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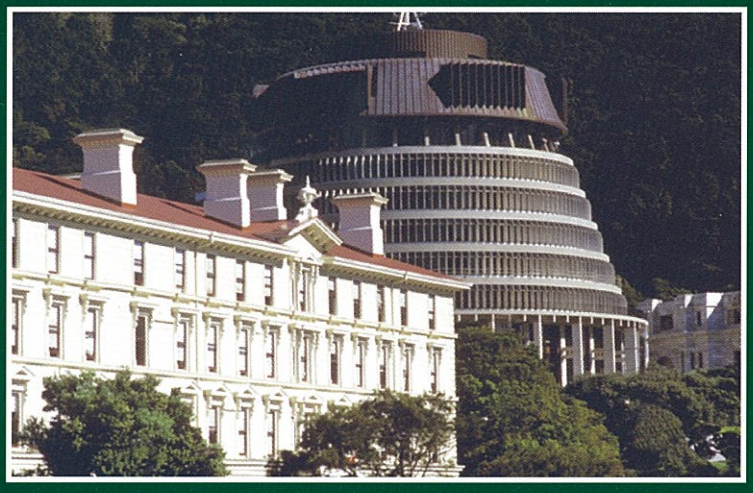

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SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: THE RECORD AFTER TEN YEARS

Dennis Davis*

This paper challenges the approach taken by the Constitutional Court of South Africa in socio-economic rights cases. Judge Davis finds the Court excessively deferential to government, arguing that the Court has not gone far enough in securing implementation of the rights guaranteed under the 1996 Constitution.

South Africa will celebrate the first decade of constitutional democracy in 2004. The occasion affords a useful opportunity to assess the progress achieved in fulfilling the promise of the Constitution.[1] The South African Constitution promises a society based upon freedom, equality, and dignity. It includes a concept of substantive equality, an anti-discrimination clause of great boldness which outlaws discrimination on a wide range of grounds including race, gender, sex, ethnic or social origin, age, sexual orientation, religion, and language. It includes rights which promote multiculturalism. Its ambition is to operate not only vertically but horizontally, thereby seeking to hold abuses of power accountable, wherever sourced. It entrenches the right of workers to strike and to organise collectively. In addition, it includes a range of socio-economic rights which are designed to be judicially enforceable.[2]

* Judge of the High Court, Cape Town, South Africa. This paper, revised significantly from a version presented in Wellington in 2003, owes much to the inspiration of Frank Michelman, who, during a period I spent at Harvard Law School in early 2004, caused me to reconsider much of my thinking, as well as providing a wealth of insight into the Constitutional Court's jurisprudence. Thanks are also due to Steven Ellman and Mark Tushnet for a number of helpful suggestions.

1 Constitution of the Republic of South Africa Act 108 of 1996, which followed upon the so-called "interim Constitution", the Constitution of the Republic of South Africa Act 200 of 1993.

2 For a comprehensive analysis of the scope and promise of the text see M H Cheadle, D M Davis and N R L Haysom *South African Constitutional Law: The Bill of Rights* (Butterworths, Durban, 2002) ch 1. For a comprehensive analysis of the legal scope and ambition of the Bill of Rights read as a complete document, see Karl Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 144. Klare's reading is, of course, but one reading of the text among manifold

It is the judicial record relating to this latter set of rights which constitutes the subject of this paper. The essential argument of this paper is that the Constitutional Court has only been partly successful in the development of a coherent socio-economic rights jurisprudence which is reflective of the ambition of the text of the Constitution. The Court has provided a weak form of priority-setting for government with regard to the latter's formulation of policy but has failed to install an adequate principle of accountability. Hence, the possibility of a constitutional trialogue between the judiciary, the government, and the citizenry, who are listeners to the conversation being so affected by the outcome of litigation, has been impaired.

Before commencing this analysis, it is useful to pause and reflect upon the manner in which socio-economic rights became part of the South African Constitution, as well as the scope and ambition of those who drove this part of the constitutional development process.

Although intense debates about the nature of a bill of rights for a democratic South Africa took place decades before the founding of a constitutional democracy, little was mentioned about the inclusion of social and economic rights in a constitutional instrument. The possibility was launched on the political terrain a few years before the unbanning of the African National Congress (ANC) in February 1990, when Albie Sachs published a number of papers, initially drafted for internal circulation within the ANC, which challenged conventional jurisprudential thinking about the role of law in social transformation. In particular, Sachs argued that a South African Constitution needed to provide for an orderly and fair redistribution by means of the establishment of a minimum floor of rights to a series of carefully defined social and economic goods. As he stated,[3]

> [T]he danger exists in our country as in any other, that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and the oppressed oppressed. The only difference would be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of racial oppression we will have nonracial oppression.

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alternatives. Compare, for example, C J Roederer "Judicious Engagement: Theory, Attitude and Community" (1999) 15 SAJHR 486; Ackermann J in *Ferreira v Levin NO* 1996 (1) SA 984, 995–1079 (CC). Each of the various interpretations will need to compete, in terms of prevailing political and legal discourse and of the nature of the text read as a whole. This vast topic clearly falls outside the scope of this paper, but I concede readily that were a different interpretation to be adopted, my analysis of the Court's record may well prove incorrect.

3 Albie Sachs *Advancing Human Rights in South Africa* (Oxford University Press, Cape Town, 1992) xi.

In arguing for the inclusion of social and economic rights in the Constitution, Sachs also cautioned against the use of the ordinary courts as the institution to be employed for the enforcement thereof. He contended instead that a series of commissions would be a better means by which to promote a new jurisprudence. His concerns were clearly focused on the legacy of a judiciary which had served the apartheid system so conscientiously. As he wrote,[4]

> In South African conditions, it is unthinkable that the power to direct the process of affirmative action should be left to those who are basically hostile to it. In later years, when the foundations of a stable new nation have been laid and when its institutions have gained habitual acceptance, it may be possible to conceive of a new-phase Bill of Rights interpreted and applied by a "mountaintop" judiciary. At present the great deed is to give people confidence in Parliament and representative institutions, to make them feel that their vote really counts and that Parliamentary democracy serves their interests.

The kind of body that might provide a bridge between popular sovereignty on the one hand and the application of highly qualified professional technical criteria on the other would be one similar to the Public Service Commission. A carefully chosen Public Service Commission with a wide brief, high technical competence, and general answerability to Parliament could well be the body to supervise affirmative action in the public service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action to areas of social and economic life, while a Land Commission could deal with the question of access to land.[5]

The interim Constitution did not implement these ideas but the issue remained firmly on the constitutional agenda. It came as no surprise when a number of social and economic rights were included in the final Constitution. In particular, section 26 provided for a right to housing,[6] section 27 a right to health,[7] and section 28 a range of children's rights including basic nutrition, shelter, basic health care services, and social services.[8]

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4 Sachs, above n 3, 19.

5 Sachs, above n 3, 20–21.

6 South African Constitution, s 26:

> (1) Everyone has the right to have access to adequate housing.
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> …

7 South African Constitution, s 27:

> (1) Everyone has the right to have access to—
> (a) health services, including reproductive care;

At an early stage of the debate about the inclusion of these rights in the Constitution, a series of significant objections was raised. It was contended that these rights could not be considered to be universally accepted fundamental rights to be included in a bill of rights. Secondly, it was argued that the inclusion of these rights was inconsistent with a doctrine of separation of powers because once courts were entrusted with the determination of social and economic rights, the judiciary would in effect encroach upon the powers to determine policy which resided in the legislature and executive.

These objections were raised in the certification process by a number of objectors.[9] Significantly, when it came to the question of separation of powers, the Constitutional Court said:[10]

> It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers.

A further objection was raised concerning questions of the justiciability of these rights. Again the Court adopted the view that these rights were, at least to some extent, justiciable, noting that "[t]he fact that socio-economic rights will almost inevitably give rise to [budgetary] implications does not seem to us to be a bar to their justiciability".[11]

> …
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> …

8 South African Constitution, s 28(1)(c).

9 The certification process involved the implementation of an agreement concluded essentially between the ANC and the National Party and then enshrined within the interim Constitution, whereby the Constitutional Court was required to certify that the Constitution passed by the Constitutional Assembly and known colloquially as the final Constitution complied with 34 constitutional principles agreed to by the negotiators at the constitutional talks which gave rise to the interim Constitution.

10 *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 77.

11 *In re Certification of the Constitution of the Republic of South Africa*, above n 10, para 78.

I THE RECORD OF THE CONSTITUTIONAL COURT

It was some time before social and economic rights were litigated before the Constitutional Court, thereby postponing any judicial response to the implementation of these rights. When the first challenge was launched, the Court approached the issue with great caution. In *Soobramoney v Minister of Health, KwaZulu-Natal*[12] the appellant was a diabetic who suffered from ischaemic heart disease. His kidneys had failed in 1996 and his condition was diagnosed as irreversible. Soobramoney asked to be admitted to a state hospital for dialysis treatment. The relevant hospital had adopted a policy that it would only admit patients who could be cured within a short period, and those with chronic renal failure only if eligible for a kidney transplant. Soobramoney was ineligible as a result of his heart condition.

He sought judicial relief, claiming that he had a right to receive treatment from the hospital under section 27(3) of the Constitution (the right to emergency medical treatment). The Court held that this right could not be construed outside the context of availability of health services generally. The Court found that within its available resources, the hospital authority could not be expected to provide treatment to patients who matched the appellant's health profile. The determination of an appropriate policy lay with hospital authorities who had acted in good faith; hence the Court was slow to interfere with decisions made within the context of scarce resources and compelling medical demands.

Two years later, in *Government of the Republic of South Africa v Grootboom*,[13] the Constitutional Court finally set out a framework for a South African socio-economic rights jurisprudence. In this case, Ms Irene Grootboom and some 899 other squatters had been evicted from their informal homes, which had been erected on private land earmarked for formal low-cost housing. Many of the litigants had applied for subsidised low-cost housing from the municipality but had remained on the waiting list for many years. The key question for decision was whether the measures already taken by the State to realise housing rights in terms of section 26 were reasonable.

In considering the test for reasonableness, the Court considered that it should not enquire "whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent".[14] The Court accepted that a measure of deference must be given to the legislature and particularly to the executive to implement a proper housing programme. However, the Court insisted that the concept of

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

13 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) ["*Grootboom*"].

14 *Grootboom*, above n 13, para 41.

reasonableness meant more than an assessment of simple statistical progress, and that evidence had to be provided to show that there was sufficient attention given to the needy and most vulnerable within the community, for they were to be considered to be a priority in the development of any sensible and constitutionally valid housing policy. In other words, those most desperately in need were the first group which the State was required to consider in the implementation of a policy which fell within the framework of section 26 of the Constitution.[15]

Although invited to follow the approach of General Comment Three of the United Nations Committee on Economic, Social, and Cultural Rights, to the effect that there was "[a]t the very least, minimum essential levels of each of the rights",[16] the Court acknowledged that while "it may be possible and appropriate" to consider the contents of a minimum core to determine whether measures taken by the State were reasonable, it was not provided in this case with "sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution".[17] The Court then concluded: "It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core of the right".

The Court's next encounter with socio-economic rights was in the case of *Minister of Health v Treatment Action Campaign*.[18] This case concerned a government policy which appeared to be based upon a refusal to make an anti-retroviral drug called Nevirapine available in the public sector so as to prevent mother-to-child transmission of HIV. Two rights were invoked by the applicants in support of their challenge to the government policy: section 27(1), namely that everyone has the right to have access to health care services, and section 28(1)(c), which provides that every child has the right to basic nutrition, shelter, basic health care services, and social services.

The Court refused to conclude that section 27(1) gave rise to a self-standing and independent positive right, enforceable irrespective of the considerations contained in section 27(2), namely that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of the rights.[19]

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15 *Grootboom*, above n 13, para 44.

16 UNCESCR General Comment 3: The Nature of State Parties Obligations (art 2, para 1 of the Covenant) (5th session, 14 December 1990) UN Doc E/1991/23 annex III para 10.

17 *Grootboom*, above n 13, para 33.

18 *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) ["*TAC*"].

19 *TAC*, above n 18, para 39.

The Court applied the approach adopted earlier in the *Grootboom* decision to section 27(2) of the Constitution and found:[20]

> The policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their new born children who did not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.

Its potential for controversy notwithstanding, the decision in the *TAC* case was unsurprising, in that before the judgment was delivered, the Government had already retreated from its blanket refusal to provide Nevirapine in cases which would assist in the reduction of mother-to-child transmission of HIV. The judgment was nevertheless important for two reasons: the Court's refusal to find that section 27(1) constituted a self-standing right to health care, and its refusal to grant a structural interdict as a key element of the order.

The Court had been faced with a series of arguments to the effect that section 27(1) contained an independent right to health. The Court refused to follow this line of argument, holding:[21]

> [T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them … . All that is possible, and all that can be expected from the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.

With regard to the question of the appropriate form of relief, the Court said:[22]

> The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution … . In appropriate cases [courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of the failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.

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20 *TAC*, above n 18, para 39.

21 *TAC*, above n 18, paras 34–35.

22 *TAC*, above n 18, para 129.

II THE IMPLICATIONS OF GROOTBOOM *AND* TAC

The judgments in both the *Grootboom* and *TAC* cases reveal the Constitutional Court's willingness to implement a constitutional commitment to certain socio-economic goods and services as enshrined in the Constitution. However, the Court has been exceptionally cautious in the development of this area of constitutional jurisprudence. Admittedly, in the *TAC* case it dismissed an argument that the principle of separation of powers prevented a court from enforcing socio-economic rights on the ground of a breach of this key constitutional principle. The Court reasoned thus:[23]

> Where State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

However, the Court's reluctance to follow the approach to the minimum core of socio-economic rights enshrined in the International Covenant on Economic, Social, and Cultural Rights,[24] and adopted by the United Nations Committee on Economic, Social, and Cultural Rights, is significant. In this regard, the Court's refusal to follow the Committee is consistent with an unwillingness grant a structural interdict.

It is a key argument of this paper that the same reason holds for both the Constitutional Court's reluctance to interpret sections 26(1) and 27(1) as constituting a guarantee of a minimum core of rights and its unwillingness to grant a structural interdict as part of the relief ordered against the Government. In both situations, the Court is anxious not to impose any excessive burden on the State. By making section 26(2) or section 27(2) do all the work in cases where the corresponding socio-economic right is at issue, the Court ensures that no direct claim can be made by a litigant against the State for the delivery of a minimum core of rights. Every case must be tested in terms of the concept of reasonableness. In turn, this allows a court the room to mould the concept of reasonableness so that, on occasion, it resembles a test for rationality and ensures that the court can give a wide berth to any possible engagement with direct issues of socio-economic policy. As one commentator has noted,[25]

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23 *TAC*, above n 18, para 99.

24 International Covenant on Economic, Social, and Cultural Rights (16 December 1966) 993 UNTS 3.

25 David Bilchitz "Towards a Reasonable Approach to the Minimum Core" (2003) 19 SAJHR 1, 10.

> At present reasonableness seems to stand for whatever the Court regards as desirable features of state policy. The problem with this approach is that it lacks a principled policy basis upon which to found decisions in socio-economic rights cases.

It may be argued that the Court's approach in the *TAC* case to section 27 is in accordance with the clear reading of the text. But the problem with this argument is to be located not only in the wording of the section, in which subsection (2) expressly refers to the right of access to health services in subsection (1), thus compelling some indication of the nature of the right which is to be realised progressively, but also in the reasoning employed by the Court. In rejecting the contention that subsection (1) is to be given independent status, the Court said:[26]

> A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give access even to a "core" service immediately. All that is possible, and all that can be expected of the State, is to act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.

In *Grootboom* and *TAC*, the actions of the Court reflect a policy of deference to the other institutions of the State. The passage from *TAC* just cited reveals that the interpretive reasoning adopted by the Court is based not so much on a close reading of section 27(1), but rather on a concern that the State should not be obliged to provide any service immediately, "as of right". Had the Court accorded section 27(1) a meaning of its own, the result would not have been to impose unreasonable obligations upon the State. Section 27(2) would always have permitted the State to contend that the implementation of the minimum core was not possible because of limitation of resources and competing demands upon the public purse. In short, the interpretation of section 27 which was urged upon the Court did not represent the most liberal position regarding socio-economic jurisprudence, since it still left open to the State possible defences against immediate implementation of the right, even in the form of a minimum core. But the adopted approach diluted the Court's ability to monitor the performance of the State in terms of a defined bench mark, being the minimum core of the right as interpreted by the Court.

A refusal to grant a structural interdict prevents the Court from monitoring the efficacy of any order granted, and hence from being compelled to engage in the very mechanisms of policy implementation. The Court asserts the rights of unsuccessful litigants and then, unlike the approach adopted in at least three decisions of the High Court,[27] is very cautious in maintaining a measure of control over the progress of the

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26 *TAC*, above n 18, para 35.

27 Apart from the decisions of the Court a quo in *Grootboom* and the *TAC* case, see also *City of Cape Town v Rudolph* [2003] 3 All SA 517, 557–559. Most recently, after this paper was completed, the Constitutional Court handed down a decision in *Khosa v Minister of Social Development* (4 March

implementation of the relief. This reluctance to act as a guardian of poorly resourced applicants who have successfully asserted their right to a socio-economic benefit raises the question of the legitimacy, at the very least, of the inclusion of socio-economic rights in the Constitution.

III THE LEGITIMACY QUESTION

The reluctance of the Constitutional Court to exercise any form of tangible control over the process of implementation has already had consequences which have worked to the disadvantage of a successful litigant. As Kameshni Pillay observed with regard to the *Grootboom* case,[28]

> A further problem with the Constitutional Court order, which also stems from the declaratory nature of the order, is that the order does not contain any time frames within which the State has to act. The result is that, more than three years after the *Grootboom* judgment was handed down, there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations.

A failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long-term illegitimacy of the very constitutional enterprise with which South Africa engaged in 1994. A right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation soon becomes an illusory right—hardly the sort of right so essential to the long-term success of the constitutional project launched but a decade ago!

In some ways, the Court's reluctance to be seen as activist reflects an even more deep-seated difficulty inherent in this area of jurisprudence. As the reports of the South African

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2003) CCT12/03 which dealt with the right of non-citizens who were permanent residents to obtain social security benefits. The outcome (the litigants were successful) and the willingness of the Court to interrogate the Government's defence to the effect that the provisions of benefits to non-citizens would be too costly represent a "leftward" move. However, the judgment makes for confusing reading in that it deals with both s 27 and the right to equality. A "rightward" move may be observed in the manner in which the Court appeared to locate its socio-economic jurisprudence within the framework of its dignitarian approach to equality (see, in particular, para 80). The line of reasoning in para 80 to the effect that "the exclusion of permanent residents from the [social assistance] scheme is likely to have a severe impact 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" may well serve to individualise distributional claims by the poorest classes, and hence further to weaken the argument that ss 26 and 27 stipulate a basic core of rights from which the government must commence with social and economic policy and impose a set of priorities to be met by government. Viewed thus, *Khosa* fits within the deferential scheme developed in the *Grootboom* and *TAC* cases.

28 Kameshni Pillay "Implementing Grootboom: Supervision Needed" (2002) 3 ESR Review 11, 12.

Human Rights Commission on economic and social rights have consistently indicated, there has been a significant gap between the promise of housing, medical care, and basic infrastructure and the delivery thereof.[29] In a careful examination of these reports, Dwight Newman remarks that:[30]

> It was fortunate for the government that the damning word of the constitutional violation for falling budgets and the inappropriate management of existing budgets came thirteen months after the *Grootboom* decision was handed down rather than promptly enough to precede that decision. In *Grootboom*, the judges essentially operated from a premise that the government had a reasonable housing policy as a whole and that it was unreasonable basically only in that it failed to contemplate temporary shelter for those most in need. Who knows how they might have reacted to the government's argument of a reasonable housing policy in the wake of such realisations by constitutional rights-monitoring institutions.

While these reports are critical of the Government's record, they are illustrative of a more deep-seated set of difficulties, which require a rather more complex explanation than the usual levels of administrative incompetence. We must examine instead the relationship between the Constitution and the development of government economic policy.

In 1994 and 1995, when the final Constitution was negotiated by members of the Constitutional Assembly, the Government had not yet reached a clear decision as to the direction of its economic policy. Accordingly, the Constitution reflected a social-democratic view of the future South African society.[31] By the time the *Grootboom* case was decided, government economic policy had began to take clear shape. A maximum tax-to-GDP ratio of 25 per cent, inflation targeting designed to ensure that inflation would be in relatively low single digits, and a limit for budget deficits of two per cent were all elements of a particular form of economics which began to diverge from the economic vision contained within the Constitution. Whereas the ANC Government had begun its term of office in 1994 with a commitment to an economic policy entitled the "Reconstruction and Development Policy", within the first five years of its rule it had shifted direction in favour

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29 See the South African Human Rights Commission Economic and Social Rights Report 1997–1998 (first report); 1998–1999 (second report); 1999–2000 (third report); 2000–2002 (fourth report).

30 Dwight G Newman "Institutional Monitoring of Social and Economic Rights: The South African Case Dug in a New Research Agenda" (2003) 19 SAJHR 189, 204.

31 I accept immediately that it was not simply the under-development of economic policy which allowed a social democratic vision to be contained within the Constitutional text. The very history of the ANC, most certainly from the time of the Freedom Charter in 1955, was based on the inclusion of a significant series of rights in a constitutional text—rights which could not simply be classified as first- or second-generation. The ANC's own rights discourse was itself an important component of the forces which shaped the outcome of the text of the final Constitution.

of financial austerity and a minimalist role for the State. The Government saw the solution to the economic burdens bequeathed by apartheid in a so-called "Growth and Redistribution Policy", in which the development of an economy which could be competitive on the global stage would produce the kind of growth rate sufficient to release resources to redress the poverty of the majority.[32]

It is here that we may begin to locate the basis for the Constitutional Court's theory of deference. Were the Court to do more to promote socio-economic rights, the theory goes, it might place the Constitution at war with government policy on a key issue of the shaping of the economy. In my view, academic commentators have either been naïve or somewhat arrogant to believe that only they, and not the members of the Constitutional Court, understand that a particular minimum core approach to a text such as sections 26(1) and 27(2) has been established in international jurisprudence,[33] and that this is the basis for the Court's refusal to follow this jurisprudence.[34] In my view, the Court's approach is

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32 A comprehensive analysis of the evolution of ANC economic policy is beyond the scope of this paper. An examination of the Treasury's own economic policy reports was the basis for my conclusions above. (See the Budget Reviews for the years 2000–2004, compiled by the Treasury and accessible on <http://www.finance.gov.za> (last accessed 10 June 2004).)

33 See UNCESCR General Comment 3: The Nature of State Parties Obligations (art 2, para 1 of the Covenant) (5th session, 14 December 1990) UN Doc E/1991/23 annex III para 10. See also UNCESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art 12 of the Covenant) (22nd session, 11 August 2000) UN Doc E/C.12/2000/4 para 43:

> [In] the Committee's view, these core obligations include at least the following obligations:
>
> (a) To ensure the rights of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
> (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
> (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
> (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
> (e) To ensure equitable distribution of all health facilities, goods and services;
> (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

34 See for example Newman, above n 30, 196–197; David Bilchitz "Placing the Social Needs at the Centre of Socio-Economic Rights Jurisprudence" (2003) 19 SAJHR 1; S Liebenberg "The Right to Social Assistance: Implications of *Grootboom* for Policy Reform in South Africa (2001) 17 SAJHR 232.

reflective not of an ignorance of international jurisprudence, nor of a lack of cognisance of the implications of sections 26(1) and 27(1) of the text, but rather of the knowledge that the text itself holds out a promise of a kind of society predicated upon a very different approach to economics from that which presently prevails in the Ministry of Finance and which currently holds sway over government policy. It seems to me that the Court has taken the view that were it to be more activist, it would run the risk of placing itself at an increasing level of conflict with the Government.

This conclusion may well stand accused of over-emphasising an anxiety about a transient issue, namely the present nature of government economic policy. But the Court's cautious approach can be located in some of its earliest cases. In *Ferreira v Levin NO*,[35] the Court divided on the question of the scope of the right to freedom as contained in section 11 of the interim Constitution. Ackermann J employed the work of Isaiah Berlin[36] to develop a definition of freedom as contained in section 11 as a negative right, being "the right of individuals not to have 'obstacles to possible choices and activities' placed in their way by … the State".[37]

Conscious of what he referred to as the "Lochner problem",[38] Chaskalson P observed that were this negative concept of freedom to be adopted by the majority of the Court,[39]

> we will be called upon to scrutinise every infringement of freedom in this broad sense … . In a democratic society the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.

Judge Chaskalson was clearly concerned that an interpretation of freedom which could "overshoot the mark and trespass upon terrain that is not rightly ours"[40] could disturb the relationship between the Court, the legislature, and the executive, and thus jeopardise the status of the Court at the stage of its birth. The pragmatism of this approach is highlighted in the normative rejection of the concept of negative freedom within the South African

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35 *Ferreira v Levin NO*, above n 2.

36 In particular, the concept of negative liberty as developed by Berlin in "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford University Press, London, 1969).

37 *Ferreira v Levin NO*, above n 2, para 54.

38 After the majority decision in *Lochner v New York* (1905) 198 US 45.

39 *Ferreira v Levin NO*, above n 2, paras 181–183.

40 *Ferreira v Levin NO*, above n 2, para 183.

constitutional schema as adopted by Judges Sachs and O'Regan, who source a positive concept of liberty within the foundational values of freedom, equality, and dignity, as well as the history of the country within which the Constitution must be located.[41]

The majority of the Court, in agreement with the judgment of Chaskalson P, articulated a concern that constitutional review needs to take account of majoritarian impulses, particularly within the context of a democratically elected government being mandated to implement policies designed to redress the past. The clear concern with judicial modesty began in *Ferreira* and would only have been reinforced by the role imposed upon the Court by way of the inclusion of socio-economic rights in the final Constitution.

This deferential approach of the Court has found significant support among academic commentators. Thus, Cass Sunstein has contended that the Constitutional Court has remained faithful to the transformative character of the South African Constitution by developing an approach to socio-economic rights that gives tangible effect to those rights without undermining the need for democratic judgement about how to set priorities. In short, Sunstein contends that the test as formulated in *Grootboom* follows an administrative law model in which the court calls on the government to act reasonably in designing a plan to ensure that relief will be forthcoming to a significant number of those whom the rights were intended to benefit, namely the poor.[42] By the employment of this model, Sunstein contends that the Court has carved a path between the establishment of a juristocracy, in which judges assume the exclusive role of setting allocative priorities and overseeing the public purse, and the unfettered exercise of the power of a transient majority in which these rights may well be honoured more in the breach then in the implementation.

To an extent, Sunstein may be correct. The present strategy has appeared to be at least partially successful, and it would be wrong to reject the body of cases in this area as justification for a conclusion that the rights contained in sections 26 and 27 serve no transformative purpose. The judgments of the Court have provided a framework for, at the very least, holding government accountable to the constitutional commitments imposed upon it. Subject to further criticisms set out below, which are directed to the Court's excessive deference to the other arms of government, I must concede that a jurisprudence based upon the principle that the poorest must be given priority is not a development that should be discarded as being unhelpful to the vision of the Constitution as set out in this paper.

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41 Judge Sachs' approach is to be found in *Ferreira v Levin NO*, above n 2, paras 245–269. Judge O'Regan develops her response in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 134 and following.

42 Cass R Sunstein "Social and Economic Rights: Lessons from South Africa" [2000/2001] Forum Constitutionnel 123.

Of course, the long-term success of this approach will depend upon the extent to which delivery of the basic rights has improved significantly beyond that which is reflected in the reports of the South African Human Rights Commission. For example, in its most recent report, the Commission expresses concern over the lack of environmentally sound housing and housing with adequate infrastructure, and over the levels of maladministration and corruption. It is here that a key problem in the Court's approach can be located. To an extent, the lack of delivery may have been exacerbated by the reluctance of the Court to follow through with the implementation of its chosen model. The Court's refusal to grant structural relief which would empower courts to supervise the implementation of their own orders has produced unfortunate results. Litigants have won cases and government has done little to produce the tangible benefits that those litigants were entitled to expect from their success. The Court has in effect surrendered its power to sanction government inertia and, as a direct result, litigants have not obtained the shelter or drugs that the judgments so clearly promised.

A possible defence of the Court can be mounted on the strength of the argument that remedies which are designed to vindicate society's values should not place the elected representatives of government or the administration in the position of outlaws. That, so it is argued, is what may well occur if the remedy is couched too broadly, thereby moving beyond the protection of an aggrieved plaintiff to the making of policy which to the greatest extent possible should be left to elected policy makers rather then a judiciary which is best placed to perform at an abstract level.[43]

This argument may well be correct in cases where the order is widely framed and open ended, leaving the court with authority to supervise policy for an indefinite period. But in the cases under review in this paper, the relief being advocated is designed to enforce the right upheld by the court. The structural injunction is not intended to substitute the judiciary for the administration, but to relieve the judge from framing relief in a way which would constitute democracy by means of judicial decree, as well as to afford the successful litigant an opportunity to be heard after the defendant has formulated its policy in accordance with the order of the court. Without a second audience, the plaintiff may well have little further avenue to be heard, particularly by members of government whose failure to listen initially is often the cause of the litigation.[44]

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43 Ross Sandler and David Schoenbrod *Democracy by Decree: What Happens when Courts Run Government* (Yale University Press, New Haven, 2003) ch 9.

44 It must be conceded that without some political organisation apart from the litigation strategy, the chances of the judgment promoting social change is diminished. But the point is that absent such organisation, as in the case of landless squatters, the court may become the last resort for any relief.

The approach adopted by the Constitutional Court, sourced in a theory of deference which in turn is derived from principles of administrative law,[45] has replaced the principle of democratic accountability that should lie at the heart of the adjudication of socio-economic rights. A theory of accountability takes into account the essence of the constitutional promise, that citizenship in a post-apartheid society means more than the provision of a range of negative rights, which alone cannot power the model of a society prefigured in the Constitution read as a whole, being one based upon the cardinal values of dignity, freedom, equality, and democracy. While the value of democracy warns against the judicial activity of a Hercules who, possessed of the right answer, always does better than the imperfect product of politics, the remaining three foundational values should guide the court to an approach whereby government is given a margin of appreciation to implement these socio-economic commitments but remains accountable not only for the conceptualisation of an appropriate plan but also for the implementation thereof. In this way, the court continues to be a mechanism by which those most in need can engage with government and thus ensure that government is forced to account to them for the manner in which it has decided to respond to its constitutional obligations.

This form of accountability must be distinguished from political accountability, which depends upon the manner in which a government is elected and, if so provided in the constitution, recalled. But that is a matter of political design and the exercise of popular sovereignty in the way elections take place. By contrast, a constitution of the design as contained in the South African text introduces another form of accountability, in terms of which the government, howsoever elected and supported, owes fidelity to the preservation and promotion of the very basic cornerstones of the society of which it has been elected government. Whatever its particular policies, it is required to fulfil certain essential obligations, sourced within the Constitution, including a commitment to some key distributional issues. That government may seek to fashion a particular response in the image of its own core policies is one thing; that it remains accountable to those who are the beneficiaries of these basic commitments is a separate consideration. It is with regard to the latter that the court plays a vital role as a transmission belt between the government of the day and the constituencies who seek to rely on these most basic of commitments.

I have chosen the word "accountability" and employed it in a particular context, for part of the problem may be less the use of the administrative law model and more the use of the concept of deference which appears to be part of the baggage of that branch of the law. The word "deference" connotes a passivity on the part of the court. The court concerns itself with "rights" and leaves policy to the democratically elected institutions. But other

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45 See for example David Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart, Oxford, 1999).

than offering some guidance to courts to "defer" to greater measures of institutional competence found in the other arms of government when it comes to the formulation of social and economic policy and the allied question of distribution of limited public resources, a theory of deference fails to capture the positive, dialogic role that a court is required to play within a constitutional scheme that includes socio-economic rights. In addition, it can be argued within the South African historical context that deference is far too closely aligned with the jurisprudence of apartheid to constitute a model for the transformation of the legal landscape. The Constitution holds out the hope of a trialogue between the court, the government, and the citizenry—hardly the kind of enterprise which is conducive to the culture of authority in which the principle of deference plays so significant a role and which the South African Constitution seeks to transform into a culture of deliberation.

If the role of the court remains solely at the level of analysis of the invoked right without being a watchdog for those who demand the implementation of these rights in order to exercise their citizenship (if they could do so, the role of the courts may well be less important!), the promise of socio-economic rights may remain at the level of the worst of negative rights—the right to assert without any meaningful remedy.[46] In turn, the greater the gap between the uplifting promises of the constitutional text and the degrading realities of South African life, admittedly inherited from hundreds of years of racist rule, the more significant the impact upon the very legitimacy of the constitutional community born but a decade ago.

But the argument may be raised that courts should be careful when dealing with social and economic questions of a controversial nature, which often will be the case where the government is compelled to come to court as a defendant in a socio-economic constitutional challenge. Here the experience of the United States may be employed—in particular the landmark decision in *Brown v Board of Education*.[47] In dealing with the

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46 Even the claim about analysis is problematic. By refusing to give any content to ss 26(1) or 27(1) the Constitutional Court has failed to lay down some yardstick by which performance can be judged. It is correct that it has introduced a principle of reasonableness predicated upon the need to deal first with the poorest of the poor, being the most needy in society, but that may well prove an evidential bridge too far for many litigants who will not have the benefit of any tangible guide as to what is to be expected from government. The idea behind a right to access to housing, for example, was to ensure that some baseline would be available by which to measure progress (s 27(2)), and thus to ensure a measure of open and transparent accountability.

47 The opinion which is of concern here is not the so-called *Brown I* (*Brown v Board of Education* (1954) 347 US 483) in which the Court rejected the "separate but equal doctrine", but *Brown II*, in which the Court dealt with the appropriate remedy (*Brown v Board of Education* (1955) 349 US 294). Significantly, in the *TAC* case, above n 18, para 107 the Court acknowledged that in cases like *Brown II*, United States jurisprudence had employed lower courts to determine how much time was necessary for school boards to achieve full compliance with the Supreme Court's decision, as

appropriate remedy, after outlining the potential obstacles to implementation, Warren CJ on behalf of a unanimous Supreme Court said "the courts will require that the defendants make a prompt and reasonable start toward full compliance." Without insisting that integration of schools take place within a short and defined period, the Court ordered that its finding be implemented with "all deliberate speed."

As Brest and others have remarked,[48]

> the effect of *Brown I* and *Brown II* was that the right to be free from segregation was severed from the remedy. As a result none of the students in the Deep South benefited from the cases that they brought.

It appears from the historical record, however, that the crafting of the remedy was undertaken with a clear purpose. The justices had reached an agreement that the order in *Brown* would be implemented gradually. This approach may well have been initiated by Justices Jackson and Clark, but eventually all the justices accepted that an order for immediate implementation would inflame those parts of the country which were not ready for an integrated schools system.[49]

In *Brown*, the Court was conscious that it had taken a decision which placed it at the forefront of enlightened public opinion and that an order for immediate implementation would have jeopardised the very effect of its initial finding; hence the caveat of "all deliberate speed". Viewed thus, *Brown* illustrates the concern of a court to provide space for public authorities to implement a far-reaching and contentious order in a gradual way and in a manner designed by the responsible local authority—hence the use of "prompt and reasonable start", words which are not far removed from those employed in *Grootboom*.

Can it not be argued that the approach in *Brown* supports the cautious decisions in the *Grootboom* and *TAC* cases, on the premise that in cases where the court imposes obligations upon public agencies which the latter have resisted tenaciously until so compelled judicially, a court should be careful not to endanger its institutional legitimacy? The

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well as the adequacy of any plan proposed by the school boards. However, the Court considered in *TAC* that its order to compel the Government, inter alia, to remove restrictions that prevent Nevirapine from being available to reduce mother-to-child transmission and to permit and facilitate the use of Nevirapine in these cases was adequate, because the Government abided by decisions of the Court (para 135).

48 Paul Brest, Sanford Levinson, J M Balkin, and Akhil Reed Amar *Processes of Constitutional Decisionmaking: Cases and Materials* (Aspen, New York, 2000) 769.

49 I am indebted to Professor Morton Horwitz of Harvard Law School, who provided me with a relevant part of his manuscript of a study on the Warren Court, on which the reasoning of the *Brown* Court as set out in this paper is based.

manner in which the United States Supreme Court conducted itself in *Brown* illustrates the anxiety of courts in deciding a case which has far-reaching social implications of a controversial nature. Could it not be contended that the greater the gap between the courts' reading and the public's reading of the political and economic aspirations of a society and the need to implement them, the more transformation via the courts becomes a perilous business? In the South African cases, the disputes may well have held important economic and social implications but were hardly of a controversial nature. Neither the provision of shelter for the poor and homeless nor the provision of anti-retroviral drugs placed the court at war with a significant body of public opinion, government opposition notwithstanding. In any event, the Constitutional Court, as custodian of the new constitutional enterprise, was obligated to build the basis for the long-term legitimacy of the institution. These cases were not being heard by a court which had had more than a century to construct the same project!

But it may be suggested that if the Court adopted the concept of minimum core, the result would be more significantly far-reaching, in that it would impact directly on every budgetary decision of the government which may then be constrained to mobilise public opinion against the courts. But that presupposes that public opinion would resist a court which upheld rights which help in the fight against poverty—a somewhat different challenge from that faced by the *Brown* Court, from a society which at least in significant part favoured segregation.

As noted earlier, Albie Sachs suggested a decade ago that the adjudication of socio-economic rights should not be left to the judiciary. His concern was born partly out of the historical record of the South African judiciary and partly from a view that judges were ill-equipped to deal with the problem of striking a balance between rights enforcement and democratic rule. By contrast, it is my view that an independent judiciary, rather than a commission chosen by Parliament, will possess the potential legitimacy to assist in the constitutional conversation required by socio-economic rights adjudication, which will lead to a democracy which treats all who live in the country as citizens thereof.

IV CONCLUSION

If litigants in socio-economic rights cases find themselves in the same position as the students in the Deep South in the *Brown* case, with a victory and no remedy, questions about the purpose of these rights and the role of the court will increasingly eat away at the body of legitimacy that has been constructed in the first decade of constitutional rule in South Africa. Without adherence to a principle of accountability, rights have little bite,

particularly for those who litigants who struggle to muster sufficient political organisation to promote their cause.[50]

There is of course an irony behind the manner in which the South African Constitutional Court has followed a theory of deference so enthusiastically embraced by apartheid courts (within, admittedly, vastly different contexts). In brief, this irony illustrates the importance of developing a meaningful basis for the possibility of transformation, so that in the second decade of constitutional rule in South Africa, the courts might not yet again become an arena of struggle for those who feel that the State considers them to be the Other. The sooner a clear principle of accountability to the key distributional commitments enshrined in the Constitution is embraced (initially by the courts and then, via the trialogue initiated through litigation, accepted by the other institutions of the state) the less likely it is that the courts will become a site of political struggle, of a kind that will yet again force them to adhere to the timidity of deference.

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50 In analysing the performance of Eastern European constitutional courts, Bojan Bugaric "Courts as Policy-Makers: Lessons from Transition" (2001) 42 Harv Int'l LJ 247 warns that courts have a limited capacity to deal with complex issues in the new global economy and that what is required is a jurisprudence based upon a democratic approach to interpretation rather than law's empire. That, in the light of the litigation being analysed in South Africa, is a false dichotomy in that the range of analytical choices is not between Hercules and deference to majoritarian democracy, but is rather concerned with the manner in which the government seeks to give effect to economic and social priorities as contained in the founding document. As is apparent from this paper, there is a problem, in that litigants most in need often have little in the way of political organisation to support their claims, and it is those who can combine political organisation with a litigation strategy who can most benefit from the employment of a rights strategy, as is illustrated by the *TAC* case. But in the imperfect world of democracy, groups such as landless squatters may well be left with little alternative but to litigate by way of the services of a public service law organisation. Provided that this strategy is not fetishised into the complete alternative to political action and that lawyers do not appropriate the cause for themselves, it may well be the best option in the imperfect world in which the litigants find themselves. Furthermore, the winning of a case can assist litigants and similar groups to organise around the victory, particularly when the citizenry who have listened to the case by way of media coverage become disgruntled by the efforts of government to justify the denial of such rights.