

## **Doing Justice to the Constitution? Socio-Economic Rights Jurisprudence in South Africa**

### **Introduction**

In 1996, the new government of South Africa finalized its Constitution, a revolutionary document aimed at bringing about social transformation. Its Bill of Rights is one of the first to enshrine socio-economic rights. Not only is this list of rights extensive, it is also expressly justiciable. For South Africa, socio-economic rights go above and beyond “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>1</sup> This class of rights is the new government’s way of providing restitution for the human rights abuses committed under the Apartheid regime that preceded it. Socio-economic rights are a central feature of South Africa’s transitional justice program.

Socio-economic rights have enjoyed recent popularity around the world. In the 1980s and 1990s, a series of failed structural adjustment projects led to disenchantment with neoliberal prescriptions for development. At the same time, the Soviet Union collapsed. In the resulting ideological vacuum, social democrats began proposing a “third way” that envisioned a greater role for state promotion of socio-economic rights in the context of vigorous, though regulated, market activities.<sup>2</sup>

This increased popularity is evident in state commitments to international human rights instruments. In the thirteen years between the formal promulgation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the fall of the Berlin wall, only 41 countries were parties to the ICESCR. Since 1990, an additional 119 countries have become

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<sup>1</sup> (1976). International Covenant on Economic, Social and Cultural Rights. Treaty Series, vol. 993, p. 3. United Nations.

<sup>2</sup> Giddens, A. (1999). The third way : the renewal of social democracy. Malden, Mass., Polity Press.

parties to the Covenant.<sup>3</sup> The new South Africa was born during this period of optimism about the prospects of socio-economic rights. Its Constitution reflects the spirit of this historical moment, but more importantly, it is an attempt at grappling with the exigencies of transition, away from its Apartheid past toward a new democratic beginning.

In spite of the recent “rediscovery” of socio-economic rights by Western countries, there is a long tradition of international law that addresses this body of rights.<sup>4</sup> Socio-economic rights are typically understood to include access to medical care, education and housing. They engender “positive” obligations on the state to proactively address social needs. This is in contrast to civil and political laws, such as freedom of speech or assembly, often referred to as “negative” rights because they oblige inaction or non-interference.<sup>5</sup>

On the world stage, the primary legal instruments to enumerate socio-economic rights are the Universal Declaration of Human Rights and the ICESCR that followed it. In 1986, a group of distinguished jurists from around the world met in Maastricht, Netherlands to consider the sorts of obligations the ICESCR implies for the state. Their findings were drawn up in a document known as the Limburg Principles. The ICESCR and the Limburg Principles have been used to promote the idea that the state is obligated to provide a “minimum core” of rights, to be

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<sup>3</sup> (1976). International Covenant on Economic, Social and Cultural Rights. Treaty Series, vol. 993, p. 3. United Nations. Interestingly, South Africa has signed, but not ratified the Covenant. This seems curious given that the country’s Constitution is more in keeping with the ICESCR’s tenets than other countries that have ratified. Indeed, this XYZ has not escaped the attention of South African parliamentarians, who recently remarked that there “is no apparent reason for the country’s failure to ratify the Covenant because it imposes no greater duties than the Constitution.” Quoted in SAHRC. (2008). Human Rights Development Report. Johannesburg, SAHRC: p. 11.

<sup>4</sup> Though often described as “second-generation rights”, legal scholar Mary A. Glendon describes how the UN committee that drafted the Universal Declaration of Human Rights contemplated centuries worth of legal philosophy from around the world to inform their catalog of socio-economic rights. See Glendon, M. A. (2001). A world made new : Eleanor Roosevelt and the Universal Declaration of Human Rights. New York, Random House.

<sup>5</sup> This distinction is somewhat overstated. Exercising one’s freedom of speech, for example, may entail positive action by the state. If the speech in question is controversial, police may be mobilized to ensure the safe exercise of this right. That said, in general, socio-economic rights do carry a greater obligation for state intervention. De Vos, P. (1997). "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution." South African Journal on Human Rights 13: 67-101.

progressively realized by the state as the resources to do so become available.<sup>6</sup> Still, in spite of the sudden popularity of these rights, no country has taken up the challenge of incorporating them into a judicial framework, until South Africa.

South Africa's Constitution is the world's most ambitious document in its provisions for socio-economic rights. But are these ambitions being realized? This paper examines contemporary socio-economic rights jurisprudence in South Africa. I argue for fidelity to the constitutional authors' original intent for this class of rights. The country's approach to socio-economic rights is inextricably linked to its Apartheid past. As such, the paper begins by describing this history and how it has shaped South Africa's Bill of Rights. The sections that follow use the 2001 case of *Government of the Republic of South Africa v Grootboom* to delve into contemporary socio-economic rights jurisprudence and to describe the impact of judicial remedies outside of the courtroom. The paper concludes by recommending a new approach to socio-economic rights, one that has the potential to inspire a new model of democratic governance.

## **Justice and Socio-Economic Rights**

Under Apartheid, human rights violations were not simply commonplace; they were the foundation of governance. Racial classifications were politicized and used to polarize society. The ruling Nationalist Party fostered social inequality as a means of maintaining white dominance over the black majority. Prior to any sign of concession from the Nationalist Party, the African National Congress (ANC), an exiled group that represented the interests of the black majority, prepared to assume authority. The party's leading lawyers and political scientists were

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<sup>6</sup> Steinberg, C. (2006). "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence." South African Law Journal **123**: p. 267.

preoccupied with devising a new system of governance that would address past human rights violations while uniting groups divided by race. Socio-economic rights were a central plank in the ANC's platform for change.

From the beginning, socio-economic rights were conceptualized as a mechanism for restitution in the party's ambitious transitional justice project. While in exile, Albie Sachs, one of the ANC's prominent lawyers, drew up principles upon which the new Constitution would be based. He envisioned a new model of governance based on transformative socio-economic rights jurisprudence. Drawing from the ICESCR and the Limburg Principles, Sachs promoted a minimum core of socio-economic rights as the cornerstone of this new model. By ensuring "a minimum floor of rights to a series of carefully defined social and economic goods," the new South African state could begin to tackle the lingering effects of Apartheid-era social inequality.<sup>7</sup> This minimum core idea quickly gained currency among many of the ANC cadre.

By 1990, the fall of the Apartheid system was inevitable. South Africa's ruling Nationalist Party had come to see negotiation with the black majority as imperative to preventing political violence, economic decline and international isolation. The ANC began meeting with the Nationalist Party in secret to discuss dismantling the Apartheid state.<sup>8</sup> With black South Africans making up more than 90% of the population, democracy would lead to black majority rule. This raised concerns among white South Africans that the new leadership would seek reprisals for past abuses. The Nationalist Party wanted to ensure amnesty for the white minority that had benefited from Apartheid. These concerns set the stage for how social and economic rights were discussed at the Convention for a Democratic South Africa (CODESA), where

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<sup>7</sup> Davis, D. (2006). "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" South African Journal on Human Rights 22: p. 302.

<sup>8</sup> Gevisser, M. (2009). A legacy of liberation : Thabo Mbeki and the future of the South African dream. New York, Palgrave Macmillan.

leaders from the major parties assembled to draft the interim Constitution. The Nationalist Party feared that social and economic rights would be realized through policies of reprisal and redistribution, policies that would at best alienate its white supporters and at worst precipitate a campaign of revenge against the white minority.<sup>9</sup>

Socio-economic rights were a key feature of the ANC's vision for transitional justice. Through a system of violence and oppression, the previous regime had effectively impoverished the majority of South Africans. With political violence on the scale of Apartheid, an innovative approach was called for to provide this majority with restitution. Transitional justice in South Africa is often distilled down to the country's famous Truth and Reconciliation Commission (TRC), a dramatic forum where wrong-doers publicly sought forgiveness and where the wronged told their stories. However, transitional justice went beyond the TRC hearings.

Positive state action toward fulfilling socio-economic rights was a way for the new government to pay for the sins committed under the Apartheid regime.<sup>10</sup> At the same time, the Nationalist Party wanted amnesty for itself and its constituents. Though a bitter pill to swallow, this was in the best interest of the ANC as well. Amnesty was a means toward national reconciliation. As laid out in the post-amble of the Interim Constitution:

The adoption of the Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu<sup>11</sup> but not for victimisation.<sup>12</sup>

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<sup>9</sup> Spitz, R. and M. Chaskalson (2000). The politics of transition : a hidden history of South Africa's negotiated settlement. Oxford, Hart Pub.

<sup>10</sup> Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." South African Journal on Human Rights **20**: 383-417, Davis, D. (2006). "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" South African Journal on Human Rights **22**: 301-327.

<sup>11</sup> The word "ubuntu" translates to "humanity" in Zulu and Xhosa and suggests a communitarian ideal much valued by South Africans.

This passage prefigures South Africa's experiment with a new model of transitional justice rooted in philosophies of *distributive* justice.<sup>13</sup> This form of justice does not make determinations about liability for past offences; rather it, addresses the social inequalities that arise from these offences by endorsing state remedies, often redistributive in nature.

This is a departure from earlier models of transitional justice, which were preoccupied with identifying individual leaders and charging them with a litany of offenses. Earlier models of transitional justice took their cues from the Nuremberg trials following World War II. At Nuremberg, the allies applied *corrective* notions of justice to political crimes.<sup>14</sup> Philosophies of corrective justice guide jurists to "look[] back to the position of the parties before the wrong was committed and assess[] the impact of the wrong on the status quo."<sup>15</sup> By contrast, distributive forms of justice are more concerned with righting the legacy of those offences.

Corrective justice recommends itself in instances where the litigants are only individuals, but has proven unsuitable for political crimes on the scale of Apartheid.<sup>16</sup> Corrective justice can transform yesterday's perpetrators into tomorrow's victims, and yesterday's victims into tomorrow's perpetrators.<sup>17</sup> Although victims of Apartheid would not be able to bring those who wronged them to court, the inclusion of socio-economic rights in the Constitution was seen as an

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<sup>12</sup> (1993). Interim Constitution of the Republic of South Africa. Act No. 200 of 1993. South Africa.

<sup>13</sup> Mbazira, C. (2009). Litigating socio-economic rights in South Africa : a choice between corrective and distributive justice. Pretoria, South Africa, Pretoria University Law Press (PULP).

<sup>14</sup> Ehrenfreund, N. (2007). The Nuremberg legacy : how the Nazi war crimes trials changed the course of history. New York, Palgrave Macmillan.

<sup>15</sup> Mbazira, C. (2008). " 'Appropriate, just and equitable relief' in socio-economic rights litigation: The tension between corrective and distributive justice." South African Law Journal **71**: p 74.

<sup>16</sup> Ibid. p. 79.

<sup>17</sup> Mamdani, M. (2001). When victims become killers : colonialism, nativism, and the genocide in Rwanda. Princeton, N.J., Princeton University Press.

essential first step toward providing them with restitution. Distributive justice resolved the tension between the need for reconciliation with the need for reparation.<sup>18</sup>

### **A Transformative Bill of Rights**

The final version of the Constitution was passed in December 1996 and came into effect in February of the next year. Among the socio-economic rights enumerated in the Bill of Rights, Sections 26 to 28 have proven the most contentious: Section 26 enshrines the right to housing; Section 27, the right to health care, food, water, and social security; and Section 28, the rights of children.<sup>19</sup> Section 24 discusses the protection of the environment for human health benefit and in the spirit of conservation.<sup>20</sup> Section 7(2) affirms the state's obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights," be they political or socio-economic.

The Bill of Rights also includes qualifications of rights. Section 36 addresses general limitations, noting that rights may only be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>21</sup> This clause is activated in instances where the rights violation is seen to be justifiable. Two of the most controversial socio-economic rights include their own internal limitations. In the Bill of Rights, Sections 26 and 27, which address rights to housing, health care, food, water and social security, are the only rights provisions to include internal qualifications above and beyond those imposed by Section 36. The second subsections of these provisions read: "The state must take reasonable legislative and other measures, within its

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<sup>18</sup> The TRC is not without its critics. A significant complaint is that too few of those responsible for organizing major atrocities under Apartheid provided testimony.

<sup>19</sup> (1996). Constitution of the Republic of South Africa. No. 108 of 1996, Republic of South Africa.

<sup>20</sup> Elsewhere, a distinction has been made between socio-economic rights and the right to a clean environment, where the latter is referred to as "third-generation" right. De Vos, P. (1997). "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution." South African Journal on Human Rights **13**: 67-101.

<sup>21</sup> (1996). Constitution of the Republic of South Africa. No. 108 of 1996, Republic of South Africa: s 36.

available resources, to achieve the progressive realisation of each of these rights.”<sup>22</sup> The language of these limitations (“reasonableness”, “within available resources”, and “progressive realization”) is drawn from the Limburg Principles. Although the Committee on Economic, Social and Cultural Rights sees these as qualifications that come after the “minimum core” obligation, there is no mention of the “minimum core” in the Constitution. This absence and the limitation language have proven critical to the judiciary’s inchoate approach to socio-economic rights.

Absence of “minimum core” language from the Constitution does not mean that this notion was not to be read into the Bill of Rights. The authors of the Constitution had many reasons to be somewhat circumspect in their wording. The language was partially to assuage the anxieties of white South Africans who feared the sort of dramatic redistribution that had taken place recently in Zimbabwe.<sup>23</sup> It was also intended to force important decisions on the Constitutional Court. In laying down the rights provisions in the Constitution, there was a:

tendency of the main parties to fall back on deliberate compromises and fudges, many of which entailed a major role for the Constitutional Court. The Court was thereby given a large scope for judicial decision-making. In some sense, this was no bad thing. Important decisions would come from the Constitutional Court more quickly than through the ordinary legislative channels. The judiciary would be seen to be embracing the new values of the constitutional order. In turn, the Constitutional Court, as the apex of the modernized judicial set-up, could be perceived to be cleansing – from the top downwards – a judiciary compromised by its general failure to resist the enforcement of apartheid laws.<sup>24</sup>

From the beginning, the constitutional framers saw the Constitutional Court as a proactive force, critical to offering restitution for the wrongs of the past by addressing the inequalities of the present.

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<sup>22</sup> Ibid. ss 26(2) and 27(2).

<sup>23</sup> Spitz, R. and M. Chaskalson (2000). The politics of transition : a hidden history of South Africa's negotiated settlement. Oxford, Hart Pub.

<sup>24</sup> Ibid. p. 417-8.

At the certification of the Constitution, the Constitutional Assembly made explicit that socio-economic rights would be justiciable.<sup>25</sup> This was unprecedented. During the Cold War, Communist countries had touted the value of socio-economic rights over civil-political rights, and organized their societies around fulfilling socio-economic needs. But Courts did not provide oversight of this work. While many nations signed onto the ICESCR, few states incorporated its prescriptions into their legal framework. South Africa is very much the pioneer: "In its avante-garde Constitution, South Africa has led the way in expressly recognizing such an extensive list of socio-economic rights."<sup>26</sup> South Africa is the first country to provide Constitutional guarantees for socio-economic rights *and* allow legal claims to be brought against the state for failure to meet these rights.

This generated a great deal of controversy. From the outset, legal scholars argued that the judiciary lacks the institutional legitimacy and competence to pronounce on the constitutional validity of socio-economic rights. Because jurists are appointed and not elected, judicial review implies a lesser degree of public accountability. These concerns also apply to civil and political rights, but because socio-economic rights necessitate greater state intervention, there is more at stake. With regard to institutional competence, courts are viewed as lacking the expertise and the background knowledge to comment on the practicalities of policy-making. Budgetary issues especially have been flagged as an area where jurists are ill-suited to make informed judgments.<sup>27</sup>

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<sup>25</sup> Certification of the Constitution of the RSA, 1996, ex parte Chairperson of the Constitutional Assembly, 1996. 1996 (10) BCLR 1253 (CC).

<sup>26</sup> Sarkin-Hughes, J. and W. Binchy (2001). Human rights, the citizen and the state : South African and Irish approaches. Dublin, Round Hall: p. 7.

<sup>27</sup> Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." South African Journal on Human Rights **20**: 383-417. Steinberg, C. (2006). "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence." South African Law Journal **123**: 264-284.

Predictions that socio-economic rights would invite judicial overreach began as early as 1992, but were based on speculation more than empirical evidence.<sup>28</sup> This was largely a function of the novelty of South Africa's approach to socio-economic rights. As the pioneer in socio-economic rights jurisprudence, South Africa's Constitutional Court did not have the luxury of a body of existing case law from which to draw guidance for its rulings: "in the absence of clear precedent to support them, judges often shy away from formulating new or innovative legal rules and principles, [a result of] deep-seated positivism prevalent in the legal fraternity in South Africa that dictates that judges are not the 'makers of law', but merely the 'adjudicators of law'."<sup>29</sup> This is an articulation of what was on the minds of many concerned legal practitioners and political theorists: after the Constitutional Assembly proclaimed that these rights are in fact justiciable, would the Courts be bold enough to step forward to enforce them? Or were these rights merely paper aspirations?

The next section of this paper describes *Government of the Republic of South Africa v Grootboom*, the second<sup>30</sup> socio-economic rights case to be heard by the Constitutional Court. The *Grootboom* case, though the first major case brought before the Constitutional Court to address socio-economic matters, presents a good case study for considering how the Courts have come to treat these issues. After presenting the case and the Court's findings, the paper continues

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<sup>28</sup> Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." South African Journal on Human Rights **20**: 383-417.

<sup>29</sup> De Vos, P. (1997). "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution." *Ibid.* **13**: p. 74.

<sup>30</sup> The first socio-economic rights matter brought before the Constitutional Court was *Soobramoney v Minister of Health, KwaZulu Natal* in 1998. Soobramoney, the appellant, suffered from a terminal form of chronic renal failure. He brought the case against the state when a public hospital refused to provide him with the specialized care necessary to prolong his life. His case was based on Section 27(3) of the Constitution, which guarantees the right to emergency medical care. The Constitutional Court dismissed his case on the grounds that Soobramoney's condition, while terminal, was also chronic, and could therefore not be considered an emergency in the sense of a sudden catastrophe. Given the available resources, the public hospital's denial of treatment was deemed "reasonable." Because the case dealt with expensive, specialized care, this was not an effective first test of the judiciary's willingness to engage with socio-economic rights. (1998). *Soobramoney v Minister of Health, KwaZulu-Natal*, Constitutional Court.

by using the *Grootboom* case to describe trends in South African socio-economic rights jurisprudence as well as how judicial remedies in such cases get implemented in the real world.

### ***Government of the Republic of South Africa v Grootboom***

The decision in *Government of the Republic of South Africa v Grootboom* in 2001 put to rest the question of whether there would be judicial enforcement of socio-economic rights. The case was brought by a community of squatters on the basis that eviction from their informal settlements constituted an infringement of Section 26, the right to housing, and Section 27, a child's right to shelter. Drawing from the language of the ICESCR, the applicants argued that "the right of access to adequate housing must be interpreted to include a minimum core entitlement to shelter."<sup>31</sup> The case was initially heard by the Cape of Good Hope High Court, which found that the government was obligated to provide housing to those families with children under Section 27. It refrained from applying the remedy more broadly on the basis that subsection 2 of Section 26 limited the government's obligation to provide housing. The High Court found that the internal limitation exempted the municipality from immediate provision of housing until resources became available for the "progressive realization" of this right. Section 27 lacked this internal limitation. The High Court interpreted this absence to mean that shelter for children should be considered a priority for the state.<sup>32</sup>

On appeal, the Constitutional Court found that the government had failed in its obligation to provide adequate housing as stipulated by Section 26. The Constitutional Court found that Section 27 was irrelevant as the state is under no obligation to provide housing for children under the case of their parents. The Court ordered the government to provide proper housing and

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<sup>31</sup> (1999). *Grootboom and Others v Oostenberg Municipality and Others*, Cape of Good Hope High Court.

<sup>32</sup> *Ibid.*

sanitation to the whole Grootboom community. The Court handed down a second order “to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.”<sup>33</sup> This order included descriptions of the types of measures to be included in the housing program. In spite of the seemingly broad implications of these decisions, there have been significant issues with implementation. This will receive greater attention later in this paper.

Although the Constitutional Court interpreted Section 26 to mean that “[t]he state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing,”<sup>34</sup> it rejected the notion of a minimum core entitlement. The Court noted that such an approach necessitates a “floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.”<sup>35</sup> Justice Yacoob argued that such a floor can only be determined after considering a complex set of social, political and historical factors. As such, the Court deemed itself unqualified to make an assessment about what the minimum core might be. However, the Court qualified this remark by noting that “[i]t is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.”<sup>36</sup>

The decision of this case and its aftermath set the tone for how the Constitutional Court engages in socio-economic rights issues. Though one of the earliest socio-economic rights cases heard by the Constitutional Court, the *Grootboom* case illustrates how the judiciary has approached these matters. The following sections reference this case study to describe

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<sup>33</sup> (2001). *Government of the Republic of South Africa v Grootboom*, Constitutional Court: Para 99.

<sup>34</sup> *Ibid.* Para 24.

<sup>35</sup> *Ibid.* Para 31.

<sup>36</sup> *Ibid.* Para 33.

contemporary socio-economic rights jurisprudence and what happens to decisions beyond the courtroom.

### **Contemporary Socio-Economic Rights Jurisprudence**

In the *Grootboom* case, as in the socio-economic rights cases that follow, the judges adopted a two stage approach to considering socio-economic rights. In the first stage, the burden of proof is on the applicant to demonstrate that a human rights violation has occurred. If the Court determines that a rights infringement has occurred, the Court proceeds to the second stage wherein the state must justify itself in accordance with the general limitations set out in Section 36.<sup>37</sup> This two stage process is complicated when the right in question has its own internal limitations, as illustrated in the *Grootboom* case. As noted above, internal limitations apply only to Sections 26 and 27. In *Grootboom*, neither the High Court nor the Constitutional Court engaged with Section 36. Instead, each found that it was sufficient to rule on the internal limitation set out in Section 26(2), but their conclusions differed on whether the state justified its neglect of duty. After considering whether the obligation to provide housing needed to be met given Section 26(2), consideration of Section 36 became redundant.

The internal limitations on the rights to housing, health care, food, water and social security set these rights apart from the rest of the Bill of Rights. The decision by the Constitutional Court in *Grootboom* proves that these internal limitations do not make for toothless rights: “very definite obligations are engendered by [socio-economic] rights, even when

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<sup>37</sup> Pieterse, M. (2003). "Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council." South African Journal on Human Rights **120**(41-48).

they are subject to ‘progressive realization.’”<sup>38</sup> However, the decision of the High Court does seem to suggest that the bar for these types of rights violations is set higher on the grounds that they entail a resource commitment the state may not be able to make yet.<sup>39</sup>

The *Grootboom* case demonstrates that while the rulings for socio-economic rights cases have been quite progressive, the justifications for their judgments have been conservative. The Courts have shied away from adopting a minimum core approach, instead relying on the Constitution’s language of “reasonableness”. The reasonableness approach flows naturally from the internal limitations enumerated in Sections 26(2) and 27(2). The reasonableness approach comes into play during the second stage of deliberation and is comprised of three tests:

1. Has the state taken “reasonable legislative and other measures” toward the realization of the rights?
2. Is the state taking positive action toward the “progressive realization” of the rights?
3. Has the state done what it can given its fiscal constraints?

In applying these three tests, the Courts have developed corollary rules. A claim on the state is considered reasonable if it cannot be realized horizontally. Horizontal claims are those made on one’s family or community, rather than the government.<sup>40</sup> In the *Grootboom* appeal, the Constitutional Court recognized that it is the primary responsibility of parents to house their children, and that this duty resides with the state only when the children have been removed from their families. Because the children were still in the care of their parents, the Constitutional Court found that the state was under no separate obligation to house the children.<sup>41</sup> The presumption is

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<sup>38</sup> De Vos, P. (1997). "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution." *Ibid.* **13**: p. 93.

<sup>39</sup> Elsewhere, litigants have appealed to Section 7(2), which obliges the state to “respect, protect, promote, and fulfill the rights in the Bill of Rights,” to attenuate the effects of these internal limitations. (2002). *Minister of Health v Treatment Action Campaign*, Constitutional Court, Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* **19**: 189-216.

<sup>40</sup> Spitz, R. and M. Chaskalson (2000). *The politics of transition : a hidden history of South Africa's negotiated settlement*. Oxford, Hart Pub.

<sup>41</sup> (2001). *Government of the Republic of South Africa v Grootboom*, Constitutional Court: Para 79.

that private citizens should provide for their own. The horizontal application of the Bill of Rights has been criticized as depoliticizing, a way for the state to abdicate responsibility to its citizens.<sup>42</sup>

Guided by the reasonableness approach, the Courts *do not* inquire into alternative policies for realizing socio-economic rights. They look narrowly at the rights claim before them, without issuing statements on the broader implications for related rights. They consider evidence as to whether policy-makers have made rational choices about service provision. In doing so, they consider both the design and implementation of the services, but *not* what the fulfillment of a particular right might mean in terms of tangible needs.<sup>43</sup>

Much of the initial anxiety around socio-economic rights was based in fears about judicial overreach: “the Courts’ constitutional obligation to deal with socio-economic rights does not translate into an unbounded exercise allowing the imposition of unconstrained standards.”<sup>44</sup> The “reasonableness” approach leads to narrow decisions, assuaging concerns about judicial activism. The Court considers only the claim before it and the state’s capacity to address it.

By contrast, a “minimum core” approach to resolving socio-economic matters would entail a broader interrogation of the content of rights, a role most political theorists ascribe to policy-makers. Carol Steinberg, a proponent of the reasonableness doctrine, argues that the minimum core approach entails overly specific interpretations of the content of rights. To describe a minimum level of the right to health care, for example, would mean delineating services a person is entitled from those she is not. Steinberg characterizes the minimum core

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<sup>42</sup> Brand, D. “The ‘Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights Claims in South Africa” In Van der Walt, A. J. (2005). Theories of social and economic justice. Stellenbosch, South Africa, Sun Press.

<sup>43</sup> Steinberg, C. (2006). "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence." South African Law Journal **123**: 264-284.

<sup>44</sup> *Ibid.* p. 270.

approach as judicial activism at its worst: an inexcusable intrusion into the workings of the legislative branch that has the potential to undermine the credibility of the judiciary.<sup>45</sup>

Others have argued that the minimum core should not be treated as an alternative to the reasonableness approach. David Bilchitz argues that judicial engagement with the three “reasonableness” tests should necessitate grappling with the content of the right in question.<sup>46</sup> Looking at the high-profile case of *Minister of Health v Treatment Action Campaign*, Bilchitz found that the Constitutional Court’s decision, though in conformity with the reasonableness approach, pointed to certain contradictions within this approach.

In the *TAC* case, the Court found that access to nevirapine<sup>47</sup> should be guaranteed under Section 27(1) of the Constitution. But in making this determination, the Court did not critically engage with the nature of the rights in Section 27.<sup>48</sup> Should access to health care include primary, secondary or tertiary care? Reasonable in relation to what? The Court was reluctant, as it was in the *Grootboom* case, to relate abstract notions of rights to tangible needs. While principles of judicial minimalism preclude the Court from answering questions such as these in a prescriptive fashion, Bilchitz argues that the decision to include nevirapine within the universe of health care entitlements appears arbitrary without some effort to describe what the right to access to health care services might mean. The narrow findings on the entitlement to nevirapine suggest that reasonableness has been used to make determinations on access to health care, on a case-by-case basis. Rather than providing some standard for determining whether provision of a

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<sup>45</sup> Ibid.

<sup>46</sup>Bilchitz, D. (2003). "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence." *South African Journal on Human Rights* **19**: 1-26.

<sup>47</sup>An anti-retroviral medication administered to HIV positive pregnant women to prevent mother to child transmission of HIV.

<sup>48</sup> (2002). *Minister of Health v Treatment Action Campaign*, Constitutional Court.

particular service should be considered a right, the reasonableness approach has been used to identify isolated services that the state is obliged to offer.

While the *Grootboom* case did not rule out use of the minimum core approach, subsequent cases that address socio-economic issues have not employed it. The *TAC* case certainly did not advance the minimum core as a guiding doctrine. Instead, the Court suggested that the minimum core should be a consideration in establishing whether government action is reasonable, but should not automatically confer benefit.<sup>49</sup>

### **Translating Judicial Remedies to Social Change Outside the Courtroom**

Thus far, this paper has been limited to an abstract discussion of judicial theory. Recall that the Bill of Rights, and the socio-economic rights therein, are part of the government's ongoing efforts to ensure justice to those who suffered during the Apartheid years. In the minds of those who drafted the Constitution, these statutes were to be traded in for social services. In this section, I look at what socio-economic rights jurisprudence has meant *outside* of the courtroom. I begin this section by returning to *Grootboom* to examine implementation of court orders and the mechanisms for monitoring implementation. I conclude this section by looking at the socio-economic conditions in South Africa today and suggesting that the ambitions of the architects of the Constitution have not yet been realized.

Enforcement of the judicial remedies in the *Grootboom* case is widely criticized as inadequate.<sup>50</sup> The first order concerning housing and sanitation for the Grootboom community

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<sup>49</sup> Ibid. Para 34-35.

<sup>50</sup> Berger, J. "Litigating for Social Justice in Post-apartheid South Africa: A Focus on Health and Education", In Gauri Pillay, K. (2002). "Implementing Grootboom: Supervision Needed." *ESR Review* 3(1), Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* 19: 189-216, Gauri, V. and D. M. Brinks (2008). *Courting social justice : judicial enforcement of social and economic rights in the developing world*. Cambridge, Cambridge University Press, Langford, M. S. K. (2010). Just Tick the Boxes? Judicial Enforcement in South Africa, ESRC-Net.

was only partially followed: due to unmaintained infrastructure, the Grootboom community continued to live in unhealthy conditions. The Grootboom community ultimately had to bring a follow-up case in order to ensure compliance.<sup>51</sup>

The second order that came out of the *Grootboom* case compelled the state to “take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.”<sup>52</sup> This order was declaratory and lacked a timeframe. As a result, policy change was slow to follow. Two and half years after the Court made its decision, national and provincial ministers began a program called Housing Assistance in Emergency Situations which provides emergency shelter in cases of catastrophe or forced eviction. This program was incorporated in the National Housing Code in 2004. The Treasury also made “Grootboom allocations” available to municipalities for the emergency provision of housing.<sup>53</sup> With such emergency allocations accounting for less than 1% of the entire annual national housing budget, critics have dismissed these allocations as window-dressing.<sup>54</sup> The pace of implementation has been slow and uneven.

The policy changes that followed *Grootboom*, though limited, are considered victories. Still, there are concerns that policy implementation has not followed the spirit of the remedies handed down. Forced evictions of informal settlements continue. The state does not always provide former residents with shelter, in spite of the Constitutional Court’s insistence that they

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<sup>51</sup> Pillay, K. (2002). "Implementing Grootboom: Supervision Needed." *ESR Review* 3(1). Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* 19: 189-216.

<sup>52</sup> (2001). Government of the Republic of South Africa v Grootboom, Constitutional Court: Para 24.

<sup>53</sup> ESCR-Net International Network for Economic, S. C. R. (n.d.). "Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (11) BCLR 1169. (CC)." from [http://www.escr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401409](http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401409). Langford, M. & S. Kahanovitz. (2010). Just Tick the Boxes? Judicial Enforcement in South Africa, ESRC-Net.

<sup>54</sup> Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* 19: 189-216.

are constitutionally obliged to do so.<sup>55</sup> Many evictees are on long waitlists to receive housing from the national Reconstruction and Development Programme at the time of their evictions.<sup>56</sup> When housing is provided, it is often of low quality. Policy change is welcome, but is insufficient if it does not effect change on the ground.

These criticisms extend beyond *Grootboom* to socio-economic rights cases in general. The courts rely heavily on declaratory orders when ruling on socio-economic matters. Implementation of these orders has been limited and uneven, with litigants resorting to second and third cases to ensure follow through on the Court's orders. In spite of requests from litigants and the advocacy groups that support them, the Constitutional Court declines to take a role in oversight of the execution of its decisions.<sup>57</sup>

How are these remedies being monitored? The Constitution makes explicit provision for monitoring the translation of socio-economic rights jurisprudence into service delivery. Section 184 of the Constitution established a national parastatal, the South African Human Rights Commission (SAHRC), tasked with promoting and monitoring human rights. The Constitution assigns the SAHRC with collecting data from "relevant organs of state...on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."<sup>58</sup> The SAHRC compiles these data to produce reports on the status of socio-economic rights in South Africa.

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<sup>55</sup>(2009). Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others, Constitutional Court. SAHRC (2006). 6th Economic and Social Rights Report. Economic and Social Rights Report. Johannesburg, South African Human Rights Commission. Berger, J. "Litigating for Social Justice in Post-apartheid South Africa: A Focus on Health and Education", In Gauri, V. and D. M. Brinks (2008). Courting social justice : judicial enforcement of social and economic rights in the developing world. Cambridge, Cambridge University Press.

<sup>56</sup> Langford, M. S. K. (2010). Just Tick the Boxes? Judicial Enforcement in South Africa, ESRC-Net.

<sup>57</sup> Pillay, K. (2002). "Implementing Grootboom: Supervision Needed." ESR Review 3(1), Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." South African Journal on Human Rights 19: 189-216.

<sup>58</sup> (1996). Constitution of the Republic of South Africa. No. 108 of 1996, Republic of South Africa: s 184(3).

In thinking about the SAHRC's monitoring role, it is instructive to examine the part the SAHRC played in evaluating the remedies handed down in the *Grootboom* case. The Court charged the Commission with monitoring of and, "if necessary", reporting on the compliance of the state in following its remedies.<sup>59</sup> Although not required to, the SAHRC did report back to the Court, but with a narrow focus on the first order concerning the Grootboom community. The SAHRC's report found that the municipality had not sufficiently complied with the Court's first order. The report did not include information on the execution of its second order obliging the state to develop a public housing program.<sup>60</sup> This omission is especially troubling given that the SAHRC should be well suited to report on these figures. After all, the Constitution grants the SAHRC access to government housing data.

Beyond its role in judicial oversight, the SAHRC is more broadly concerned with the government's success with improving socio-economic conditions. In accordance with Section 184(3), the SAHRC solicits data on socio-economic indicators from various government agencies on national, provincial and local levels. It assembles these figures and reports its findings in Economic and Social Rights Reports, which are published on a sporadic basis. These were initially intended to be published on an annual basis, but the SAHRC has encountered problems securing funding from the Ministry of Finance.<sup>61</sup> As such, only six reports have been published since the SAHRC was first launched in 1995, and several of these were funded by European donors. That the state seems unwilling to finance its own research on socio-economic progress may be a reflection of its interest in monitoring enforcement rights provision.

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<sup>59</sup> (2001). *Government of the Republic of South Africa v Grootboom*, Constitutional Court: Para 97.

<sup>60</sup> Pillay, K. (2002). "Implementing Grootboom: Supervision Needed." *ESR Review* 3(1), Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* 19: 189-216.

<sup>61</sup> Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." *South African Journal on Human Rights* 19: 189-216.

NGOs provide an additional source of socio-economic rights monitoring. In the context of Africa's recent "constitutional revival", NGOs "shin[e] the light of critical scrutiny on progress and failings in constitutional governance."<sup>62</sup> The Institute for Democracy in South Africa (IDASA) conducts research on the implementation of socio-economics policy, publishes critical policy analysis and provides comments to parliament on draft bills. A second non-profit organization called the Human Rights Committee (with no relation to the SAHRC) conducts similar work. These NGOs and other like them report faster than the SAHRC and appear more capable of identifying politically sensitive trends.<sup>63</sup>

The enforcement and monitoring of the *Grootboom* remedies suggest that there is much left to be desired from judicial engagement with socio-economic rights issues. Indeed, there is reason to believe South African citizens are impatient with the pace of change. It is becoming common occurrence for outraged communities to organize rallies and marches targeting government agencies. Such demonstrations often become violent.<sup>64</sup> The overarching theme of these demonstrations has earned them the moniker "service delivery protests". Service delivery protests often revolve around housing issues like those that the *Grootboom* remedy sought to address, but also deal with other socio-economic issues such as health care, sanitation, schooling and employment.

Indeed, there is reason to believe that dissatisfied South Africans are not wrong to be disappointed. Measures of socio-economic development tell their own story. IDASA has reported that in spite of an overall upward trend in budgetary allocations for social services in the last ten years, indicators of wellbeing and human capacity have not improved and in some cases

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<sup>62</sup> Prempeh, H. (2007). "Africa's "Constitutional Revival": False Start or New Dawn?" International Journal of Constitutional Law 5(3): p. 489.

<sup>63</sup> Newman, D. G. (2003). "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda." South African Journal on Human Rights 19: 189-216.

<sup>64</sup> Africa News. (2009). South Africa: Delivery Protests Grow More Political. Africa News.

have deteriorated.<sup>65</sup> Using the United Nations Human Development Index, South Africa's progress has stalled or declined, depending on the socio-economic indicator. The country's rating on the UN Human Development Health Index is .506 for 2010, compared with .64 in 1995. Its rating on the UN Human Development Education Index is .668, the same rating it received in 1995.<sup>66</sup> Racial income inequality is a persistent fact of life in South Africa. After its last Income and Expenditure Survey for FY2005-06, Statistics South Africa found that the average annual income for black South Africans was 37,711 Rand (approximately \$5,154), compared with R280,870 (approximately \$39,010) for white South Africans.<sup>67</sup>

Although increasing budget allocations reflect a commitment to socio-economic rights, these policies do not seem to translate into improved service delivery services. IDASA sheds light on this seeming contradiction by pointing out that the problem may not be in the amount budgeted; it is in how the money is spent. The Department of Health and Social Development is the department principally responsible for social services. This department's performance on audits has consistently gone down while unauthorized expenditures have increased into the hundreds of millions. The Departments of Housing, Health and Social Development are guilty of "fiscal dumping",<sup>68</sup> which suggests that money is not being spent in the most effective manner.<sup>69</sup> Some have argued that the South African government has failed to fulfill its developmental

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<sup>65</sup> Verwey, L., Durham, S., & M. Zamisa. (2010). PIMS Budget Paper 6: Budget 2010: Still a Rocky Road Ahead. PIMS Budget Paper, IDASA.

<sup>66</sup> UNDP. (2010). "Worldwide Trends in the Human Development Index 1970-2010." Retrieved 12/15/2010, 2010, from <http://hdr.undp.org/en/data/trends/>.

<sup>67</sup> StatsSA (2006). Income and Expenditure Survey 2005-2006. Johannesburg, Statistics South Africa.

<sup>68</sup> Verwey, L., Durham, S., & M. Zamisa. (2010). PIMS Budget Paper 6: Budget 2010: Still a Rocky Road Ahead. PIMS Budget Paper, IDASA.

<sup>69</sup> The practice of relative fiscal austerity, until the fourth quarter when government departments offload their remaining budgets in order to justify future allocations. Verwey, L., Lefko-Everett, K., & A. Mohamed. (2009). PIMS Budget Brief 4: Budget 2009: Still Getting the Balance Right? PIMS Budget Brief. Johannesburg, IDASA.

imperative because of its tendency to put macroeconomic stability first.<sup>70</sup> Whatever the reason, the Courts' entreaties to improve socio-economic conditions have not manifested into change on the ground.

It should be repeated here that socio-economic rights are the central feature of South Africa's distributive justice project, a way of providing restitution to the majority wronged under the Apartheid regime. 1994 to 1996 are often referred to as South Africa's "democratic transition", but this formulation implies that the country has successfully "arrived" at democracy. The fulfillment of socio-economic rights is popularly understood to be a yardstick for measuring progress toward democracy. The persistence of racial inequality is suggestive of undemocratic tendencies that have lingered into the post-Apartheid era.

No doubt, it is unfair to proclaim South Africa's transitional justice project a failure so soon. It is unrealistic to expect the current government to have reversed the effects of decades of oppression. That said, South African citizens will only grant the new government so much time to get it right, and there are already mounting signs of disappointment. In the next section, I propose a return to the principles espoused by the ANC in the early 1990s as a way of fulfilling the promise of distributive justice. From the earliest blueprints for a new South African government up to the Constitutional Assembly, "minimum core" entitlements were seen as critical to providing the historically disenfranchised population with restitution. I endorse the "minimum core" approach as the basis for a more transformative socio-economic rights jurisprudence. I conclude by thinking through the implications of such an approach for a distinctly South African model of democratic governance.

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<sup>70</sup> Edigheji, O. (2007). *The Emerging South African Democratic Developmental State and the People's Contract. State Series*. Johannesburg, Centre for Policy Studies, Gevisser, M. (2009). *A legacy of liberation : Thabo Mbeki and the future of the South African dream*. New York, Palgrave Macmillan.

## **Toward A New Model of Democratic Governance**

The debate about the minimum core is critical to the issue of enforcement. Steinberg observes that “[t]he intense judicial activism inherent in the minimum core approach is justified in part by a perceived lethargy and recalcitrance on the part of the state in respect of its duty to protect the interests of the poor.”<sup>71</sup> It is failure to enforce Court orders through the development and implementation of meaningful policies for the betterment of the poor and vulnerable that evinces “lethargy and recalcitrance”. Perceptions of the state of progress, or misperceptions as Steinberg seems to suggest, have resulted in widespread disappointment at the pace of change. Perhaps, it is time to reconsider minimum core entitlements.

Since its first socio-economic rights case, the judiciary has been reluctant to engage with the notion of a minimum standard for fulfilling socio-economic rights. This has had two consequences: first, it permits many millions of South Africans to live in a state of abject poverty and vulnerability; second, it waters down the imperative to “progressively realize” these rights. Bilchitz argues that understanding that a right can be realized at certain levels, and demanding that a minimum core entitlement be realized without delay, is in keeping with the “progressive realization” clause. Absent some articulation of the minimum core, policy-makers can delay provision of services on the grounds that resources are being allocated elsewhere, presumably where there is greater need. A benchmark will spark action from policy-makers to realize their obligations to fulfill these rights.<sup>72</sup>

Bilchitz recommends a new approach to socio-economic rights jurisprudence that uses the minimum core notion alongside the three “reasonableness” tests. He proposes a third stage to

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<sup>71</sup> Steinberg, C. (2006). "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence." *South African Law Journal* **123**: p. 274.

<sup>72</sup> Bilchitz, D. (2003). "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence." *South African Journal on Human Rights* **19**: 1-26.

the two stage approach to the adjudication of socio-economic issues. This additional stage should precede deliberation of whether a rights infringement has occurred. In this new first stage, the Courts would be tasked with thinking in general terms about the content of the socio-economic right, in order to develop criteria for a minimum threshold of service provision. This is quite intuitive: how can one determine that rights have been violated without giving expression to those rights? Socio-economic rights jurisprudence that makes use of the minimum core alongside the reasonableness approach is at once prescriptive and aspirational. It demands a minimum level of service delivery, above which entitlements should be progressively realized.

Some worry that the minimum core approach entrenches judicial activism. Yet judicial restraint demands that a jurist apply the Constitution in a manner that conforms to how the authors intended.<sup>73</sup> The minimum core approach should be considered judicially restrained because it is what the constitutional framers wanted. This was made clear during the Constitutional Assembly, when it was announced that socio-economic rights would be justiciable and that judicial interrogation of budgets and policy was to be expected. It was made even more explicit in the writings of the framers of the Constitution. Although the minimum core approach requires that the judiciary perform a more proactive role in policy-making, it should not be understood as judicial activism, as that new role is in keeping with the original intent of the constitutional framers.

While it would be inaccurate to characterize the minimum core as judicial activism, this approach to socio-economic rights does entail a breach from established models of democratic governance. This breach is an inevitable result of the transformative nature of the Constitution, and not because of a presumptuous judiciary. Innovations in democratic governance are not

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<sup>73</sup> Wambali, M. K. B. (2009). "The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania." *Journal of African Law* 53(1): 34-58.

uncommon. Separation of powers, a doctrine which has been used to critique judicial pronouncements on socio-economic rights, is itself an innovation. The minimum core has the potential to usher in a new form of democracy, one that holds great promise for the social and economic development of South Africa.

Unfortunately, the Courts have thus far demonstrated a commitment to handling socio-economic rights cases conservatively. That said, the Constitutional Court has never stated unequivocally that the minimum core is inimical to the Constitution. Indeed, in its *Grootboom* decision, the Court explicitly left the possibility open: “[i]t is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.”<sup>74</sup>

The remainder of the paper is an exercise in imagining democratic possibilities. I proceed by arguing that the minimum core approach could be a catalyst for a new and distinctly South African model of democratic governance. I examine three characteristics of this new model: 1. a reconfiguration of the system of separation of powers; 2. litigation as an avenue for citizen participation in policy-making; and 3. an expanded, and even institutionalized role for NGOs. It is easy to romanticize an idea. In tracing the contours of this new model, I try to anticipate possible weaknesses.

First, South Africa’s expanded Bill of Rights has the potential to lead to a new configuration of the separation of powers. Classical conceptualizations of “separation of powers” hold that three branches of government – the executive, the legislature and the judiciary – wield separate and independent forms of power. The rationale behind this model of governance is that it prevents an undemocratic consolidation of state power. A minimum core of justiciable socio-economic rights blurs the boundaries between these functions. Socio-economic rights entail

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<sup>74</sup> (2001). *Government of the Republic of South Africa v Grootboom*, Constitutional Court: Para 33.

positive action on the part of government. Making these rights justiciable tasks the judiciary with interpreting whether those positive actions sufficiently enable the enjoyment of those rights. Thus, the judiciary is invited to contribute to socio-economic policy-making, an arena that has traditionally fallen within the purview of the legislature.<sup>75</sup> This constitutes a radical break from established practices of separation of powers. As one South African legal scholar observes, “[i]ntroducing a fully justiciable Constitution has fundamentally changed the place of the judiciary in South Africa’s constitutional and political order.”<sup>76</sup>

Given the judiciary’s history of legal positivism, the Courts have found this new role difficult to fill.<sup>77</sup> The Courts have issued progressive decisions in socio-economic cases, but these are supported by the reasonableness approach, a relatively conservative doctrine. This has thrown up contradictions. As Bilchitz and others have argued,<sup>78</sup> a judiciary tasked with interpreting a Constitution that enshrines socio-economic rights *must* engage with the content of these rights, in particular the “minimum core” notion. Still, classical separation of powers doctrine cautions the judiciary to interpret responsibly. Judicial engagement with the minimum core should be done with reference to the reasonableness clause, or else it is likely to “forestall the conversation between the three branches of government.”<sup>79</sup> In effect, the Courts will be offering inputs and guidance on policy. Rather than being antagonistically prescriptive, “the interpretative task should be viewed as courts *assisting* other branches of government to establish

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<sup>75</sup> That said, there have been moves away from this classical configuration toward a larger Executive that contributes more and more to policy-making. Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." South African Journal on Human Rights **20**: 383-417.

<sup>76</sup> Klug, H. (1997). "Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review." *Ibid.* **13**: p. 185.

<sup>77</sup> De Vos, P. *Ibid.* "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution." p. 73.

<sup>78</sup> Bilchitz, D. (2003). "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence." *Ibid.* **19**: 1-26, Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." South African Journal on Human Rights **20**: 383-417.

<sup>79</sup> Steinberg, C. (2006). "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence." South African Law Journal **123**: p. 269.

the precise content of their obligations.”<sup>80</sup> Fidelity to the constitution and the intentions of those who drafted it demands a reconfiguration of the separation of powers, with greater judicial input into socio-economic policy-making. That said, it is critical that the judiciary be circumspect in its contributions to policy and always cognizant of the limits of its own competence in this new arena.

A second feature of this new model of democratic governance is that it adds an avenue for citizen participation in policy-making. The Bill of Rights and the inclusion of judiciable socio-economic rights invite a different sort of citizenship work, over and above showing up at the polls. Too often political theorists distill the notion of democracy down to representative politics.<sup>81</sup> Because socio-economic rights are more often than not about the positive obligations of the state, litigation has become a way for citizens to contribute to policy-making. The Court has become a forum for people to publicly confront their governors about the priorities they set and the choices they make to realize these priorities.

Litigation has two advantages over voting. First, it is more participatory. In the courtroom, applicants may advance their own interpretation of the Constitution and their assessment of how well policy realizes its intent. Voting, by contrast, involves an up-down choice between options that are determined without the average citizen’s input. Second, litigation as a form of citizenship work is more transparent than voting. Casting a vote is an act of faith, even in the most robust democracies. Once the ballot is cast, a voter can only sit back and wait to learn the outcome. Even when electoral monitors are involved in the process, it is safe to assume that no single electoral monitor will have seen every vote cast. The courtroom is relatively more public. There are more people who bear witness to the event, in its entirety. In a well-functioning

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<sup>80</sup> Emphasis mine. Pieterse, M. (2004). "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." *South African Journal on Human Rights* 20: p. 406.

<sup>81</sup> *Ibid.* p. 391.

democracy, cases are often tried in public. Even when they are closed to the public, transcripts of the proceedings are maintained and more often than not made available as public resources.

This is not to suggest that elections are not a critical component of democracy; rather that they should not be the *only* component of democracy.<sup>82</sup> Certainly, citizens should not rely on litigation alone to make an impact on socio-economic conditions. Bringing a case is costly and time-consuming and most of those who suffer socio-economic rights violations are without the resources to engage in this sort of citizenship work. This explains why so few socio-economic rights cases have been tried.<sup>83</sup> Voting is certainly a more accessible avenue for contributing to policy. That said, judiciable rights that entail positive action from the state open up a space for citizens to challenge the government on how it translates abstract notions of “rights” into service delivery. This space has the potential to be an important feature of a new model of democratic governance.

NGOs have proven to be a critical part of socio-economic rights litigation. For better or worse, their expanded role in the functioning of democracy will be another feature of this new model. On the one hand, NGOs have much to contribute. As described above, they serve as watchdogs of the execution of judicial orders. They consolidate support for popular positions and marshal resources to have those viewpoints heard. NGOs have been indispensable in bringing socio-economic rights violations to the attention of the general public and to jurists. In the *TAC* case, an advocacy organization brought a case against the Minister of Health on behalf of all HIV positive pregnant women and their infants. After the Court issued its remedy, the *TAC* applied pressure on the Ministry of Health to ensure that nevirapine was quickly rolled-out. This

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<sup>82</sup> Dahl, R. A. (1971). Polyarchy: participation and opposition. New Haven,, Yale University Press: p. 4.

<sup>83</sup>Berger, J. “Litigating for Social Justice in Post-apartheid South Africa: A Focus on Health and Education”, In Gauri, V. and D. M. Brinks (2008). Courting social justice : judicial enforcement of social and economic rights in the developing world. Cambridge, Cambridge University Press.

legal action and the advocacy that followed would have been beyond the means of most of those who benefited from the *TAC* remedies. In this way, the organization was instrumental to enforcement of the Court's order. Of the socio-economic rights cases that have been brought to trial, those that have involved NGOs are more likely to end favorably for the wronged party and more likely to have remedies enforced.<sup>84</sup>

On the other hand, it is important to qualify these observations. NGOs are uncritically celebrated as altruistic representatives of the most vulnerable segments of society. Anthony Giddens, for example, sees the cultivation of civil society as a way to “democratize democracy”.<sup>85</sup> There is reason to treat the portrayal of NGOs as paragons of democracy with some skepticism. The mechanisms for ensuring NGO accountability are limited. NGOs draw their legitimacy from representing often vulnerable and marginalized groups of beneficiaries, but it is not clear where they get their authority to do so. NGOs can constitute their own elite interest groups, especially when they have the sort of funding that litigation entails. Partha Chatterjee sees NGOs “as the closed association of modern elite groups, sequestered from the wider life of the communities, walled up within enclaves of civic freedom and rational law.”<sup>86</sup>

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This paper has described the recent history of socio-economic rights in South Africa. Among the ANC's political theorists, these rights were seen as the central feature of an ongoing distributive justice program to provide restitution for those who suffered under the Apartheid regime. I have argued that contemporary socio-economic rights jurisprudence has not kept with

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<sup>84</sup> Ibid.

<sup>85</sup> Giddens, A. (1999). *The third way : the renewal of social democracy*. Malden, Mass., Polity Press.

<sup>86</sup> Chatterjee, P. and ebrary Inc. (2004). *The politics of the governed reflections on popular politics in most of the world. Leonard Hastings Schoff memorial lectures*. New York, Columbia University Press: p. 4.

the transformative ideals of the Constitution, ideals which were intended to inspire a new model of democratic governance. I have advocated for incorporating the “minimum core” notion of rights to the existing “reasonableness” approach as a means of more expeditiously improving socio-economic conditions.

South Africa’s transformative Constitution has important implications for democracy, in South Africa and around the world. The constitutional provisions for socio-economic rights have been called “brave”<sup>87</sup>, not because the government’s architects foresaw the country becoming a social welfare state. There is nothing new about that. Rather, the Constitution calls upon the judiciary to courageously chart new interpretative territory without the guidance of precedent; to arbitrate between citizens and their representatives. There is still time for the nation’s jurists to take up this challenge. South Africans demand it.

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<sup>87</sup> Sarkin-Hughes, J. and W. Binchy (2001). Human rights, the citizen and the state : South African and Irish approaches. Dublin, Round Hall: p. 7.

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