹²⁶ As above para 118.

¹²⁷ As above para 119.

¹²⁸ As above para 120.

¹²⁹ As above.

However, perhaps not too much should be read into this. In the same way as in *Soobramoney*, the Court in *Treatment Action Campaign* does not interrogate and reject the state's assertion of resource constraints on its own initiative. Rather, its interrogation was prompted by the Treatment Action Campaign, and its rejection of the assertion made possible because it was provided with up-to-date relevant information by the Treatment Action Campaign.¹³⁰ The Treatment Action Campaign was only able to take the initiative in this respect and to provide the Court with the information it needed because it was a highly organised, well-resourced, politically powerful organisation with strong links to expert researchers and research institutions.¹³¹ The same is unlikely to be the case in many socio-economic rights cases – most such cases will involve poorly resourced litigants advancing politically unpopular causes, without expert research backing.¹³² In short, therefore, in *Treatment Action Campaign* the Court still did not effectively call the state to account for its resource allocation. In addition to this, the basis upon which the Court interrogated and rejected the state's reliance on resource constraint also limits the extent to which *Treatment Action Campaign* can be read as a wholesale advance on *Soobramoney*. The Court did not at all interrogate the allocational choices made by the state, that is, it did not question the choice made by the state to allocate the available resources to other needs than the prevention of mother-to-child transmission of HIV/AIDS at birth. Rather, it was presented with and accepted evidence that the state was not, as it had claimed, constrained by limited resources. The political questions inherent in the issue of resource constraint – why it is that certain choices favouring certain needs were made – were left untouched.

To my mind *Khosa* represents the high water mark with respect to the Court's dealings with the issue of resource constraints. In *Khosa* this issue arose as

¹³⁰ M Heywood 'Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the treatment action campaign case against the minister of health' (2003) 19 *South African Journal on Human Rights* 278 303 – 307.

¹³¹ As above.

¹³² See D Brand 'Minister of Health v Treatment Action Campaign: the right to have access to health care in the South African constitution' (2003) 11 *Tilburg Foreign Law Review* 671 702.

one of the state's responses to the claim that non-citizen permanent residents living in South Africa if otherwise eligible should be included in the public social assistance provisioning net. The state objected to this claim that its finite resources would preclude extending social assistance grants to indigent permanent residents.¹³³ With what seemed at the time to be startling boldness, Mokgoro J rejected this objection.¹³⁴ First, she was unconvinced that the information provided by the state to back up its objection in fact did so.¹³⁵ In this respect Mokgoro J held that the state's estimation that allowing indigent permanent residents into the system would add an additional R234 million to R672 million to the social assistance budget was simply too imprecise to prove anything – it did not allow the Court to decide whether the additional burden would be unbearable. In more intrusive fashion, Mokgoro J also scrutinised the evidence provided by the state of current spending on and projected increases in spending on social assistance.¹³⁶ Here she found that, even at the most pessimistic estimate of the additional cost that the inclusion of permanent residents in the system would cause,¹³⁷ the additional burden on the state would in relative terms be so small as to be negligible.¹³⁸

Mokgoro J's holdings with respect to resource constraints in *Khosa* are significant for my purposes in a number of respects. First, as in *Treatment Action Campaign*, the simple fact that she does not accept the assertion of resource constraints at face value, but interrogates it and, having found it wanting, rejects it again dispels the kind of straight line, either/or thinking evidenced in this respect in *Soobramoney*. As Botha points out, the depiction of legal rules as straight lines or boundaries that, if applied to a set of facts that they fit, mechanically render a self-evident result, is not only inaccurate

¹³³ *Khosa* (n 120 above) paras 60 & 61.

¹³⁴ The Court's willingness to do so is not insignificant. See by way of contrast Ncgobo J, dissenting in *Khosa* (para 128): 'Mr Kruger ... estimates that the annual cost of including permanent residents could range between R243 million and R672 million. Policymakers have the expertise ... to present a ... prediction about future social conditions. That is ... the work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.'

¹³⁵ *Khosa* (n 120 above) para 62.

¹³⁶ As above para 60.

¹³⁷ The state estimated that the additional cost would be between R243 million and R672 million. The wide range itself indicated to the Court the absence of clear evidence as to the possible resource consequences of a finding of inconsistency (as above para 62).

¹³⁸ As above.

as a description of legal rules. It also under-estimates the contingency of the facts or evidence to which legal rules are applied. Facts and evidence are also ‘texts, the interpretation of which is contingent upon the experience, values and imagination of the interpreter.’¹³⁹ The process of applying legal rules (or standards) to a set of facts or a body of information in order to reach conclusions implies work, not application by rote. It is, in Botha’s words, ‘a dynamic interplay between rules and facts, by means of which both are moulded and remoulded to fit each other’.¹⁴⁰ For Mokgoro J to interrogate and question the information presented by the state and the conclusions the state draws from that information, is to surface the contingency of that information, to dispel the impression of inevitability with which it is presented and acknowledge that such presentation is politically contestable. This opens space for the operation of a transformative politics – or at least, avoids closing down such space, as would have happened had the resource constraint assertion been accepted without interrogation.

But *Khosa* goes further than *Treatment Action Campaign*. By scrutinising the state’s assertion of constraint on her own initiative, without a contrary showing having to be made by the applicants in the case, Mokgoro J implicitly abandons the approach applied in *Soobramoney* and still evident in *Treatment Action Campaign* in terms of which the state only has to allege resource constraint and it then remains for the complainant to rebut that allegation. Mokgoro J’s approach to the matter indicates that it is indeed the state that has to persuade the Court of the cogency and correctness of an assertion of resource constraint. Mokgoro J in other words powerfully imposes a duty to account on the state and in so doing again opens space for transformative politics.

Again, perhaps, not too much should be read into *Khosa*. Although Mokgoro J, as happened in *Treatment Action Campaign*, both surfaces the political contestability of the issue of resource constraint and goes one step further in clearly imposing a duty to account in this respect on the state, she was, at

¹³⁹ Botha ‘Freedom’ (n 6 above) 273.

¹⁴⁰ As above.

least in part, able to do so because *Khosa* was an easy case. This is true both with respect to the basic issue in the case (exclusion from social assistance eligibility of indigent permanent residents, children, disabled and the elderly alike just seems intuitively wrong) and with respect to the resource constraint question. In short, the state's bungling – presenting vague figures capable of conflicting interpretations - made possible Mokgoro J's holding. One can only speculate whether or not she would have been as bold in her interrogation if the state were more precise in asserting the resource constraint point.

4.3.2.2 Application of the reasonableness test

In an influential early response to the Constitutional Court's decision in *Grootboom*, Theunis Roux attempted to formulate the precise basis upon which the Court in that case found the state's housing programme to be inconsistent with the constitution, and so, I suppose, to formulate the test or rule that emerged. He wrote that the case was decided on the basis of a requirement of 'mere[] inclusion' and that 'a government programme that is subject to socio-economic rights will [in terms of this finding] be unreasonable if it fails to cater to a significant segment of society.'¹⁴¹ Specifically, so he continued, *Grootboom* was not authority for the proposition that a measure would be unreasonable if it fails to engage in 'sensible priority-setting, with particular attention to the plight of those in greatest need'.¹⁴² At the time this prompted from me an analysis of *Grootboom* and *Treatment Action Campaign* in which I argued that both cases were decided on the basis of narrow rationality concerns only – a basic requirement of 'rational coherence'.¹⁴³ In *Grootboom*, so the argument went, the Court was concerned in the final analysis only with a logical inconsistency in the state's housing policy – with the fact that no reference was made to absolutely homeless people. *Treatment Action Campaign*, so I continued, was similar. Ostensibly that case was decided on the basis that the state's policy with respect to the provision

¹⁴¹ T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12:2 *Constitutional Forum* 41 49.

¹⁴² CR Sunstein 'Social and economic rights? Lessons from South Africa' (2001) 11:4 *Constitutional Forum* 123 127.

¹⁴³ D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or: "What are socio-economic rights for?" ' in Botha, Van der Walt & Van der Walt (eds) (n 26 above) 33 50.

of Nevirapine to prevent mother-to-child transmission of HIV was unduly inflexible.¹⁴⁴ However, I pointed to passages from the judgment which to me made it clear that in fact at least part of the underlying rationale of the decision was, just as in *Grootboom*, a basic logical inconsistency in the state's position. Responding to the state's argument that Nevirapine could not be provided at all public health facilities where it is needed, the Court pointed out that the state was indeed providing Nevirapine to mothers and new-born babies at the designated pilot sites. These pilot sites constituted 10% of public health facilities at which mothers gave birth. It was for the Court 'unthinkable' that the state would provide to babies and women a drug the safety and efficacy of which it was not convinced about.¹⁴⁵ In short, one part of the state's position – its questioning of the safety and efficacy of Nevirapine – did not square logically with another – its provision of the same Nevirapine to real women and children at the pilot sites.

In Chapter 3 I criticised this aspect of the two judgments as an example of the Court using and legitimising a depoliticising rhetoric. I characterised the requirement of 'rational coherence' as a 'structural good governance principle' and argued that the Court's reliance on this requirement pointed to an attempt to depict socio-economic rights as a set of technical good governance guidelines or rules, devoid of political content. This, I concluded, fed into a general tendency in the political discourse about need and deprivation to describe these issues, in an attempt to remove them from political contestation, as best left to the impersonal forces of the market for solution, with the role of the state depicted as that of a neutral arbiter or regulator only.¹⁴⁶

Here my concern is slightly different. In Chapter 1 I related how the traditional understanding of legal rules as straight lines depicts rules in an either/or fashion. Either a set of facts falls right next to the rule in a space well-populated by settled precedent, in which case the rule is absolutely

¹⁴⁴ As above.

¹⁴⁵ As above.

¹⁴⁶ See 176 and further above.

constraining upon the adjudicator; or the set of facts does not fit the rule, or falls right next to the rule but in a space not yet filled in by settled precedent, in which case the adjudicator is absolutely free. I further related how this view of legal rules allows judges to present their work as wholly mechanical and so empty of political content.¹⁴⁷

There is something of this either/or logic for me in the Court's reliance on the requirement of rational coherence in *Grootboom* and *Treatment Action Campaign*. A logical inconsistency is something that one notices and declares – or, at least, it is easy to present it as such. It is not a matter of opinion, something that can be debated, it is a fact. For the Court to spot and latch onto this kind of logical flaw in the state's position allows it, whilst finding the state's measure to be inconsistent with the constitution, to maintain the image of mechanical operation so central to the straight line-view of law. This in turn allows it to escape, at least ostensibly, responsibility for its holdings and so to avoid political engagement with them.

Of course, there are good reasons why the Court would opt to base its holdings in controversial cases such as *Grootboom* and *Treatment Action Campaign* on the kind of technical rational coherence requirement related above. The pretence of political neutrality that comes with such reliance is useful for the Court in its management of its institutional relations with the other branches of government. It allows the Court to enforce the rights in question, whilst maintaining at the same time that there is in substance nothing wrong with the state measure at issue – to enforce rights whilst at the same time legitimising the state's transformative programme.¹⁴⁸ It also presents a good example of the kind of 'judicious avoidance' that I briefly touched upon above – deciding a case on as narrow a basis and in as shallow a manner as possible, so as to avoid having to make decisions on and so bringing about closure with respect to contentious social questions.¹⁴⁹ The importance of this both strategic and democracy-oriented advantage should

¹⁴⁷ See 54 – 55 & 57 above.

¹⁴⁸ See, in general, Roux (n 68 above).

¹⁴⁹ See 208 and further above.

not be discounted. Nevertheless, both come at a cost: the device used to attain them works, as I have argued here, to discourage transformative political action.

The reading of *Grootboom* and *Treatment Action Campaign* as reflecting elements of traditional straight line thinking presented above should immediately be placed in perspective or, more to the point, qualified. First, with the benefit of hindsight, it seems clear that the decision in *Grootboom* was motivated by more than a simple rational coherence concern – that, indeed, the decision exhibits in a concrete and operationalised fashion a concern that some form of priority be accorded the needs of those who are desperately deprived. As I will show in more detail below¹⁵⁰ cases subsequent to *Grootboom* have shown that the Court operates with a sliding standard of scrutiny when applying its socio-economic rights reasonableness test, scrutinising state measures more strictly in some cases than others. One of the factors that seem to determine the level of scrutiny the Court will apply in any given case is the level of deprivation experienced by the claimants before the Court and the impact that the state's alleged failure to give effect to their rights has on them. In cases where the claimants are severely deprived and are drastically affected by the failure of the measures in question, the Court applies a stricter standard of scrutiny than in cases where the level of deprivation is more attenuated and the impact less severe. It has, to my mind persuasively, been argued that one reason why the Court opted in *Grootboom* for a level of scrutiny far stricter than that used in *Soobramoney* is that the claimants in *Grootboom* were simply much worse off in general terms than the claimant in *Soobramoney*.¹⁵¹ This does make it seem as though, although it is not articulated in the judgment, a substantive concern for different levels of deprivation was at play in the decision, with concrete results.

In addition, in subsequent cases, the Court has engaged in much more substantive analysis and reasoning than is evident in *Grootboom* and

¹⁵⁰ See 240 and further below.

¹⁵¹ See P de Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258.

Treatment Action Campaign and has clearly not relied on a requirement of rational coherence. *PE Municipality* would have been the perfect example for this point, with Sachs J's focus on the position of the squatters in that case in society, the impact the eviction would have on them, the reasons for their initial occupation of the land in question and the reasons why the landowner now wanted to have them removed, as well as his articulation of a particular vision of a just society making for a richly substantively argued judgement. However, *PE Municipality* was not decided on the basis of the section 26(2) reasonableness test, but on the basis of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.¹⁵² As such, its usefulness as comparator for *Grootboom* and *Treatment Action Campaign* is limited.

Once more, *Khosa* steps into the breach. In *Khosa Mokgoro* J does not avoid the substantive issues of need, deprivation, marginality and social exclusion that the case raises or deny their politically contested nature. Instead, she makes them central to her judgment. Mokgoro J kicks off her consideration of whether or not the exclusion from the social security system of permanent residents is reasonable for purposes of section 27(2) by describing the reasonableness test and its manner of application. First, she emphasises the fact that, when applying the reasonableness test, 'context is all important'.¹⁵³ This, so it transpires, means that the content of the test is determined by the circumstances of each case: Mokgoro J lists a number of factors or circumstances that would be relevant to determining the reasonableness of the measure at issue in this case (the purpose served by social assistance; the relevance to this purpose of the requirement of citizenship; and the impact the exclusion has on impoverished permanent residents) with the unstated implication that in other cases, other factors might be important.¹⁵⁴ Her description of the test in the abstract is illuminating – she seems to regard the reasonableness standard in precisely the 'field of action' terms that I relate earlier in this Chapter and in Chapter 1 below.¹⁵⁵ That is, it is clear that for

¹⁵² Act 19 of 1998.

¹⁵³ *Khosa* (n 120 above) para 49.

¹⁵⁴ As above.

¹⁵⁵ See 58 - 60 above.

her, although the test poses certain broad outline requirements,¹⁵⁶ its operative content is determined by its interpreter anew in each case in light of the facts and circumstances of that case. Again, her understanding of the application of the reasonableness test seems to square with the idea that interpretation and application is ‘a dynamic interplay between rules and facts, by means of which both are moulded and remoulded to fit each other’.¹⁵⁷

The description of the standard in the abstract is also translated into her decision in the case. In eventually holding the exclusion of permanent residents inconsistent with the constitution, she introduces a number of important innovations into the reasonableness test, all of which seem to be dictated by the peculiar circumstances of the case before her. So, for example, it is clear from her judgment that she sees that the stringency of application of the test will vary from case to case. She emphasises the uniquely marginalised and vulnerable position in society of the claimants before her and the fact that their exclusion from the social assistance system has a severe impact on them.¹⁵⁸ She then proceeds to test the measure excluding them amongst other things against a standard of proportionality, weighing up the importance of the purpose of the exclusion against the impact that it has on the claimants.¹⁵⁹

In this light, it is clear, as with the development of the Court’s interpretation and application of the resource constraint qualification related above, that the initial indications of straight line thinking encountered in *Grootboom* and *Treatment Action Campaign* and the disengagement with transformative politics that suggested, has gradually been supplanted by a reading and application of the reasonableness test much more aware of the interpretive role of the judge, the indeterminate nature of the standard, and the resultant fact of judicial responsibility. This development seems to indicate a growing sensitivity in the Court’s jurisprudence to transformative politics. The next step in the development of the Court’s socio-economic rights jurisprudence – *Olivia*

¹⁵⁶ Such as that a measure must be rationally related to its purpose.

¹⁵⁷ Botha ‘Freedom’ (n 6 above) 273.

¹⁵⁸ *Khosa* (n 120 above) paras 76 – 78.

¹⁵⁹ As above para 82.

Road – unfortunately seems in this respect to be a step in the wrong direction, or one too far in the right direction.

4.3.2.3 Olivia Road – collapse into instrumentality?

In *Olivia Road*, it will be recalled, Yacoob J dealt with the application for an eviction order before him on appeal in a novel manner. Rather than himself deciding the matter, he left it to the parties to resolve it amongst themselves. After hearing the case, *but before handing down judgment*, he ordered the parties to engage with each other in order to find a solution to their common problem.¹⁶⁰ This they did, submitting an agreement to the Court. Yacoob J approved this agreement so that it became an order of court – again *before handing down judgment in the case*.¹⁶¹ In the result the main live issue in the case – the question whether or not the occupiers should be evicted before suitable alternative accommodation had been found for and made available to them – was disposed of without any direct involvement by the Court.

Despite its intuitive appeal to anyone interested in the relationship between transformative politics and socio-economic rights adjudication (transformative politics seems almost to have been injected into the process of socio-economic rights adjudication), Yacoob J's approach to the case viewed from the perspective employed in this Chapter is highly problematic. In Chapter 1 I pointed out that a view of adjudication just as problematic as the straight line view in its relationship to transformative politics, is the view of adjudication as the play of sound-bite pairs. In this view adjudication is nothing but the almost ritualistic exchange of sets of contradictory sound-bites. Botha feels more or less the same unease about this depiction of adjudication as he does about the straight line view. He is concerned that it too denudes adjudication of its political nature and content. Because adjudication in the sound-bite depiction occurs absent any constraint, so he reasons, judges are completely free to pursue their own ideological purposes and preferred outcomes in cases. This

¹⁶⁰ *Olivia Road* (n 99 above) para 5.

¹⁶¹ As above para 27.

means that adjudication degenerates into something completely instrumental, devoid of broader political significance.¹⁶²

This, unfortunately, seems exactly what happens in *Olivia Road*. Yacoob J's choice to order engagement and to approve the agreement reached before having decided the case means that a solution is reached for the predicament of the group of occupiers before the Court only. The dispute is resolved without any judicial decision – without the application and elaboration of law, that is. This means that, apart from establishing the rule that a court may, even at the level of final appeal, before having decided a case order parties to resolve the dispute between them by engaging with each other, no new law is created, no rules of general application in terms of which future similar cases can be resolved. As a result the process of adjudication becomes wholly instrumentalised, aimed at generating a practicable solution to the specific dispute before the court only, in the terms that the specific parties see fit, without any concern shown for its broader political significance. That this is indeed so is underscored by Yacoob J's response to the challenge of the occupiers to the general housing plan of the City of Johannesburg. This aspect of the case represented to me the attempt of the specific occupiers before the Court to bring to the fore the broader political significance of their particular plight – to point out that their predicament was shared by a large number of other people and raised political questions that transcended their specific concerns. Yacoob J, on the argument that the dispute directly before the Court (the specific eviction dispute) had been resolved declined the invitation to consider this matter, holding that future groups of people who suffer the same fate as the group of occupiers then before him could each go to court on their own behalf and solve their problems on their own terms.¹⁶³ The message, seemingly, could not be clearer – the process of adjudication is intended for specific people or specific groups of people to solve their own, narrow instrumental concerns. It is not concerned with the resolution of or engagement with broader political questions.

¹⁶² Botha 'Freedom' (n 6 above) 264.

¹⁶³ *Olivia Road* (n 99 above) paras 34 – 35.

4.3.3 Finality

4.3.3.1 Introduction

In section 4.2.3 above I related two ways in which the tendency in adjudication toward finality, with its transformative politics-unfriendly results, could be problematised: greater context sensitivity in the interpretation and application of standards or rules; and the use of innovative remedies. Below I explore to what extent these two approaches have had an impact on the socio-economic rights jurisprudence of our courts.

4.3.3.2 Context

As soon as the second socio-economic rights decision of the Constitutional Court – *Grootboom* - was handed down, it was clear that context sensitivity plays an important role in the application of the Court's reasonableness test. At the time, for example, Pierre de Vos attributed the different outcomes in *Soobramoney* and *Grootboom* to the Court's sensitivity to context, arguing that the more vulnerable position of the claimants in *Grootboom* if compared with the claimant in *Soobramoney* persuaded the Court in the latter case to employ a more intrusive standard of scrutiny and to find in favour of the evicted squatters.¹⁶⁴ I also, in a contribution published just after *Grootboom* was handed down, speculated that the case indicated that the Court was fashioning a variable standard of scrutiny, the intensity with which it will be applied in any given case being determined primarily by the position of the claimants before the Court in society and the impact that the state measure in question has on them.¹⁶⁵

These predictions have since proven to be true. The Court's subsequent decisions have indicated that it indeed applies different degrees of scrutiny in different cases. This is certainly most clearly evident with respect to the Court's standard of review. As will be recalled, the Court applies a reasonableness test to review the compliance of state measures with socio-economic rights. This reasonableness test – essentially a means-end

¹⁶⁴ De Vos (n 151 above).

¹⁶⁵ D Brand 'The minimum core content of the right to food in context: a response to Rolf Künneman' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 99 108.

effectiveness test in which the Court asks whether or not and to what extent a measure is capable of achieving the realisation of the socio-economic right in question – is explicitly designed by the Court to manage its concerns with institutional capacity and democratic legitimacy, as, in theory it allows the Court to find a policy unreasonable, without having to prescribe to the state specifically what it must do to act reasonably. However, it has been applied as though on a sliding scale, with the Court in particular varying the extent to which it by implication directly prescribes to the state what it must do. In *Soobramoney*, the standard was one of simple rationality. The Court simply asked whether the policy was rationally conceived and applied in good faith.¹⁶⁶ Its inquiry was limited to whether the policy, on its face, was rationally linked to the goal of providing access to health care services, in the sense that, within the bounds of logic, it could conceivably achieve its goal.

The standard applied in *Grootboom* was clearly much more substantial. The Court there indicated that its standard of reasonableness requires the state's policies and programmes intended to implement socio-economic rights to be comprehensive and coherent, coordinated, flexible, inclusive of all significantly at-risk sectors of society, sensitive to various degrees of deprivation and reasonably implemented as well as conceived.¹⁶⁷ Taken together, these factors indicate that the Court in *Grootboom* required a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*. The Court significantly narrows the range of policy options that it would be legitimate for government to choose from and thinks about the relative efficiency of different policy options - the question now seems to have become whether the policy at issue was *likely* to achieve its goal.

In *Treatment Action Campaign* the scrutiny becomes stricter still. Apart from adding a new factor to the list of factors used to determine the reasonableness of policies (transparency),¹⁶⁸ the Court here limits the range of policy options that would be reasonable in light of the right to have access

¹⁶⁶ *Soobramoney* (n 104 above) paras 25 & 29. The court applied, in other words, the low end of the arbitrariness standard enunciated in *FNB* (n 83 above).

¹⁶⁷ See 120 and further above.

¹⁶⁸ *Treatment Action Campaign* (n 102 above) para 123.

to health care services even further. The Court in *Treatment Action Campaign* makes a number of quite detailed findings of fact,¹⁶⁹ interrogates the wisdom of government's policy choice not to extend the provision of Nevirapine beyond the designated pilot sites closely,¹⁷⁰ and finds the policy option proposed by the respondents in the matter to be superior in a number of respects to government's position.¹⁷¹ Indeed, the Court in *Treatment Action Campaign* comes close to asking whether government's chosen policy option *will* achieve its constitutionally mandated end.

In *Khosa*, the Court's scrutiny is even more intensive. The Court in *Khosa* finds the measures excluding permanent residents from the social assistance net to be unreasonable both because the purpose of the exclusion (to prevent people immigrating to South Africa becoming a burden on the state) could be achieved through means less restrictive of permanent residents' rights (stricter control of access into the country) and because 'the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the state relies'.¹⁷² The Court here applies a proportionality test to the state's measures - the measures in question have to be necessary and the importance of the purpose of the measures must outweigh the adverse impact they have on individual rights and interests. The question has now become not only whether the measures in question will achieve their constitutional goal, but whether they are the best measures with which to do so.

Finally, in *PE Municipality*, the Court goes the furthest. Here the Court does not only, based on a contextual consideration of a range of factors, find that the squatters may not be evicted without being provided with suitable alternative accommodation – an analysis which of itself already required the

¹⁶⁹ The Court for instance rejects government's contentions that Nevirapine is not safe for use in prevention of MTCT of HIV (as above paras 60 – 63) and that no capacity to counsel patients before the administration of Nevirapine and to monitor the use and effect of the drug after administration existed outside the designated pilot sites (paras 84 - 88).

¹⁷⁰ As above paras 48 – 81.

¹⁷¹ As above paras 93 – 95.

¹⁷² *Khosa* (n 120 above) paras 65 & 82.

Court to enter into a significant measure of interest balancing and policy evaluation – but goes so far as to prescribe to the state what suitable alternative accommodation for the squatters would be, by rejecting the offers of alternative land that the state had made and indicating what basic requirements suitable land would have to meet.¹⁷³

The same ‘sliding scale’ approach is exhibited in the Court’s remedial approach. The Court has drawn a fair measure of criticism with respect to its approach to providing remedies in socio-economic rights cases. The criticism has focussed on the Court’s unwillingness to impose supervisory interdicts on the state in cases such as *Grootboom* and *Treatment Action Campaign* instead of simply declaratory or directory orders. However, the Court’s penchant for declaratory rather than specific directory relief is an extension of its reasonableness test – just as the Court tries as far as possible ‘only’ to determine that the state’s conduct is unconstitutional, without prescribing how it must rectify that conduct, the Court through its remedies tries to avoid prescribing specific policy options to the state. But again, the extent to which it has managed to leave a range of options open to the state in this respect differs from case to case. In *Grootboom* the Court issued a simple declarator, without at all prescribing to the state what kind of action it should take to take account of the needs of the homeless.¹⁷⁴ In *Treatment Action Campaign* its order was more specific – it issued a declarator but coupled with an order directing the state to make Nevirapine available at all public health facilities to prevent MTCT of HIV and directing it to adopt a general plan to combat MTCT of HIV.¹⁷⁵ However, the Court’s decision to add a directory order to its arsenal in this case was precisely motivated by a desire to defer to the technical judgment of health care professionals and health care managers. Had the Court simply declared the state’s decision not to make Nevirapine generally available unconstitutional, the implication would have been that the state must provide it at all public health facilities. By adding a directory order, the Court qualified the effects of its finding of unconstitutionality – it indicates in its

¹⁷³ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 54.

¹⁷⁴ *Grootboom* (n 24 above) para 99.

¹⁷⁵ *Treatment Action Campaign* (n 102 above) para 135.

directory order that the state must make Nevirapine available at public health facilities, but only there where, in the opinion of the attending physician and her supervisor, it is appropriate and feasible. Nevertheless, the *Treatment Action Campaign* order is certainly far more specific and direct than the order in *Grootboom*. In *Khosa* the Court issues its most specific order – not only is it very specific in what adjustments it requires the state to make in its conduct (the state must simply include permanent residents in its social assistance net), it goes so far as to step into the shoes of the legislature and read the requisite words into the challenged statutory provision.¹⁷⁶

More interesting than the simple fact of this variability in scrutiny and remedial approach is the question of what it is that persuades the Court that it is less constrained by its institutional incapacity and inappropriateness and can therefore act more robustly in one case than in another. The Court has not itself explicitly indicated which principles and factors influence it in this respect, so that one has to deduce from the judgments what the position is. An analysis and comparison of the different judgments show that at least the following factors play an important role:

(a) Positive or negative duties

Certainly, whether or not the case in question is presented as aimed at enforcing a positive or a negative duty plays a distinguishing role. As a rule, courts will scrutinise infringements of negative duties imposed by socio-economic rights more strictly than they would failures in meeting positive duties. Although this is also simply a question of judicial attitude the difference in degree of judicial constraint at play in cases of enforcement of positive as opposed to negative duties is simply required by the way in which these rights are formulated and by the general structure of constitutional litigation in South Africa.

Constitutional litigation in South Africa proceeds in two stages. First, the complainant bears the onus to persuade the court that a right in the bill of

¹⁷⁶ *Khosa* (n 120 above) para 98.

rights has been infringed. Should a court find that the right has been infringed the state bears the onus to justify its limitation of that right. In principle, the standard of scrutiny in terms of which courts decide whether or not any infringement of any constitutional right is justified is prescribed by section 36(1) - the general limitation section, which applies to all rights. However, despite the fact that section 36(1) in principle applies to all infringements of all constitutional rights, courts in practice do not apply section 36(1) when they must decide whether or not failures by the state to give effect to the *positive duties* to protect, promote and fulfil socio-economic rights can be justified.¹⁷⁷ The positive duties imposed by socio-economic rights are explicitly described by the constitution as duties to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of the rights in question.¹⁷⁸ The Constitutional Court has interpreted this qualifying phrase as an internal limitation clause: a special standard of 'reasonableness' scrutiny, used instead of section 36(1), according to which to decide whether or not failures in meeting the positive duties imposed by socio-economic rights can be justified.

Whether or not the possible justification of an infringement of a socio-economic right is considered in terms of section 36(1) or in terms of this special limitation clause significantly determines the degree of intensity with which a court operates. This is so because the standard of scrutiny that is applied under the two tests is different. Section 36(1) poses both a threshold requirement that an infringement of a right must meet in order for it to be capable of justification - the infringement must have occurred in terms of 'law of general application'¹⁷⁹ to be at all justifiable - and a standard of justification that the infringement must satisfy once it has passed the threshold. The standard of justification or scrutiny required by section 36(1) is a proportionality test: a court weighs the purpose and benefits of the infringement against its nature, effect and severity, and considers the relative

¹⁷⁷ As above para 83 & 84.

¹⁷⁸ See eg ss 26(2) and 27(2).

¹⁷⁹ The infringement must have occurred in terms of a clear, precise and accessible rule (as opposed to a once-off decision) that applies in equal measure to all those that it reaches; see the dissenting judgment of Kriegler J in *Hugo* (n 21 above) para 86.

efficacy of the infringing measure in achieving its purpose, to decide whether or not it is justified. As such, it allows courts a fair amount of leeway to interrogate state conduct and to prescribe specific alternative options where state conduct is found to be unjustifiable. The reasonableness test that applies in cases of positive infringement of socio-economic rights, as pointed out above, rises only in exceptional cases to the level of proportionality. As a result, infringements of the positive duties imposed by socio-economic rights are usually evaluated against a more lenient standard of scrutiny than that which applies to other infringements of rights in terms of section 36(1).

Although seemingly unavoidable, as the constitution mandates it, the distinction made with respect to the treatment of negative infringements and positive infringements is problematic. This is so because the distinction between positive duties and negative duties itself has been shown to have neither an empirical nor a principled basis. First, often the same conduct of the state can be described both as an infringement of the positive duty to fulfil a right and an infringement of the negative duty to respect it. As Liebenberg points out, in *Minister of Health v Treatment Action Campaign*, it was not clear whether the refusal to extend provision of Nevirapine for purposes of preventing transmission of HIV from mother to child at birth to all public health facilities, outside of a select few pilot sites, constituted a negative interference in or impairment of the right to have access to health care services, or a failure of the state positively to provide an essential health service. In effect, it could be characterised as both.¹⁸⁰ Similarly, an element of the supposedly negative duty to respect rights - the duty to mitigate interference in the exercise of a right there where such interference is unavoidable - clearly requires the state to act, rather than to refrain from acting.

Second, the distinction in consequence on the basis of which it is said that it is less problematic for courts to enforce negative duties than positive duties also does not hold. Enforcement of a negative duty against the state is as likely to have consequences for expenditure of resources as enforcement of a positive

¹⁸⁰ S Liebenberg 'The interpretation of socio-economic rights' in Woolman, Roux & Bishop (eds) (n 84 above) ch 33 19.

duty. Enforcement of a negative duty also potentially requires a court to interfere as deeply in the policy-making powers of the executive or legislature as does enforcement of a positive duty. Suppose the state seeks to evict a group of illegal occupants from state land, with the purpose of developing that land for low-cost housing, to be occupied by a different group of people, next in line on the housing waiting list. For a court to prevent the state from doing so (to enforce the negative duty to respect the right to have access to adequate housing) will have important resource consequences - the state will have to find other suitable land and buy it, or use other state land, which itself in turn might have been allocated for a different use. Equally, in enforcing the positive duty in this respect, a court would interfere very directly in a complex, multi-faceted policy choice about how to decide who gets access to housing first, about where to situate low-cost housing development, etcetera.¹⁸¹

As a result the distinction between negative and positive duties is a rather crude mechanism according to which to calibrate the intensity of a court's review and the intrusiveness of its remedies. Nevertheless, cases which were presented by claimants as complaints of negative interferences with a socio-economic right – such as *Jaftha* – have been decided by the Court in accordance with the strict section 36(1) proportionality standard of review and in such cases the Court has seen fit to apply also significantly more intrusive remedies than in others.¹⁸²

(b) Where the state has acted

In cases where courts are required simply to enforce socio-economic rights as *the legislature, the executive or the state administration have themselves defined those duties*, rather than to interpret constitutional socio-economic rights, define duties on the basis of those rights and then to impose them on the state, courts have been more intrusive than in others. Arguing a case on

¹⁸¹ With respect to the blurring of the distinction between positive and negative constitutional duties, see, in general, S Bandes 'The negative constitution: a critique' (1990) 88 *Michigan Law Review* 2271.

¹⁸² See also in this respect *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 5 SA 3 (CC) and *PE Municipality* (n 173 above).

the basis of such self-defined duties or second tier socio-economic rights, rather than directly on the basis of a constitutional socio-economic right, is therefore generally to be preferred. The most obvious examples of the enforcement of such self-defined duties are cases where courts enforce statutory socio-economic rights, in any one of the two senses described above.¹⁸³ In most such cases, constraint is diluted not only by the fact that courts are not faced with themselves having to define duties to impose on the state, but also because courts are able to make use of remedies from the existing law to enforce statutorily defined duties. The many instances where courts have enforced statutory entitlements to social assistance through administrative law remedies illustrate this point.¹⁸⁴

By the same token, courts will be more comfortable to enforce socio-economic rights as they have been defined through executive or administrative action, as described above. In *B*,¹⁸⁵ the willingness of the Court to order the state to provide at its own cost anti-retroviral medication to the two applicants to whom the state had prescribed it, in contrast to its refusal to make the same order with respect to the two applicants for whom it had not yet been prescribed, turned on the fact that the prescription of the medication to the first two applicants amounted to an administrative self-definition of the state's duty. The Court was willing to enforce that duty because, in doing so, it was not required itself to determine what adequate medical treatment entailed, a task that it felt it did not have the requisite expertise to undertake.¹⁸⁶ *Treatment Action Campaign* provides a similar example, although with respect to an executive policy formulation decision rather than a decision by the administration. The relatively robust manner in which the Constitutional Court in that case engaged with issues of AIDS policy and the willingness of the Court in that case, as opposed to other cases, to impose a precise and intrusive directory order on the state can in significant part be explained by the fact that the Court was simply requiring the state to extend a

¹⁸³ See 83 and further above.

¹⁸⁴ See N de Villiers 'Social grants and the Promotion of Administrative Justice Act' (2002) 18 *South African Journal on Human Rights* 320 for an overview.

¹⁸⁵ *B v Minister of Correctional Services* 1997 6 BCLR 789 (C).

¹⁸⁶ As above para 37. See also paras 35, 36 & 60.

policy decision that it had itself already taken (that Nevirapine was suitable and safe to provide to mothers giving birth at select public health facilities and their new-born children to prevent transmission of HIV) to its logical conclusion (to extend the provision to all public health facilities for the same purpose).¹⁸⁷ Again, an element of self-definition of duties, this time through an executive policy decision, influenced the Court's perception of constraint.

The fact that the state has acted with respect to a socio-economic right is relevant to the Court's degree of intensity in review and remedy in another way. In *Grootboom*, *Modderklip* and *PE Municipality* the Constitutional Court emphasised the fact that the squatters in those cases were placed in the predicament that they faced by the state itself – that the state had previously evicted them from land without providing to them alternative accommodation, so that they had to occupy the land from which the state then again sought to evict them. This fact clearly influenced the Court in favour of the squatters, persuading it in particular in *Modderklip* and *PE Municipality* to make particularly robust findings and impose particularly intrusive remedies on the state.¹⁸⁸

(c) The impact of the state's conduct

The extent to which the state's conduct has an adverse impact on the rights and interests of those affected by it further clearly determines the intensity of its review and the intrusiveness of its orders. This is true in both a general and a particular fashion. First, the Court's intensity is enhanced when it deals with claimants from some historically marginalised or particularly vulnerable group, such as children or rural women. With respect to children, the constitution seems to mandate the application of the stricter section 36(1) proportionality review standard, as their rights are not subject to the special limitations clauses to which the rights of everyone are. In addition, the Court has, in particular in *Grootboom*, *Treatment Action Campaign* and *Khosa* indicated that its willingness to act robustly in review and remedy will be enhanced if the

¹⁸⁷ Brand (n 108 above) 53.

¹⁸⁸ See eg *PE Municipality* (n 173 above) para 55.

claimants hail from such a particularly vulnerable group.¹⁸⁹ Second, the real adverse impact that the state's conduct has on the actual claimants before the Court, irrespective of which group they are from, has also been cited by the Court as a justification for more robust action than in other cases.¹⁹⁰

(d) The conduct of the parties to litigation

The final factor that has seemed to influence the Court's intensity of review and intrusiveness of remedy is the conduct of the parties to the litigation leading up to and during the dispute before the Court. This is perhaps best illustrated by *Modderklip* and *PE Municipality*. As will be recalled, in both these cases the Court utilised a particularly intense standard of review. It did not only ask the question whether or not the state is obligated to provide to the squatters alternative accommodation should they be evicted, but also inquired into and rejected the suitability of accommodation that the state had selected and offered to the squatters. Furthermore, it translated these findings into particularly specific orders that had significant resource implications for the state (denying the eviction orders sought by the state, unless suitable alternative accommodation *as described by the Court* was provided by the state). In both cases, the Court cited the conduct of the parties to the litigation as relevant to determining its intensity of review and remedy. The Court focussed on the fact that the state, by evicting the squatters previously from other land without providing alternative accommodation, had caused the squatters' predicament in the first place and had then subsequently made no effort to solve their problem and rejected their own efforts to do so amicably. It also noted that the squatters had moved onto the land in question not to force the state to provide them with alternative accommodation but simply because they had nowhere else to go, and had subsequently tried to negotiate an amicable solution to the problem with both the state and the private landowners in question. These circumstances clearly influenced the Court to act robustly in favour of the squatters.¹⁹¹

¹⁸⁹ See eg *Khosa* (n 120 above) para 74 (identifying permanent residents as a particularly vulnerable group).

¹⁹⁰ See eg as above paras 76 & 77.

¹⁹¹ See eg *PE Municipality* (n 173 above) paras 57 & 59.

I have shown above how the Constitutional Court has managed, through adopting a flexible or variable standard of review and remedial approach in socio-economic rights cases, to take account of the specific circumstances and context of each case coming before it in a practical, operationalised fashion. I have also shown which factors seem to influence the Court in calibrating the intensity of its review and the intrusiveness of its orders in any given case.

The contextual awareness the Court displays in this way, its willingness to be responsive to the specific requirements of each and every case, rather than to rely on rigid conceptualist distinctions to determine its reasoning and findings, is encouraging. It potentially presents a powerful way in which the Court can avoid the closure and finality that a more generalised approach would have resulted in. Importantly, however, the Court still manages to retain a measure of generality in its application of the reasonableness standard. It operates in terms of a broad settled normative framework (the elements of the reasonableness test have been clearly enunciated) but simply varies the intensity with which that framework is brought to bear on any particular measure.

At this stage the development of a set of principles on which to base its approach of variability is still in its infancy. In this respect the Court's reliance on the distinction between positive and negative duties is problematic, as it seems to recall the very conceptualist logic that the approach of variability is intended to avoid, falling into the kind of either/or straight line thinking that works against the fostering in adjudication of transformative politics. The increasing indications that the Court is relying on other factors – the extent to which it is actually required to define duties and impose those unilaterally on the state, instead of simply enforcing duties as the state has defined them; the impact of the state's conduct; and the conduct of the parties to litigation – to calibrate its intensity of review and the intrusiveness of its orders shows promise in this respect.

4.3.3.3 Remedies

(a) Introduction

To date much criticism has been levelled at the Constitutional Court for the remedies it has awarded in socio-economic rights cases. The cases that have attracted most of the criticism have been those in which a failure by the state to provide in some basic need was at issue – cases, that is, such as *Grootboom*, *Treatment Action Campaign*, *Khosa*, *PE Municipality* and *Olivia Road*. In these cases, the relief fashioned by the court must prompt the state to act affirmatively in order to set things right - to amend a policy or adopt a new one, or to provide a service that it is not currently providing or extend a service to people who do not currently qualify for it. Such cases necessarily involve ‘amorphous, sprawling party structures, allegations broadly implicating the operations of large public institutions such as schools systems ... mental health authorities ... and public housing authorities, and remedies requiring long term restructuring and monitoring of these institutions’, policies and programmes.¹⁹² Courts are therefore confronted in their fashioning of remedies in these cases with institutional capacity concerns – questions about their capacity both to prescribe particular conduct to the state (to determine policy) and to monitor whether or not their orders are in fact implemented by the state.

Criticism of the remedies fashioned in these kinds of cases has focussed on the effective implementation of court orders and has mostly been directed at the Court’s failure in any of the cases to impose on the state supervisory interdicts that would allow the retention of jurisdiction to ensure compliance.¹⁹³ I argue in Chapter 2 that this criticism is overstated, primarily because it fails to take account of the difficulties attached to the implementation of such supervisory interdicts.

In this section, my concern is different. My purpose here is to ask to what extent the Court has, in fashioning remedies in these kinds of difficult cases,

¹⁹² Sabel & Simon (n 89 above) 1017.

¹⁹³ See eg K Pillay ‘Implementation of *Grootboom*: implications for the enforcement of socio-economic rights’ (2002) 6 *Law, Democracy and Development* 255.

managed to maintain a degree of openness that would create space for transformative politics, whilst still providing effective relief. I focus on just four of the cases listed above – *Grootboom*, *Treatment Action Campaign*, *PE Municipality* and *Olivia Road*. Although *Khosa* involved the same kind of issue as the other four cases – the failure by the state to provide in the needs of a group of impoverished people – fashioning appropriate relief in that case was unproblematic: as the challenge was directed against a statutory provision, the Court could simply read words into the statute to remedy its exclusionary defect. The four cases that I do consider quite clearly fall into two distinct categories – *Grootboom* with *Treatment Action Campaign* and *PE Municipality* with *Olivia Road*.

(b) *Grootboom* and *Treatment Action Campaign*

In *Grootboom*, the Court issued a simple declaratory order that the state's housing policy was inconsistent with the constitution to the extent that it failed to make provision for the housing needs of absolutely homeless people. The remedy of this constitutional defect was left entirely to the state.¹⁹⁴ In *Treatment Action Campaign*, the Court similarly issued a declarator that the state's failure to make Nevirapine available at public health facilities to prevent mother-to-child transmission of HIV at birth was inconsistent with the right to have access to health care services. However, now the declarator was coupled with a mandatory order requiring the state to remedy the constitutional defect in its programme for prevention of mother-to-child transmission of HIV at birth, by making Nevirapine available at all public health facilities where mothers give birth when in the opinion of the attending physician in consultation with the superintendent of the facility concerned, it is medically indicated.¹⁹⁵

Both *Grootboom* and *Treatment Action Campaign* are noteworthy for the extent to which closure and finality is avoided in the orders handed down. In *Grootboom* this is most evident. No particular course of action is prescribed to the state – the constitutional deficiency is simply pointed out and the state is

¹⁹⁴ *Grootboom* (n 24 above) para 99.

¹⁹⁵ *Treatment Action Campaign* (n 102 above) para 135.

left to its own devices to remedy it. But *Treatment Action Campaign* also exhibits a fair measure of openness in its order. Although a particular course of action is prescribed – making Nevirapine available at all public health facilities – this direct prescription is attenuated by the proviso that it needs be made available only when the attending physician in consultation with the superintendent of the facility in question believes it to be medically indicated. In this way the Court also defers the final decision as to a course of action to the state – or, to be more accurate, to those officials who have the expertise needed to make that kind of decision.

Despite the clear avoidance of closure exhibited by both *Grootboom* and *Treatment Action Campaign*, neither case can be described as sensitive in particular to transformative politics as a result. The difficulty with both cases is that the openness and flexibility exhibited in the orders is directed only at the state. It is the state and the state alone that gets the opportunity to engage with the search for solutions to the problems raised in the cases. Indeed, it is fair to say that the openness exhibited in the orders handed down in both cases was motivated not by a concern for transformative politics, but by a concern about institutional capacity. That is, the Court sought with keeping the orders open, to defer to the superior technical expertise and democratic legitimacy of the executive and state administration. As I argue more comprehensively in Chapter 3 above, this tendency to defer to the executive, state administration or legislature is in itself an example of depoliticising rhetoric with the potential to discourage, delegitimise and limit transformative political action.¹⁹⁶ In *PE Municipality*, however, the beginnings of a new remedial direction, that directly engages transformative politics, can be detected.

(c) *PE Municipality and Olivia Road*

Both *PE Municipality* and *Olivia Road*, it will be recalled, were eviction cases. In *PE Municipality* the eviction order was denied primarily because the state

¹⁹⁶ See 150 and further above.

had failed to provide suitable alternative accommodation to the evictees.¹⁹⁷ In *Olivia Road* it was denied on administrative law grounds, with the Court holding that the City of Johannesburg had failed in coming to its decision to evict the occupiers to consider whether suitable alternative accommodation as available.¹⁹⁸

Because the eviction order was denied in *PE Municipality*, it was not necessary to provide further relief to the squatters in that case. Nevertheless, Sachs J had much to say about remedies in eviction cases in his judgment. Although in the event declining to do so,¹⁹⁹ Sachs J raised the possibility that a court, in providing a remedy in an eviction case such as the one the Constitutional Court was faced with could order compulsory mediation between the parties. That is, a court could make a normative finding, in the sense of describing the outcomes that the constitutional and other legal duties at play in the case required, but could then order the parties to enter into a process of mediation in order to agree upon the most appropriate means with which to reach those outcomes.²⁰⁰

This approach alluded to by Sachs J reminds of the ‘experimentalist’ approach to remedies mooted by Sabel and Simon that I relate above.²⁰¹ The issue that would have remained for determination in *PE Municipality* had the Court granted the eviction order would have been the question of alternative accommodation for the evicted squatters. One can well imagine that, had the Court granted the eviction order and ordered the parties to enter into mediation, it would have taken care to describe the basic requirements that the alternative accommodation would have to meet. Although the resolution of the case would be left to the parties to determine through a process of mediation, that mediation, in other words, would occur within a normative framework setting limits to what can be decided by the parties. This aspect of the remarks is important. For the court to set the normative framework – to

¹⁹⁷ *PE Municipality* (n 173 above) para 59.

¹⁹⁸ *Olivia Road* (n 99 above) para 46.

¹⁹⁹ *PE Municipality* (n 173 above) para 47.

²⁰⁰ As above para 39 - 46.

²⁰¹ See 136 above.

describe the desired outcomes of the mediation it orders - could work to encourage and legitimate transformative politics not only by providing a space within which such politics can occur. It could also address the imbalance of power that would inevitable be an issue where impoverished people negotiate solutions to the predicament with the state.

In *Olivia Road* the opportunity arose for the Court to give effect to Sachs J's remedial suggestions in *PE Municipality*. In that case the background was such that it seemed clear that, for their own safety and health, the occupiers would have to be removed from the two buildings in question, even if only temporarily. This meant that the question what to do with them once they were removed arose – a question eminently suited to being resolved through mediation between the parties. At first glance it seems that Yacoob J in *Olivia Road* indeed did give effect to Sachs J's remedial suggestions. He indeed resolved the case by ordering the parties to engage with each other in order to reach an agreement that would satisfy them both. However, Yacoob J's solution departs in one important respect from the suggestions Sachs J made in *PE Municipality*. Instead of first deciding the application for an eviction order, granting that subject to the proviso that suitable alternative accommodation, described with a fair level of detail, be provided to the evictees, the Court ordered the parties to engage with each other and approved the agreement they reached *before having decided the case*. The result is unfortunate. Although Yacoob J's approach to resolving eviction cases exhibited in *Olivia Road* has the dual virtues of maintaining a measure of openness and directly involving impoverished people in fashioning a solution to their problems with the state, it suffers from the fact that the Court made no normative pronouncement on the basis of which the negotiations between the parties could proceed. Without a normative framework within the limits of which the negotiations can proceed, the power imbalance that exists between the occupiers and the state is left undisturbed. This quite obviously limits the extent to which transformative politics can in fact operate properly within the space created for it by the engagement order.

4.4 Conclusion

In this Chapter, I considered the manner in and extent to which the two themes of legal certainty and finality or closure in adjudication have featured in the development of the socio-economic rights jurisprudence of our courts. I argued that any resort to absolute certainty or absolute finality, by denying judicial responsibility and effecting normative closure respectively, runs counter to a transformative politics. Equally, I pointed out that any complete abandonment of the two ideals, by causing adjudication to resort to mere instrumentalism, would have the same depoliticising effect.

Turning to the case law, I investigated ways in which the tension between complete certainty and complete flexibility; complete finality and complete openness can be maintained. I showed that the Constitutional Court, up to its decision in *Olivia Road* more or less consistently managed to maintain this tension satisfactorily – in its interpretation and application of the phrase ‘within available resources’; in its interpretation and application of its reasonableness test, through the increasing employment of substantive reasoning; in the sensitivity shown to particular context by way of the use of a shifting standard of scrutiny; and in the fashioning and use of open-ended remedies that avoid normative closure. However, I identified within each of these themes a worrying turn toward instrumentalism heralded by the latest socio-economic rights decision of the Court – *Olivia Road* – that runs counter to the sensitivity shown to transformative politics shown in the Court’s decisions before it.

Conclusion

My broad purpose with this study was to investigate to what extent and in which ways South African courts have, through their adjudication of socio-economic rights claims, taken account of the transformative vision of the South African constitution.

I focussed on one aspect of that transformative vision – I asked specifically how South African courts have related their work in adjudicating socio-economic rights claims to transformative political action. In this respect I distinguished my study from scholarly work that has depicted socio-economic rights adjudication as one form of transformative political struggle or as an instrument supportive of transformative political action. I focussed particularly on the ways in which socio-economic rights adjudication limits rather than promotes transformative political action.¹

I chose two such ways as a theoretical framework on the basis of which to analyse the case law. First, I traced the operation in the socio-economic rights case law of the legal ideal of neutrality – that is, the ideal to separate law and politics and present adjudication as a value neutral exercise. In this respect I investigated to what extent our courts have in their socio-economic rights judgments participated in prevalent de-politicising discourses about the issues of poverty and need that arise in disputes about impoverishment, need and deprivation. Have our courts, in other words, in the attempt to ‘rise above’ politics, presented the issues facing them in such ways that they themselves could be said to stand outside of political contestation?²

I chose to investigate the operation in the socio-economic rights case law of three ‘de-politicising rhetorical tropes’ – three stock strategies through which issues of impoverishment and need are often represented as non-political.

¹ I make this distinction in Chapter 1 above 39 and further.

² See Chapter 3 above.

First, I identified in the Constitutional Court's early socio-economic rights cases a tendency for the Court to describe the legal standard against which it evaluates social policy (the reasonableness standard enunciated by the Constitutional Court in *Grootboom*)³ in politically neutral 'good governance' terms. I showed how, on one reading, the Court decided *Grootboom* and *Treatment Action Campaign*⁴ on the basis of a standard of 'rational coherence'. I identified as high point of this 'proceduralisation' of socio-economic rights claims the decision in *Modderklip*,⁵ where the Court decided a housing and property rights dispute on the basis of the constitutional principle of 'rule of law' and the right of access to courts. I argued that, as these are structural standards only, they allowed the Court to decide these cases whilst ignoring and so denying the deeper, and politically far more contested distributive questions and questions about responsibility to alleviate desperate deprivation that the cases raised. In short, I argued that it allowed the Court to present its reasoning and decision as though somehow 'above' political contestation. I then placed these two decisions in the context of the Court's later socio-economic rights judgments, and pointed out that these cases showed a greater awareness on the side of the Court of the politically contested nature of issues of impoverishment and deprivation. This is so, I argued, both in individual cases (*Khosa*,⁶ *PE Municipality*),⁷ and if one looks at the cases together. The different levels of scrutiny employed by the Court in the different cases, and the different levels of intrusiveness of the orders handed down, in part determined by the degree of deprivation and need at issue in the different cases, shows that more substantive and therefore more candidly political questions played an important role in the Court's decisions throughout – also in *Grootboom* and *Treatment Action Campaign*.⁸

Second, I investigated how the Court dealt with the potentially conflicting individual or particular, and the collective interests at play in the socio-

³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

⁴ *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

⁵ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 5 SA 3 (CC).

⁶ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).

⁸ See 176 and further above.

economic rights cases it has decided. Were the Court to have decided its cases on too narrow an individualised basis, so I warned, it could depict the issues involved in a narrow, instrumental and privatised fashion, so denying the broader structural – and political – aspects of the disputes before it. At the same time, were it to ignore the particular and concrete interests at issue in these disputes, it would to a large extent remove the incentive for impoverished people to use litigation to advance their interests and so potentially to place broader issues of the public good before the Court and could fall into the trap of disregarding the particular in typical legal generalising fashion. I then pointed out that the Court, whether by accident or design, had in fact managed in most of its cases up to *Olivia Road*,⁹ to be attentive to both the individualised, particular interests at issue and the broader collective (and political) issues raised in the cases. This the Court has done by employing its reasonableness standard of review as a generalised policy review standard, scrutinising policies and programmes as they apply to everyone for whom they are intended and issuing orders with a general rather than only a specific application (so addressing collective or ‘public’ issues) whilst at the same time in different ways ensuring that the particularised interests of the claimants before it were (at least nominally) addressed. I then argue that *Olivia Road* – explicitly eschewing as it does decision on the broader issues raised by the case – runs the risk of drawing the Court’s socio-economic rights jurisprudence in a direction that privileges narrow, instrumental, individual interests above more collective and structural questions of impoverishment and deprivation and so to deny the difficult political dimensions of the issues involved.¹⁰

Third, I focussed on the Court’s engagement in its socio-economic rights judgments with separation of powers concerns and related issues of institutional capacity, legitimacy and security. I argued that the tendency of the Court to defer in its judgments on complex technical matters or politically intractable questions to the other branches of government potentially sends a

⁹ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC).

¹⁰ See 161 - 176 above.

powerful de-politicising message. In doing so the Court depicts the issues involved as difficult technical or politically sensitive issues that only the state (the executive, legislature or state administration) properly should and can engage with, to the exclusion of other political actors. This tendency, however, I further point out, has to some extent been counteracted by the Court in its recognition of a requirement in eviction cases that the state must engage with occupiers who stand to be evicted and through its employment, prefigured in *PE Municipality* but put into practice in *Olivia Road*, of remedies requiring engagement to resolve eviction disputes.¹¹

The second leg of my theoretical framework on the basis of which to analyse the case law focussed on the traditional legal ideal of certainty. Here I argued that a non-reflexive belief by judges in the self-evident nature (the certainty) of legal meaning, by discounting the active role of judges in creating legal meaning and adjudicatory results, works against a transformative politics because it discourages scrutiny and engagement with judicial work product. At the same time a non-reflexive belief in the complete indeterminacy of legal materials, by leaving the generation of legal meaning and adjudicative outcomes wholly to the instrumental agendas of individual judges, renders law arbitrary and instrumental and so equally works against transformative politics. In addition, so I continued, the drive toward achieving finality inherent in adjudication and law more generally that is closely linked to the ideal of legal certainty, also works against transformative politics by bringing about normative closure and so ending off political contestation and by privileging certain voices and visions over others, so excluding the diversity of visions necessary for the operation of a transformative politics.¹²

The belief in the self-evidence of legal meaning that I warn against, I identified in operation in some of the earlier socio-economic rights cases (*Soobramoney*,¹³ *Grootboom* and *Treatment Action Campaign*) in the Court's interpretation and application of the resource constraint aspects of the socio-

¹¹ See 155 and further above.

¹² See Chapter 4 above.

¹³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

economic rights in the constitution. I pointed to instances where the Court interpreted those aspects according to an idea of legal rules as straight lines that allow for a mechanical either/or application to facts, thus excluding the role that judges play in determining the application of rules and the results generated. I also identified instances where the Court indeed applied these resource constraint qualifications in this mechanical fashion. I then pointed out how, in later cases, the Court, by scrutinising the assertions relating to resource constraint made by the state, moved closer to depicting its role as moving on a 'field of action' – participating in the forming of legal meaning and the generation of adjudicative results, that is – and so showed a greater sensitivity to transformative politics. Next I showed how the Court, through relying on the structural 'good-governance' standards referred to above in its earlier cases managed also to depict and apply its reasonableness standard as a straight-line rule, denying its active role in determining the outcomes of its application. This tendency in the earlier cases, I continued, is not reflected in later cases such as *Khosa* in particular, where the Court showed a much greater willingness to engage in substantive reasoning, avoiding reliance on structural good governance standards alone.¹⁴

I then traced the extent to which the drive to finality referred to above operated in the Court's jurisprudence. Here I pointed out that the Court had, in two ways, managed to retain a fair degree of normative openness in its socio-economic rights judgments. This it managed first by employing a shifting standard of scrutiny, stricter in some cases, more lenient in others, with its level of intrusiveness determined by the particular circumstances of each case. The context sensitivity reflected in this approach, so I argued, meant that the conclusion reached in one case cannot without more determine the results in another, so that, even whilst a determination of one case is indeed attained, questions not directly pertinent to it are left open for future decision and contestation. Normative openness was further achieved by the Court through the manner in which it fashioned remedies in socio-economic rights cases. It is clear that the Court, there where it was possible to do so, tailored

¹⁴ See 219 and further above.

its remedies in such a manner that as few of the specific contentious questions as possible were conclusively decided and prescribed. Instead, the Court seems to have wanted to fashion a broad normative framework only, leaving the determination of particular solutions to problems to other actors. In the cases leading up to *PE Municipality* and eventually *Olivia Road*, the Court employed this normatively open approach to remedies primarily because it was one way in which to manage its institutional relations with the other branches of government. This, as I pointed out earlier, holds the disadvantage that it privileges the state as political actor over other political actors involved in the political debate about impoverishment and deprivation. However, I pointed out that the Court's approach took a turn in *PE Municipality*, where Sachs J's *obiter* remarks about the possibility of ordering mediation to resolve an eviction dispute – and in particular the dispute about the provision of adequate alternative accommodation to evictees – raised the possibility that the Court could retain the normative openness characterising its other judgments, whilst at the same time empowering political actors other than the state to participate in the process of reaching solutions. These *obiter* remarks were given concrete effect in *Olivia Road* with Yacoob J's engagement order there. However, so I conclude that section, the potential of *Olivia Road* as an example of a transformative politics-sensitive decision is undercut by the choice to hand down the engagement order before the application for the eviction order was decided. This deprived the Court of the opportunity to set a normative framework within which engagement had to occur, so that the power imbalance between the state and the occupiers in that case was left unaddressed.¹⁵

From all this, unsurprisingly, no one clear conclusion arises. At most my different analyses of the cases show, I believe, that it is indeed so that courts in deciding socio-economic rights cases, at the same time as that they promote through their judgments transformative politics, inevitably and importantly also limit it. This would lead one to the practical conclusion that judges should be aware of this fact – aware and willing constantly to think of

¹⁵ See 238 and further above.

ways in which the limiting effect of their work can be mitigated. But, so I further believe, my analyses also show that such awareness and such willingness is not enough. All of the instances to which I pointed where the Court's jurisprudence has indeed showed sensitivity to transformative politics have also been problematic in their own right. So, for example, the normative openness I identified in the Court's remedial approach has, as I also point out, worked to privilege the political agency of the state to the detriment of other political actors;¹⁶ the legitimising remarks made about the political agency of impoverished people in cases such as *Modderklip* and *PE Municipality*; run the risk of marginalising political actors who do not conform to the Court's view of acceptable political contestation;¹⁷ the attempt by the Court in a case such as *Olivia Road* to concretely draw impoverished people into the political arena potentially degenerates into an instrumental, privatised interest-driven negotiation.¹⁸ Each attempt, so it seems, has its cost. In the end it shows little more than how difficult it is.

But even this realisation need not lead to despair. An awareness about the difficulty of things – eschewing the reduction that a clear, confident taking of position implies – does not imply weakness. Instead, it is 'an invitation to continue the process of generating understanding'.¹⁹ It is only by remaining aware of the difficulty of things, by refraining from making confident findings and statements about the transformative politics-affirming nature of judgments and positions and taking account of both the gains and the costs of all transformative strategies, that judges can keep working at meeting their ethical responsibility.

¹⁶ See eg 238 and further above.

¹⁷ See 158 above.

¹⁸ See 162 and further above.

¹⁹ P Cilliers 'Complexity, deconstruction and relativism' (2005) 22 *Theory Culture Society* 255-262.

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