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**RIGHTS-BASED LITIGATION TECHNIQUES AND THE JUDICIARY IN POST-
1994 SOUTH AFRICAN SOCIO-ECONOMIC RIGHTS JURISPRUDENCE**

by

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DECLARATION OF ORIGINALITY

Declaration:

I, the undersigned, **791624** declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before any degree or examination in this or any other university.

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ABSTRACT

This study focuses on the vindication of socio-economic rights and the role of judges, especially in the Constitutional Court, in giving meaning to and realizing socio-economic rights in line with the transformative goal of the Constitution. The study traces the socio-economic rights jurisprudence of the Constitutional Court through its first, second, and post-second 'waves' or phases in order to lay a foundation of the attitude and approach of the Constitutional Court to socio-economic rights interpretation.

The study further looks at the critique against the approaches of the Constitutional Court and finds that the Court is placed in a good position and is empowered to set a normative framework for the realization of socio-economic rights. The normative framework is based on the transformative goals of the Constitution and functions to provide guidance to the Court and the State in general on interpreting and realizing the political aims of socio-economic rights

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1.

INTRODUCTION

"An imbalance between rich and poor is the oldest and most fatal ailment of all republics"

– *Plutarch*



Figure 1: Little Girl art painting by Eneji Peter

A wide discrepancy exists between those socio-economic rights made available in the Constitution of the Republic of South Africa, 1996 (the Constitution) as constitutionally guaranteed rights, and the unfortunate lived experiences of poor and vulnerable individuals, groups, and communities in South Africa. For many, this *status quo* calls into question the Constitution's vision of an equal, transformed society that prioritizes basic human rights. A society wherein the needs of the poor and vulnerable are met, their rights respected and protected, and where socio-economic and political change are not abstract terms but tangible realities.

Even though the Constitution includes socio-economic rights that should inform State policies and action towards the realization of such rights, through the provision of social goods and services aimed at addressing socio-economic deficits, poor and vulnerable groups still find themselves running to the courts in attempts to vindicate their rights, since for many people the promise of these rights has not come into fruition. The courts have thus found themselves at the epicentre of socio-economic rights disputes. This has presented the courts with opportunities to define the contents of socio-economic rights and provide guidance about how the State is meant to respond to its constitutional obligations to give effect to socio-economic rights.

However, the courts have not, through their jurisprudence, necessarily responded to the demands of poor and vulnerable individuals and groups, including responding to the expectations of scholars and interested organizations alike, in a manner that has sufficiently vindicated socio-economic rights. In this paper, I am particularly interested in the Constitutional Court as the norm-setting apex judicial institution in South Africa and the jurisprudence it has advanced and can still advance in order to realize socio-economic rights in the country.

This paper will study the jurisprudence of the Constitutional Court with respect to socio-economic rights interpretation with the aim to assess whether such jurisprudence has met the political and historical aspirations underpinning socio-economic rights. More importantly, it will suggest a normative framework that could contribute significantly towards realizing these aspirations. I will first discuss the history and jurisprudence of the Constitutional Court in respect of socio-economic rights in South Africa, by providing a description of the different 'waves' of legal interpretation that have informed the Constitutional Court's approach to socio-economic rights adjudication. Secondly, I will discuss the role of judges and the Constitutional Court in post-1994 socio-economic rights litigation, together with a theoretical discussion of what necessitates a normative framework for socio-economic rights interpretation and on what such a normative framework would be based, including what it should attempt to achieve. Thereafter and lastly, I will conclude.

2.

PART I: THE HISTORY AND DEVELOPMENT OF SOCIO-ECONOMIC RIGHTS JURISPRUDENCE IN SOUTH AFRICA

It is trite that the deep historical atrocities and political struggle that inform South Africa's heinous past of colonial-apartheid have necessitated the substantive protection of human rights and has emphasized the imperative to guard against repeating that past.¹ Even before the era of colonial-apartheid, South Africa's colonial history in general is infamous for systemic oppression and the negation of social and economic justice.² One amongst other avenues that have been established within the current South African polity to address the once non-existent regard for human rights is through the entrenchment of socio-economic rights in the Constitution.

Socio-economic rights refer to those rights that mandate the State to take measures aimed at providing or delivering what are understood as social goods and services such as food and water, social security, healthcare, housing, and so on.³ The

¹ C Heyns and D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2(2) *Law, Democracy, & Development* 153. That is, South Africa's colonial-apartheid past was lacking in rights aimed at recognizing rights and protecting the public interest in the form of rights equally conferred on all people.

² *Ibid.* I use the term "colonial-apartheid" as a teleological description of South Africa's colonial history that combines the social realities of colonialism and apartheid in order to emphasise the colonial purpose served by apartheid, the inseparability between colonialism and apartheid, and the resultant contested limitation of contemporary socio-economic rights discourse (see also footnote 6 of JM Modiri 'The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the "Afterlife" of Colonial-apartheid' PhD thesis, University of Pretoria, 2017 (on file with the author)). However, a decolonial critique falls out of the scope this paper as this paper primarily focuses on the jurisprudence of the Constitutional Court as an institution belonging to the current constitutional dispensation. I do not intend to address a decolonial critique in this paper, although it is a relevant critique.

³ C Albertyn '(In)equality and the South African Constitution' (2019) 36(6) *Development Southern Africa* 761.

Constitution imposes both negative and positive obligations on the State to progressively realise socio-economic rights.⁴ Textually, the Constitution makes available one of the most relatively comprehensive legal systems for the protection of socio-economic rights in the world.⁵ However, the Constitutional Court ("**the Court**") found itself in a position wherein the need for a judicial articulation of socio-economic rights arose in the early years of South Africa's post-1994 constitutional democracy. This was amid a global context where the "international judicial experience on the enforcement of social and economic rights was virtually non-existent".⁶

There had generally been disagreement before the inception of South Africa's current constitutional democracy about the preferred approach for the advancement of socio-economic rights after the Constitution's enactment.⁷ One side argued for the constitutional entrenchment of socio-economic rights so as to address the most fundamental needs of society, and the other side argued against it due to its erosive potential in the face of limited State resource capacity since the guarantee of rights creates corresponding State duties.⁸ The Constitutional Assembly, which was responsible for drafting the Constitution, eventually struck a balance between the two arguments by recognizing socio-economic rights as equal to civil and political rights and including them in the same justiciable bill of rights, with internal limitations in order to limit State obligations.⁹

⁴ S Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 20. This obligation was inspired by Article 2 of the International Covenant on Economic, Social and Cultural Rights, read along with General Comment 3 of the Committee on Economic, Social and Cultural Rights.

⁵ Heyns and Brand (note 1 above) 153.

⁶ J Dugard *Socio-economic Rights: Progressive Realization?* (2018) 23.

⁷ Heyns and Brand (note 1 above) 153-154.

⁸ *Ibid.* The debate on each side mainly centred on the future legitimacy of the Constitution, without necessarily disagreeing with the enactment of the Constitution itself and/or negating the importance of socio-economic rights in post-1994 jurisprudence.

⁹ *Ibid* 155.

However, South Africa's contested post-1994 polity, its conservative legal culture,¹⁰ and the ongoing debate about the limitations of rights meant that the realization of socio-economic rights would be met with difficulty from multiple angles, including from the Court's own jurisprudence.¹¹

There were no textbooks or judicial precedent to guide the Court in navigating socio-economic rights.¹² Socio-economic rights were quite novel at the conceptual level after the enactment of the Constitution, so socio-economic rights norms required original definition.¹³ Understandably so, this meant that the Court had to balance the imperative to find an interpretive paradigm for the realization of socio-economic rights whilst attempting to maintain stability institutionally in its early socio-economic rights cases.¹⁴ Consequently, the jurisprudence on government's positive obligation to give effect to socio-economic rights was cautiously and incrementally constructed.¹⁵

It is conceivable that the Court perceived their adoption of an interventionist and critical approach to socio-economic rights adjudication as irreconcilable with the Court's priority to consolidate itself as an institution, since new constitutional courts in transitional societies which intervened in executive decisions experienced backlash in the form of restricted powers and replacement of its judges.¹⁶ It comes as no surprise then that the justiciability of positive obligations to realize socio-economic

¹⁰ S Wilson and J Dugard 'Constitutional Jurisprudence: The First and Second Waves' M Langford (ed) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013) 38.

¹¹ J Dugard et al (note 6 above) 23.

¹² *Ibid.*

¹³ Wilson and Dugard (note 10 above) 38.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid* 37. That is, my suggestion is that the Court's restricted approach to socio-economic rights interpretation in the early stages of South Africa's democracy may have been heavily influenced by both global political trends and the delicate domestic political situation at that time, which meant that the Court had to ensure its own survival as an institution by indirectly managing the possible political ramifications of its decisions.

rights by government has been met with what Albertyn refers to as a “jurisprudence of reasonableness”¹⁷ in socio-economic rights adjudication by the Court, which is located within administrative law review.¹⁸

The main test under the reasonableness standard is based on assessing how fair or appropriate government action is in realizing socio-economic rights.¹⁹ Reasonableness review does not make pronouncements on the objective norms advanced or those particular goods and services made available by rights.²⁰ Rather, it amounts to an intricate balancing test that considers the specific context of a complaint, the relevant wider societal context, including those who are in a worse off position than or similar to the litigant(s), the capacity of the State and resources that the State can make available within a particular context.²¹

Reasonableness review imposes positive obligations on government to act where the government has done nothing to realize socio-economic rights. Where government has acted, it evaluates government action on procedural grounds and avoids judicial policy-making.²² In this, the courts require the extension or revision of existing policy measures through other non-judicial means.²³ In particular, the Court has avoided

¹⁷ Albertyn (note 3 above) 761.

¹⁸ *Ibid.* Administrative law review in respect of reasonableness as a ground of review encompasses the standard of rationality, together with assessing the effectiveness and proportionality of decisions.

¹⁹ Wilson and Dugard (note 10 above) 38. The standard of reasonableness has been followed since it was first developed by the Court in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). The Court had adopted a similar approach during its first socio-economic rights decision in *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) by applying a standard of rationality to justify decisions by the State. The similarity between the standards of reasonableness and that of rationality is that both allow the courts to avoid making pronouncements on the contents of socio-economic rights in respect of the substantive entitlements that fall within the ambit of given rights.

²⁰ *Ibid.*

²¹ S Liebenberg ‘Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law’ (2014) 32(4) *Nordic Journal of Human Rights* 317-318.

²² Albertyn (note 3 above) 761.

²³ *Ibid.*

granting substantive content to socio-economic rights but has required flexibility and justification of policy choices by government in light of the accountability function of socio-economic rights.²⁴

This reasonableness jurisprudence has meant that litigators have had to adopt strategic and long-term-result oriented litigation programmes for the advancement of socio-economic rights through the courts.²⁵ Wilson and Dugard have argued that the Court's jurisprudence on socio-economic rights can be divided into two different temporal phases (or 'waves'), which evince the Court's changing and nuanced approach to socio-economic rights adjudication.²⁶ I suggest that a possible third (or rather post-second) wave has also been evinced by the Court to date.

The 'first wave' of jurisprudence comprises of early socio-economic rights decisions by the Court from 1998-2005.²⁷ The 'second wave' of jurisprudence was witnessed in the Court's decisions from 2008-2010, after a three-year gap from the first wave.²⁸

²⁴ *Ibid.*

²⁵ See S Budlender, G Marcus & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics, and lessons* (2014) 102. Indeed, this brings to the fore the importance of a proper relationship between litigation and mobilisation, the latter of which suggests reliance on non-judicial mechanisms and strategies. The socio-economic rights jurisprudence discussion considered in this paper should be viewed to include public mobilisation as an essential element of socio-economic rights litigation, especially in taking advantage of the political dimension of socio-economic rights litigation in order to influence policy decisions or create an effective context that courts can take into account when adjudicating.

²⁶ Wilson and Dugard (note 10 above) 35-37.

²⁷ The cases that include decisions which form part of the Constitutional Court's first wave of jurisprudence include *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (*Soobramoney*), *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*), *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC) (*TAC*), *Khosa and others v. Minister of Social Development and others* 2004 (6) SA 505 (CC) (*Khosa*); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (*Various Occupiers*), and *Jaftha v. Schoeman; Van Rooyen v. Scholtz* 2005 (2) SA 140 (CC) (*Jaftha*).

²⁸ The cases that form part of the second wave of the Constitutional Court's jurisprudence include *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. the City of Johannesburg and others* 2008 (3) SA 208 (CC) (*Olivia*); *Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and others* 2010 (3) SA 454 (CC) (*Joe Slovo*); *Nokotyana and*

There seemed to be an emerging post-second wave of the Court's jurisprudence after a four-year gap from the second wave.²⁹ I discuss these triple waves below in order to provide the historical context and highlight the jurisprudence of the Court that informs socio-economic rights litigation in South Africa.³⁰

The First Wave

The Court in *Soobramoney v Minister of Health (Kwazulu-Natal)* (*Soobramoney*)³¹ dealt with a matter concerning the decision of a state hospital to limit health-care access. The state hospital denied the Appellant, Mr Soobramoney, access to a renal dialysis programme for a kidney transplant, in that he suffered from irreversible chronic renal failure and as a result did not qualify to receive assistance that would otherwise be freely offered to patients suffering from acute renal failure but could be cured or suffered from chronic renal failure and were awaiting a kidney transplant.³² Since Mr Soobramoney's condition was incurable, he did not qualify to receive assistance in light of the State hospital's policy that limited access to its renal dialysis programme.³³

Mr Soobramoney challenged the State hospital's decision on the basis that it amounted to a violation of his right to not be refused emergency medical treatment

others v. Ekurhuleni Municipality 2010 (4) BCLR 312 (CC) (*Nokotyana*); *Joseph v. the City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*); *Abahlali base Mjondolo v. Premier of KwaZulu Natal Province and others* 2010 (2) BCLR 99 (CC) (*Abahlali*); and *Mazibuko and others v. City of Johannesburg and others* 2010 (4) SA 1 (CC) (*Mazibuko*).

²⁹ An emerging third wave of the Constitutional Court's post-second wave jurisprudence is arguably evident in the cases of *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) and *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

³⁰ This exercise is done provide a foundational discussion of socio-economic rights jurisprudence, and not necessarily to assess or proffer a particular argument. An argument will be advanced in Part 2 of the paper.

³¹ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).

³² Note 31 above 31.

³³ *Ibid* 3-4.

in terms of section 27(3) of the Constitution.³⁴ Mr Soobramoney's irreversible condition meant that he was not in an emergency situation that triggered a section 27(3) violation, which led the Court to reject his challenge in terms of section 27(3) of the Constitution since his situation could not be remedied even by immediate treatment.³⁵

Wilson and Dugard argue that the Court's approach in *Soobramoney* revealed that the Court was not prepared to engage the substantive question of what kind of entitlements are included as part of the right of access to healthcare services or the impact of such entitlements on how the State allocates resources, since rational and intra-vires decisions were the only standards that seemed to justify the greater decision to limit healthcare.³⁶

According to Wilson and Dugard, the Court in *Grootboom* took a wider approach since it was dealing with a situation where there was no existing State programme for individuals who sought housing urgently, as opposed to reviewing a State decision that was based on an existing State programme.³⁷ The Court applied a test of reasonableness to the State's failure to act.³⁸ In doing so, the Court similarly refused to provide substantive contents to the right to housing in terms of sections 26(1) and (2) of the Constitution.³⁹ Rather, the Court emphasized that the section

³⁴ *Ibid* 7. Wilson and Dugard point out that the Appellant argued in the alternative that his rights of access to healthcare in terms of section 27(1)(a) were violated (See Wilson and Dugard (note 10 above) 39).

³⁵ *Ibid* 18; 21-22. As a result, the Court held that sections 27(1) and (2) are the appropriate sections that applied to Mr Soobramoney's claim. This means that Mr Soobramoney's claim in terms of his section 27(1)(a) right of access to health care would ordinarily be subjected to the standard of reasonableness in terms of section 27(2) of the Constitution.

³⁶ Wilson and Dugard (note 10 above) 39.

³⁷ *Ibid* 39-40.

³⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 99.

³⁹ Wilson and Dugard (note 10 above) 40.

26(1) right of access to adequate housing was to be realized based on the State's duty to take reasonable measures towards their realization.⁴⁰

The Court famously rejected the idea that there should be a minimum core content to realize socioeconomic rights.⁴¹ In this, the Court found that the State's primary obligation under section 26 was to adopt and implement policy that would ensure the realization of the right of access to housing over time,⁴² even though General Comment 3 of the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights assigns a minimum core content to housing access,⁴³ which was dismissed by the Court as not determinative of the State's obligation.⁴⁴ Rather, the assigned minimum core content was read as what may be appropriate in certain circumstances in order to examine whether the measures taken by the State were reasonable.⁴⁵

According to Liebenberg, the Court's refusal to adopt a minimum core content jurisprudence to determine a basic threshold under which the State's obligations in terms of sections 26 and 27 of the Constitution may be assessed naturally attracted criticism: the open and vague nature of the reasonableness inquiry makes room for courts to avoid providing clear substantive content to socio-economic rights.⁴⁶ There are doubts that the courts' reasonableness jurisprudence adequately protects

⁴⁰ Note 38 above 41; 54 & 82.

⁴¹ *Ibid.* This approach was a deviation from the Committee on Economic, Social and Cultural Rights's General Comment 3 on the nature of States parties' obligations, under the International Covenant on Economic, Social and Cultural Rights.

⁴² *Ibid.*

⁴³ What is particularly important about General Comment 3 as an instrument of international law is that the Constitution mandates the courts to apply international law. In essence, it can be argued that minimum core contents of socio-economic rights are in fact supposed to be part of South Africa law.

⁴⁴ Wilson and Dugard (note 10 above) 40-41.

⁴⁵ Note 38 above 30-33. An important factor that contributed to the Court's view about minimum core contents of socio-economic rights is the lack of information before the Court about the exact needs and opportunities for the right [of access to adequate housing] to be enjoyed.

⁴⁶ S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 173.

members of society who are severely and adversely impacted by a lack of access to essential levels of socio-economic goods and services.⁴⁷

Liebenberg also mentions that inversely, the critique levied against the minimum core concept approach is that its peremptory nature fails to make room for social dialogue regarding the values that underlie socio-economic rights, in a manner that identifies and validates social needs through socially and communally determined processes.⁴⁸ In addition, a minimum core content jurisprudence would necessarily favour a two-tiered approach that differentiates between core needs (which naturally implicate survival) and non-core needs (which relate more to meeting other needs that concern flourishing as a human being and pursuing other purposes).⁴⁹

What is particularly problematic about such a binary distinction is its inability to respond to the variety of differing needs for differently situated individuals in society,⁵⁰ and ignoring the inter-connectedness of social needs in daily life.⁵¹ Although the reasonableness standard was still followed by the courts in their jurisprudence, the courts developed a more engaging jurisprudence that would create a platform for parties to engage more with the State on socio-economic rights policy decisions in the second wave of socio-economic rights cases.

Second Wave

The second wave of socio-economic rights cases were characterized by review applications brought by movements and organizations with the intention to vindicate group interests since the first wave of cases discouraged litigants who sought to vindicate individual rights,⁵² due to the challenging dilemma brought about by the

⁴⁷ Liebenberg (note 46 above) 163-164.

⁴⁸ *Ibid* 167-168.

⁴⁹ *Ibid* 168-170.

⁵⁰ *Ibid* 168.

⁵¹ *Ibid* 170.

⁵² Wilson and Dugard (note 10 above) 44.

reasonableness review standard. That is, individuals' demand to vindicate individual rights was essentially measured against what was presumably reasonable for the State to achieve, without any negotiation process between the State and affected litigants.

Consequently, litigants in the second wave sought to frame their cases by making reference to the reasonableness standard, but this time with an expert command of State policy. Although the Court continued to rely on the reasonableness standard in the second wave, the focus shifted to the procedural dimension of socio-economic rights. One example is contained in the case of *Occupiers of 51 Olivia Road Berea Township v City of Johannesburg (Olivia case)*,⁵³ in which the Court had to consider the eviction of a large number of vulnerable individuals from buildings situated in the inner city of Johannesburg and declared by the City of Johannesburg to be unsafe and unhealthy for habitation.⁵⁴ The City had not devised an adequate housing plan for alternative accommodation for the vulnerable individuals and this was challenged as a violation of the State's obligations under section 26(2) of the Constitution.⁵⁵

The Court required the parties to engage meaningfully together in order to remedy the dispute. In this, the Court read meaningful engagement as a procedural element that forms part of the standard of reasonableness.⁵⁶ The Court's approach was a clear example of relying on the administrative law to place focus heavily on the procedural aspects of socio-economic rights.⁵⁷ The Court essentially sought to create a negotiation platform where the meaning and implementation of rights could be considered and agreed to by the State and affected parties.⁵⁸

⁵³ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. the City of Johannesburg and others* 2008 (3) SA 208 (CC).

⁵⁴ Wilson and Dugard (note 10 above) 46; Note 53 above 1.

⁵⁵ Note 53 above 32.

⁵⁶ Wilson and Dugard (note 10 above) 46. In essence, meaningful engagement is a form of the common law principle of *audi alterem partem* at administrative law.

⁵⁷ *Ibid* 45-46.

⁵⁸ *Ibid* 46; Note 53 above 34.

The Court favoured a more procedurally engaged jurisprudence by making pronouncements on the need for a housing plan after meaningful engagement between the parties.⁵⁹ Through its judgment the Court arguably placed a demand on the State to fulfil those policy commitments promised to claimants after following the appropriate consultation process.⁶⁰ In consulting substantive elements that informed the socio-economic rights, the Court merely turned to existing legislation and policy in order to ascribe interpretative meaning without providing any direction regarding how State policy should be formulated and implemented in order to give effect to the State's socio-economic rights obligations.⁶¹

Wilson and Dugard's analysis of second-wave cases suggests that reasonableness review has changed thrice. Firstly, since the courts have not taken the difficulty faced by vulnerable individuals in their attempts to access social goods and services, reasonableness review has fallen short of its potential to define those social goods or interests encapsulated within a given right.⁶² Secondly, it has overshadowed those administrative law rights that have undergone substantive development.⁶³ Thirdly, the Court has interpreted disputes concerning positive obligations imposed on the State in respect of socio-economic rights to effectively mean that the State is granted the opportunity to re-adjust its policies to the satisfaction of what the Court would deem reasonable.⁶⁴

Third Wave?

Liebenberg argues that there has been an increased reliance on judicial processes to realize people's material needs. She opines that this reliance co-exists uneasily with the imperative of citizen participation, the latter of which informs contemporary

⁵⁹ Note 53 above 32-36.

⁶⁰ *Ibid.*

⁶¹ Wilson and Dugard (note 10 above) 46.

⁶² *Ibid* 58.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

discourse and practices of modern development.⁶⁵ Conventionally, the litigation process is not regarded as a participatory space in that usually only a limited number of parties may formally be involved in the process and it requires expert legal knowledge for parties to effectively engage in the process, which is effectively a barrier to broader and open participation.⁶⁶ However, there has been a global shift towards an emphasized reliance on litigation for the vindication and protection of rights despite the exclusionary nature of the litigation process.⁶⁷

Liebenberg argues that courts throughout the world have become aware of the distributive and democratic deficits of socio-economic adjudication in light of potentially far-reaching substantive rulings that have polycentric ramifications.⁶⁸ Socio-economic adjudication is also constrained by the limited range of parties before a court, which bears the risk of courts making decisions that affect a larger portion of the population without the latter being afforded an adequate and equal opportunity to be heard by a court in the same matter.⁶⁹

According to Liebenberg, these deficits justify the need for a more participatory model of adjudication that promotes collaborative efforts between the courts, legislatures, and executives in a manner that adequately responds to concerns regarding separation of powers.⁷⁰ In this approach, strong forms of judicial review are departed from in order to allow other arms of State to engage in constitutional rights interpretation, instead of the courts taking a final and peremptory stance when interpreting rights.⁷¹ She points to South African evictions case law as partial

⁶⁵ Liebenberg (note 21 above) 313-314.

⁶⁶ *Ibid* 313.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* 315.

⁶⁹ *Ibid* 316.

⁷⁰ *Ibid* 318.

⁷¹ *Ibid*.

examples of a participatory model of adjudication through the Court's meaningful engagement jurisprudence as discussed in the aforementioned second wave.⁷²

In contrast to Liebenberg's assertions, Pieterse shifts the focus to the Court's own jurisprudence and states that criticism often levelled against the Court relates to the Court's refusal to meaningfully interpret the rights contained in sections 26 and 27 of the Constitution.⁷³

However, it seems that the Court is moving towards evincing a willingness to provide meaningful interpretations of sections 26 and 27 of the Constitution since its first wave jurisprudence.⁷⁴ This willingness later resurfaced in *South African Informal Traders Forum v City of Johannesburg* (SA Informal Traders case),⁷⁵ where the Court took the initiative to link the adverse socio-economic impact of government action to a deprivation of socio-economic rights even where such government action did not directly violate sections 26 and 27 of the Constitution.⁷⁶ In *SA Informal Traders*, the Court heard an appeal against the refusal of the High Court to grant urgent relief in a matter concerning the unlawful eviction of informal traders from their trading locations within the City of Johannesburg.⁷⁷ The Court was primarily concerned about the irreparable harm that would ensure, which would adversely impact the socio-economic rights of the informal traders' dependants, should the informal traders be unsuccessful in their application for urgent relief against eviction from their trading locations.⁷⁸

The Court relied on and gave content to the interests of justice by making use of its just and equitable remedy in terms of section 172(1)(b) of the Constitution to grant

⁷² Liebenberg (note 21 above) 327-329.

⁷³ M Pieterse 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarterly* 820.

⁷⁴ Pieterse (note 73 above) 821.

⁷⁵ *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC).

⁷⁶ Note 75 above 29-31.

⁷⁷ *Ibid* 11-12.

⁷⁸ *Ibid* 29-31.

urgent relief to the informal traders.⁷⁹ This was done in order to protect their livelihood and prevent an adverse impact on their children's socio-economic rights to basic nutrition, shelter, and basic health services.⁸⁰ The Court has also shown, in *Black Sash Trust v Minister of Social Development* (*Black Sash* case),⁸¹ its willingness to actively provide supervisory oversight over the protection of socio-economic rights pursuant its orders and not merely stop at determining the reasonableness of State policies and action or determining whether there was meaningful engagement between parties.⁸²

In the Court's post-second wave socio-economic rights jurisprudence, the Court has shown a willingness to break away from limiting itself to its jurisprudence of meaningful engagement in order to play a more active role where it is clear that the government did not act in good faith, by violating or threatening to violate socio-economic rights, as was the case in *SA Informal Traders* and *Black Sash*. This would have countered the criticism mentioned by Pieterse above regarding the Court's refusal to meaningfully interpret the rights contained in sections 26 and 27 of the Constitution. However, the Court only took the approach it did in *SA Informal Traders* and *Black Sash* because the facts in both these cases presented extraordinary circumstances that resulted in a crises that the Court could not help but respond to. That is, the Court did not necessarily advance its jurisprudence in a proactive manner so as to address and alleviate the systemic causes of socio-economic rights deprivations and did not give content to the relevant socio-economic rights themselves.⁸³

What the potential 'third wave' (or post-second wave) jurisprudence of the Court as evinced in *SA Informal Traders* and *Black Sash* certainly reveals is that the Court is indeed equipped to play an active and innovative role in providing meaningful interpretations of and/or remedies for realizing socio-economic rights beyond its

⁷⁹ *Ibid* 31.

⁸⁰ *Ibid*.

⁸¹ *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

⁸² Note 81 above 76.

⁸³ Liebenberg (note 21 above)

standard reasonableness review and meaningful engagement jurisprudence.⁸⁴ This brings into question the fundamental role and ambit of the courts in providing interpretation of matters, such as socio-economic rights, which are closely political in light of the often polycentric and systemic decisions taken by the other arms of State, in order for the Court to establish what such matters mean or should mean to individuals. This question about the role and ambit of the courts becomes a core barrier for the Court to overcome in order to realize the fundamental aims of socio-economic rights. I consider this conundrum in the next section of the paper.

⁸⁴ This holds true even if the courts approach is still inclusive of its standard reasonableness review and meaningful engagement jurisprudence. The argument advanced in this paper does not suggest that the Court should abandon its standard reasonableness review and meaningful engagement jurisprudence. Rather, the argument advanced is that the Court should not stop at reasonableness review and meaningful engagement but should, inclusive of these standards, take up a more active role in defining a normative framework for understanding and realizing socio-economic rights in a manner that would guide State policy formation.

3.

PART II: POST-1994 SOCIO-ECONOMIC RIGHTS LITIGATION AND THE ROLE OF THE JUDICIARY

*"We are under a Constitution but the Constitution is what the judges say it is..."*⁸⁵

– Charles E Hughes

Critiques against the Constitutional Court's jurisprudence

Pieterse's assertions suggest that the Constitutional Court finds itself in a dichotomy: on the one hand, it has been commended for its context-sensitive and open approach to socio-economic rights interpretation, whilst balancing tensions that naturally arose from counter-majoritarian dilemma and separation of power concerns.⁸⁶ On the other hand, its interpretative sparsity and remedial timidity have been decried in light of its judgments.⁸⁷

Pieterse further asserts that others have lamented the Court's second wave jurisprudence for its tendency to avoid substantive rights interpretation and defer matters to institutional dispute resolution mechanisms, in an effort to encourage meaningful engagement between the State and affected litigants.⁸⁸ The unfortunate ramifications of this may be that vulnerable and desperate litigants are sent back to the same failed democratic processes that inspired the litigation in the first place.⁸⁹

The first set of critiques cover the broad impact of the minimum core concept on South Africa's democratic culture and institutions. Liebenberg states that the concern

⁸⁵ JE Leahy 'The Constitution Is What The Judges Say It Is' (1989) 65(3) *North Dakota Law Review* 491.

⁸⁶ M Pieterse 'Socio-economic Rights Adjudication and Democratic Urban Governance' (2018) 51 *Law and Politics in Africa, Asia and Latin America* 12-13.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* 13.

⁸⁹ *Ibid.*

is that minimum core obligations would jeopardize the courts' role by creating the risk of courts transgressing their institutional boundaries, putting their legitimacy and competency into question.⁹⁰ That is, the concern is that courts might possibly usurp government's policy-making role by defining and implementing minimum core obligations.⁹¹

Even though this may certainly be a true risk, minimum core obligations would constrain and oblige the State to not disturb and or to give effect to the substantive elements of socio-economic rights in a manner that would ensure that the survival of vulnerable individuals is not compromised by their general conditions.⁹² The conundrum that we sit with is that the urgency of the interests that minimum core obligations seek to protect make the State's obligation to progressively realize socio-economic rights practically meaningless.⁹³ In this context, the courts can only go as far as requiring particularly weighty reasons from the State that explain the State's failure to meet survival-related needs,⁹⁴ without the courts providing substantive meaning to the elements contained within a right and holding the State accountable for failure to meet or fulfil those exact elements.

Consequently, Wilson and Dugard state that the Court's jurisprudence of reasonableness fails to create an opportunity for vulnerable litigants to give meaning to the concept of reasonableness in the context of their own lived experience, needs, and purposes.⁹⁵ This *status quo* places vulnerable and poor litigants in an unfortunate position, as they are forced to bear with the cost of litigation just to have the courts comment on whether the State's decisions or policy are reasonable and

⁹⁰ Liebenberg (note 46 above) 165.

⁹¹ *Ibid.*

⁹² *Ibid* 164.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Wilson and Dugard (note 10 above) 58.

then provide the State with the opportunity to reformulate its policies.⁹⁶ This indeed may have a chilling effect on future litigation by vulnerable groups.

As mentioned above, Liebenberg states that there has been a general over-reliance on the litigation process for the realization of socio-economic rights. She argues that this co-exists uneasily with the imperative of citizen participation due to democratic participatory processes in the modern era.⁹⁷ This is because courts are limited in their ability to accommodate widespread meaningful engagement regarding socio-economic rights.⁹⁸ The Court's approach in ordering meaningful engagement between litigants has not functioned as a judicial model directly used for holding the State accountable for its positive duties imposed by socio-economic rights.⁹⁹

In my view, socio-economic rights are in-and-of themselves naturally constrained in their ability to bring any kind of systemic change to individuals' socio-economic circumstances. They always need a driving force since socio-economic rights cannot implement themselves, even though they are justiciable. This is where the role of the Courts in providing meaningful interpretations, together with participatory democratic processes and mechanisms, both find their joint relevance.

Participatory democratic processes or mechanisms are associated with the concept of top-down mechanisms which function to include input from the general public within the public sector by empowering individuals to influence otherwise political and bureaucratic legislative and executive decisions and decision-making processes.¹⁰⁰ However, these participatory decision-making processes, although useful and

⁹⁶ *Ibid.*

⁹⁷ Liebenberg (note 21 above) 313-314.

⁹⁸ *Ibid.*

⁹⁹ This deficit warrants a dynamic approach to litigation where extra-judicial mechanisms are used alongside intra-judicial / judicial mechanisms to realize the aims of socio-economic rights.

¹⁰⁰ L Bherer, P Dufour and F Montambeault 'The participatory democracy turn: an introduction' (2016) 12(3) *Journal of Civil Society* 225.

necessary, may practically be limited in their effectiveness and may result in a representation gap between politicians and the populace.¹⁰¹

The practical reasons for this representation gap are that legislative representatives and executive officials (i.e. politicians), not the populace, are ultimately responsible for enacting legislation and formulating policy and the agenda for public participation consultations is often determined by politicians.¹⁰² At times, there are language barriers and the poor and vulnerable are practically unable to participate because public participation meetings are held at sites that they are not able to reach. Those who manage to attend such meetings may find that technical and/or national policy matters are addressed instead of the poor and vulnerable people's actual needs and participation may require prior access to technology or specific documentation, including a certain level of education achieved by only a few.¹⁰³ This *status quo* necessitates an investigation into how socio-economic rights interpretation can address the representation gap.¹⁰⁴

The existence of the representation gap does not suggest that participatory mechanisms are not useful. It only suggests that participatory mechanisms alone are not enough to ensure the effective realization of socio-economic rights. In my view, the Court's jurisprudence (which will function to address the representation gap as argued below), in tandem with participatory mechanisms, will both effectively ensure the realization of socio-economic rights.

As stated above, Liebenberg states that the judicial process is not regarded as participatory in light of the limited number of people that can participate and the specialized expert legal discourse involved,¹⁰⁵ as opposed to political and

¹⁰¹ D Bilchirtz 'Are Socio-Economic Rights A Form Of Political Rights?' (2015) 31(1) *South African Journal on Human Rights* 92. That is, a gap between the demands of voters and the fulfilment of those demands by political representatives who have been mandated by voters and/or who have made promises to voters to fulfil certain political objectives.

¹⁰² Bilchirtz (note 101 above) 92-93.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 93.

¹⁰⁵ Liebenberg (note 21 above) 313.

bureaucratic legislative and executive decision-making processes. Yet, a growing number of individuals are resorting to the courts to enforce socio-economic rights notwithstanding the exclusionary nature of the litigation process.¹⁰⁶ This of course necessarily intensifies the role and need of the courts to address the aforementioned representation gap and creates a platform for direct and indirect participatory models of adjudication and court process.

In my view, criticisms against the Court's jurisprudence need to take into account that the Court, as an institution, functions within a system of governance and politics wherein the Constitution requires what Liebenberg refers to as an appropriate inter-relationship between the 3 arms of State described as a 'constitutional dialogue'.¹⁰⁷ This dialogue in part is intended to create a responsive government with the aim of fulfilling individuals' constitutional rights. This will require flexible and context sensitive court decisions in which courts at times exercise restraint and deference towards the other arms of State, and at other times to make decisions that will have extensive budgetary and policy implications.

The exercise of State power in post-1994 South Africa is informed by the overarching doctrine of separation of powers between the legislature, judiciary, and executive, which, amongst other things, prohibits unwarranted judicial intrusion into the domain of the legislature and executive,¹⁰⁸ especially where the other arms of State are better placed to legislate and/or formulate policies on socio economic rights.¹⁰⁹ Since participatory democratic mechanisms allow for extensive forms of participation in the realization and implementation of socio-economic rights,¹¹⁰ separation of powers sets an appropriate scheme that enables each arm of State to appropriately play its role.

¹⁰⁶ *Ibid.*

¹⁰⁷ A Govindjee 'Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope between Activism and Deference?' (2013) 25(1) *National Law School of India Review* 68.

¹⁰⁸ Govindjee (note 107 above) 67.

¹⁰⁹ *Ibid.*

¹¹⁰ Liebenberg (note 21 above) 319.

In my view, a careful consideration of the criticisms levied against the Court's jurisprudence reveals that these ultimately call into question the actual role of the courts in socio-economic rights litigation, which I consider in this paper. Having discussed meaningful engagement jurisprudence and reasonableness review in respect of the first and second waves of the Court's socio-economic rights jurisprudence above, I now turn to the Court's role in setting normative framework(s) with respect to the interpretation and realization of socio-economic rights.¹¹¹ These approaches may in future jointly result in a clear third wave of the Court's socio-economic rights jurisprudence.

The role of the Constitutional Court in socio-economic rights interpretation

The courts' role in adjudication is conventionally understood to simply be the resolution of disputes, which I refer to as the traditional institutional mandate of the courts. In my view, the aims of socio-economic rights are not limited to the traditional institutional mandate of the Court. The history of South Africa's colonial-apartheid reveals that the struggle for legally guaranteed socio-economic rights was arguably intended to meet political aims within the context of a political struggle for political and economic liberation. That is, amongst other things, the call for the inclusion of these rights in the Constitution was one intended to address hunger, poverty, landlessness, homelessness, and socio-economic inequalities in general,¹¹² all of which represent the substantive interests that poor and vulnerable litigants seek to vindicate. In this, the law serves a vindicatory purpose through the inclusion of socio-economic rights in the Constitution, especially when litigants receive a

¹¹¹ Whilst direct participatory modes of adjudication and court process include the Court's meaningful engagement jurisprudence and the extra-judicial litigation techniques deployed by litigants in that these models immediately result in public participation towards the realization of socio-economic rights, indirect participatory modes relate to the Court's role in setting a normative framework(s) for socio-economic rights interpretation and the intra-judicial litigation techniques deployed by litigants in that these models carry the potential, be it progressively or regressively, to intensify, facilitate, and impact public participation.

¹¹² M Trilsch 'What's the use of socio-economic rights in a constitution?' (2009) 42(4) *Law and Politics in Africa, Asia and Latin America* 553-554.

decision in their favour, in that it confirms that litigants' interests are recognized and protected.¹¹³

Bilchitz states that for the representation gap to be addressed, the political dimension of socio-economic rights should be taken into account when giving effect to socio-economic rights.¹¹⁴ This is because socio-economic rights function to protect the fundamental substantive interests of the populace as argued above.¹¹⁵

Consequently, the role of the Court with respect to socio-economic rights interpretation is not solely limited to its traditional institutional mandate. To limit what underlies the role of the Court in this manner centres the goal and reach of socio-economic rights aims within the strict confines of court litigation without any political significance. It is within the Court's purview, in light of the inclusion of socio-economic rights in the Constitution, to correct any defects or obstruction caused by political and bureaucratic legislative and executive decisions and decision-making processes that result in a systemic inadequacy in how the interests of the poor and vulnerable or intended beneficiaries of socio-economic rights are dealt with.¹¹⁶

Bilchitz states that whether the courts are best placed to fulfil this mandate is debatable.¹¹⁷ In my view and as outlined below, it is well within the purview and responsibility of the Court to fulfil such a mandate in light of the aforementioned representation gap alongside the historical and political aims of socio-economic rights, alongside the transformation goal of the Constitution.

The debate regarding whether the courts are best placed to fulfil the aforementioned mandate becomes immaterial when considering the continuing problems with political and bureaucratic legislative and executive decisions and decision-making processes, which Bilchitz argues that this suggests that majoritarian institutions will

¹¹³ S Wilson and J Dugard 'Taking poverty seriously: the South African Constitutional Court and socio-economic rights' (2011) 22 *Stellenbosch Law Review* 672.

¹¹⁴ Bilchitz (note 101 above) 98.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* 100.

¹¹⁷ *Ibid.*

not always adequately address the interests of the poor and vulnerable or intended beneficiaries of socio-economic rights.¹¹⁸ This leaves a representation gap that can only be addressed by the courts as the institution of last resort for peremptory redress.¹¹⁹

In my view, this does not imply that the role of the Court is merely supplementary. To the contrary, in a developing state such as South Africa where the poor and vulnerable regularly struggle to access and/or benefit from social goods and services, it means that the Court should not play a supplementary role when it is best placed to set a normative framework for socio-economic rights interpretation which would benefit the realization of constitutionally guaranteed rights.

In characterizing a normative framework by the Court, I build on Young's description of the overarching catalytic function of the Court which is the result of a typology of the Court's review mechanisms.¹²⁰ The adjudicative approach argued in this paper is quite normative and is less descriptive than but is an enhancement of the typology of review mechanisms coined by Young.

Young's typology of review mechanisms includes deferential review, conversational review, experimentalist review, managerial review, and peremptory review.¹²¹ In deferential review, the Court defers the authority to interpret socio-economic rights and its attendant obligations to another decision-making authority.¹²² A conversational review prefers an inter-branch dialogue between the three arms of State in order to define rights.¹²³ An experimentalist review involves all stakeholders in the decision-making process for resolving any issues that obstruct the

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ K Young 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8(3) *International Journal of Constitutional Law* 412.

¹²¹ Young (note 120 above) 391.

¹²² *Ibid* 387.

¹²³ *Ibid.*

determination of a right.¹²⁴ The Court will then assume direct responsibility when it comes to interpreting the substantive limits of rights and supervising their implementation in respect of the managerial review.¹²⁵ Lastly, the peremptory review refers to the Court's insistence of its superiority to interpret rights, and command and control an immediate response.¹²⁶

The combined effect of these review mechanisms results in the role conception of a catalytic court, wherein the Court promotes public participation and reduces the political energy required to change the manner in which government responds to the protection of socio-economic rights, whilst the Court itself remains largely unchanged or is not the focus of change.¹²⁷

Although Young suggests that the catalytic role conception is a response to the transformation goal of the Constitution,¹²⁸ it still remains that the review mechanism that the Court will choose is based on the particular government action that is the subject of the review proceedings.¹²⁹ In my view, this subjects and limits the jurisprudential development and judicial realization of socio-economic rights to particular governmental action. Although I agree that the Court's choice of review mechanism should be context-specific, I am of the view that the basis of the Court's decision to use a particular review mechanism or a set of review mechanisms should be a pronounced normative framework that is aligned to the Court's already recognized vision of democracy, which is one that is arguably receptive to political vulnerabilities and inequalities through its commitment to the founding democratic values of equality, human dignity, and freedom.¹³⁰

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid* 412.

¹²⁸ *Ibid* 413.

¹²⁹ *Ibid* 416.

¹³⁰ *Ibid*; *Mahlaule and Another v Minister of Social Development and Others*; *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para 104.

I posit that in order to answer to and/or cater for the political dimension of socio-economic rights, as argued by Bilchirtz, the Court is to go beyond its traditional institutional mandate by setting a normative framework for socio-economic rights interpretation.

Towards a normative framework for socio-economic rights interpretation

The normative framework argued in this paper forms the basis of the Court's choice of review mechanism by creating a link between the Constitution's transformation goal and the realization of the political aims of socio-economic rights. In this way, the normative framework fundamentally enhances Young's typology of review mechanisms in a manner that addresses the political aims of socio-economic rights.

The goal of the Constitution, amongst other things, is to transform society along egalitarian lines.¹³¹ As the custodians of the Constitution and its values, the courts are among the fundamental institutions that are at the forefront of advancing the Constitution's transformation project. This project is commonly referred to as "transformative constitutionalism", a term first coined by Klare who described it as:

"a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."¹³²

The courts have generally affirmed the transformation goal of the Constitution. What is important is what this means for the manner in which judges should adjudicate socio-economic rights.

Moseneke states that a liberal construction of adjudication limits the function of a judge to the strict interpretation of the law and prohibits a value-laden approach to

¹³¹ SM Mbenenge 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* 2-3.

¹³² K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150. s

adjudication that allows extra-legal considerations.¹³³ Furthermore, Klare argues that the Constitution is a departure from liberalism to an empowered model of democracy.¹³⁴ A postliberal reading of the Constitution is “social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious” about the Constitution’s historical context and transformation goals.¹³⁵ That is, in this case, such a reading is directed towards addressing the political aims of socio-economic rights stated above as it does not restrict itself to the liberal construction of adjudication that does not consider extra-legal factors.

Legal texts are often vague, filled with unanswered questions and conflicting stipulations. They simply do not always explain or interpret themselves. This is where the judge comes in and there is no other option but to consult external sources to assist the judge in interpreting the applicable legal texts.¹³⁶

Klare argues that these extra-legal interpretative efforts are suppressed by maintaining a strict distinction between law and politics, between the pursuit of political and moral objectives and professional legal practice.¹³⁷ This is also promoted through general principles that are ‘objective’ or rational decision-making-procedures and are meant to create ‘determinate’ legal outcomes.¹³⁸ Klare argues that this approach is rather too simplistic.¹³⁹ In my view, this approach is commonly in denial of the true political issues at play and thus adversely impacts legal interpretation and ultimately access to rights.

¹³³ D Moseneke ‘The Fourth Bram Fischer Memorial Lecture’ (2002) 18(3) *South African Journal on Human Rights* 315-316.

¹³⁴ Klare (note 132 above) 152.

¹³⁵ *Ibid* 153.

¹³⁶ *Ibid* 157.

¹³⁷ *Ibid* 159.

¹³⁸ *Ibid* 158.

¹³⁹ *Ibid* 161.

Consequently, a critical approach to adjudication seeks to soften the distinction between law and politics.¹⁴⁰ Adjudication, as a technique, cannot be definitively described by fixed legal principles.¹⁴¹ Rather, it is the performance of work that is already limited – that is, limited by the judge’s knowledge and experience when working with legal material.¹⁴²

This cannot mean that legal texts mean what we wilfully imagine them to mean. Legal texts *can* themselves prescribe their own meaning. However, the aforementioned limitation may be found in how legal material is interpreted or experienced – not in the bare legal material that we can objectively know.¹⁴³

In my view, where uninterpreted legal material does not itself prescribe meaning, the judge is then enjoined by reason of this conundrum and in light of his/her aforementioned limitation to consider extra-legal factors, such as the political aims of socio-economic rights, in order to prescribe meaning. As Wilson and Dugard state, it is the Court’s role to identify the purposes that inform particular rights through the (extra-legal) interests these rights seek to protect and advance.¹⁴⁴ These interests and the underlying purpose of socio-economic rights are not defined in the Constitution. It is up to the Court, then, to identify them through interpretation.¹⁴⁵

Consequently, judicial interpretation on one hand deals with uninterpreted legal material, and on the other hand it includes the use of extrinsic values in light of the existing uncertainty and gaps contained in legislative provisions that make it impossible to merely interpret the law as is.¹⁴⁶ In this case, this affects the meaning of constitutionally guaranteed socio-economic rights in light of the transformation goal of the Constitution. Therefore, judges should be honest about the politics

¹⁴⁰ *Ibid* 159.

¹⁴¹ *Ibid* 159-160.

¹⁴² *Ibid* 160.

¹⁴³ *Ibid*,

¹⁴⁴ Wilson and Dugard (note 113 above) 670.

¹⁴⁵ *Ibid* 669.

¹⁴⁶ Klare (note 132 above) 163.

involved in the exercise of adjudication and openly accept their responsibility in shaping the social order through adjudication.¹⁴⁷ Otherwise, the courts will remain institutionally unresponsive to the systemic problems of materially-disadvantaged South Africans and fail to advance the transformation goal of the Constitution.¹⁴⁸

I argue that for the Court to ensure a systemic response to the realization of socio-economic rights, a normative framework should be formulated in order to ensure that the Court produces jurisprudence which will provide certainty regarding the framework within which socio-economic rights should be interpreted, in order to address the political aims of socio-economic rights discussed above. In doing so, the Court should then establish a test for determining whether the political aims of socio-economic rights have been met by government policy and if that is not the case, how those aims can be met.

In my view, this task would fall well within the Court's purview and does not suggest a fundamental departure from the doctrine of separation powers. Separation of powers should not be understood to strictly demarcate the role of each arm of State. It is rather a flexible tool than a rigid one. It should be viewed as a pragmatic and functional tool to ensure responsive and accountable governance.¹⁴⁹ Neither the Constitution, nor the doctrine of separation of powers preclude the Court from taking into account those needs, purposes, and values which socio-economic rights must serve.¹⁵⁰

As alluded to above, the Court's normative framework will simply be a value position based on the founding democratic values of human dignity, equality, and freedom that acts as a prism through which the Court chooses which review mechanisms to employ, with the purpose of giving effect to the transformation goal of the Constitution by giving recognition to the aforementioned political aims of socio-economic rights. The normative framework will act as an evaluation standard for

¹⁴⁷ *Ibid* 164.

¹⁴⁸ J Dugard 'Courts and the Poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24(2) *South African Journal on Human Rights* 215.

¹⁴⁹ Govindjee (note 107 above) 67.

¹⁵⁰ Wilson and Dugard (note 113 above) 665.

government policies and action that vindicates socio-economic rights claims by giving effect to the political aims of socio-economic rights.¹⁵¹

Wilson and Dugard are instructive in determining the factors that may be considered in devising questions to be asked in order to provide a context-sensitive application of the aforementioned normative framework for vindicating socio-economic rights claims.¹⁵² Through the prism provided by the normative framework, the Court would firstly have to identify the underlying interest or political aim that a litigant seeks to vindicate and whether such interest is affected in the given context.¹⁵³ Secondly, the Court would have to determine whether such interest is deserving of realization under the relevant socio-economic rights in question.¹⁵⁴ Lastly, the Court should evaluate whether state policy together with the manner in which it is implemented constitute an appropriate response to the need of the person(s) in question, taking into account any competing claims that the State must inevitably consider.¹⁵⁵

¹⁵¹ See S Taekema 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) *Law and Method* 2; 7-8. This paper intends to establish a theoretical argument for the need to develop a normative framework that gives effect to the political aims of socio-economic rights, as discussed in this paper. This paper does not, however, aim to actually establish such a normative framework as such a study goes beyond the ambit and purpose of this paper and would naturally belong in a different, follow-up paper.

¹⁵² *Ibid* 672-673.

¹⁵³ *Ibid* 672-673.

¹⁵⁴ *Ibid* 673.

¹⁵⁵ *Ibid*.

4.

CONCLUSION

South African arguably still has a long way to go in fulfilling the promise of an equal society where socio-economic rights are sufficiently protected as much as they are constitutionally guaranteed. In this paper, I have focussed on the role of the jurisprudence of the Constitutional Court in respect of the realization of socio-economic rights. This paper has argued that the current jurisprudence of the Constitutional Court does not sufficiently respond to the political aims of socio-economic rights due to a lack of a proactive, norm-setting determination of the meaning of socio-economic rights.

This paper has illustrated that although the Constitutional Court's jurisprudence has changed over time in a manner that better accommodated the realization of socio-economic rights, even though not entirely effectively, the Constitutional Court is still in a position to set a normative framework for the interpretation of socio-economic rights. This should be done in a manner that will address the political aims of socio-economic rights. The Constitutional Court should do so inspired by the transformative goal of the Constitution, which necessarily implicates the political aims of socio-economic rights.

The first two waves, and a potential third/post-second wave, of the Constitutional Court's socio-economic rights jurisprudence evinced the Court's willingness to engage the reasonableness of State policies and action and proffer an approach where parties could negotiate and agree on the contents of State policies or action aimed at realizing socio-economic rights. However, the Court has not gone beyond this point in general by providing a normative meaning of the socio-economic rights contained in the Constitution. This has created an opportunity for the Court to address the representation gap between the populace and State representatives by creating a normative framework that will act as an evaluation standard for government policies and action so as to vindicate socio-economic rights claims, especially by poor and vulnerable groups.

This normative framework will function to allow the courts to approach the interpretation of socio-economic rights in a manner that will not base court decisions solely on State action and policies, but will provide clear guidance to the State in the formulation of its policies and its decisions to take action through a type of threshold framework that is aligned to the transformative aspirations of the Constitution. This will ensure that State policies and actions meet the political aims of socio-economic rights in manner that protects and respects these rights, and hopefully limiting the number of times that vulnerable litigants have to approach the courts and engage in costly legal exercises in order to vindicate their constitutionally guaranteed rights.

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