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The "Reasonableness" of Poverty: Progress and Pitfalls in South Africa's Socio-economic Jurisprudence

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I would like to thank my advisor Peter Rosenblum, for constantly unsettling my thoughts during this project, and questioning me at every turn.

To the many friends who have experienced my project with me and supported me throughout it, you have my sincere thanks.

I would like to dedicate this project to those South Africans killed in the Marikana Massacre on Aug. 16, 2012, when South African police opened fire on a crowd of striking miners at the Lonmin Platinum mine killing 34 people and injuring 78 more.

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Abstract: *The Constitutional Court of South Africa is perhaps the strongest institution in the country today. It is one of the few places for people to pursue institutional redress. In light of this, this thesis critically examines the reasonableness standard, the depoliticizing rhetoric around poverty the Court uses, as well as the practical obstacles for individuals or groups pursuing public interest litigation through the judiciary. It has found that for the Court to be more effective institution in light of the failings of other bodies conceived of by the Constitution, a number of the Court's approaches must be altered slightly. The reasonableness standard must function more effectively as a programmatic guide for the government by substantively articulating a minimum core, one which will give government programs a goal to pursue and halt the vicious cycle of programs that don't know what they are aspiring to. The Court also needs to better recognize the cost of the depoliticizing rhetoric it uses in its judgments, rhetoric that closes down political spaces for contesting poverty. Finally there are technical and practical obstacles including costs, direct access, and individual benefits that poor claimants face when trying to bring socioeconomic issues before the Court. All of these are problems that must be addressed for the Court, as potentially the only institutional actor left to fight for socioeconomic rights, to provide better redress to citizens whose rights have been violated.*

Introduction

South Africa has been declared a winner since day one. With the advent of the South African Constitution and free and fair elections in 1994, resulting in the election of President Nelson Mandela, South Africa and the South African Constitution were popularly seen as the start of a new direction for the human rights movement. With the conclusion of the Cold War, and the victory of the view that civil and political and socioeconomic rights needed to be treated as equally valuable, South Africa seemed to encompass the wide ranges of hopes for human rights going forward. Many claimed that oppression was over in South Africa and the country was merely a successful and peaceful transition away from leaving behind an abusive government-something rarely seen before. The model of the South African Constitution was to be utilized subsequently in a number of African states. Boutros Boutros-Ghali, UN Secretary-General at the time of transition, welcomed South Africa back into the world community and paid tribute to President Nelson Mandela and FW de Klerk at Mandela's presidential inauguration lunch, saying that "today South Africa regained its rightful place in Africa, in the

UN, and the family of nations. South Africa has earned the respect and admiration of all; tireless in search of understanding, and vigorous in pursuit of peace. You have refused to let difficulties defeat you."[1] The transition, the Constitution, and the government were hailed as victorious before it had even begun to undertake the daunting task of governing a deeply divided country.

The country today faces a number of economic, racial, religious, and political issues that have undercut the hope many people had at the end of apartheid. Youth that were born after the end of apartheid see a country that is still divided along many economic and racial lines. Though these divides exist in many countries across the world South Africa was thought to have a great chance at remedying them, due to its liberal constitution, robust civil society, and prominent human rights figures.

In 1996, South Africa was transformed under a constitutional order with a fundamental commitment to human rights. Notable about the South African Constitution is the extent to which it reaches beyond civil and political rights to include social and economic rights such as: rights to housing, health care, food, water, social security environmental protection, education and equitable access to land. By including these rights, the Constitution reaches towards what the Preamble describes as "freeing the potential of each person"[2] and rectifying the economic inequality that plagued the country. In doing so it also identified socioeconomic issues of inequality as one of the most formidable obstacles South Africa faces.

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[1] 72 Days That Shaped South Africa." *Southafrica.info*. Big Media, n.d. Web. 5 Feb. 2014. <http://www.southafrica.info/about/history/72days11.htm>.

[2] Preamble to the Constitution of the Republic of South Africa (1996)." *Thepresidency.gov.za*. South Africa Government, n.d. Web. 11 Mar.2014. <http://www.thepresidency.gov.za/docs/reports/annual/2008/preamble.pdf>

In order for these protections to be more than merely a hope, the 1996 Constitution does three particularly important things to ensure rights are realized. First the Constitution requires the State to "respect, protect, promote and fulfill the rights in the Bill of Rights."[3] Even if some social and economic rights are subject to progressive realization, the state is in any case under a specific legal obligation to respect, protect, and fulfill them. Second, the Constitution makes the rights in the Bill of Rights justiciable. If the state does not fulfill its duty, the citizens have recourse to an independent judiciary, which includes the Constitutional Court. Third the Constitution also creates several government entities and strategies aimed at strengthening constitutional democracy and helping citizen's address human rights grievances. Among these are chapter nine institutions such as the South African Human Rights Commission, an independent body meant to promote and monitor the realization of rights (among these socioeconomic rights).[4] While touching on some of these other measures the Constitution implemented, this paper concerns itself primarily with the Constitutional Court.

The Constitutional Court is the highest court of the independent judiciary through which individuals can seek recourse if their rights are violated. It is the body through which laws and policies are judged to be in accordance with the South African Constitution. This court was tasked with the burden of developing the jurisprudence around socioeconomic rights, which had traditionally been thought of as non-justiciable. During the transition the African National Congress came to power, and has subsequently dominated government, with part of their

[3] Constitution, *The Department of Justice and Constitutional Development*. Department of Justice, n.d. Web. 28 Apr. 2014. <http://www.justice.gov.za/legislation/constitution/constitution.htm>.

[4] Newman, Dwight. "Institutional Monitoring of Social and Economic Rights:A South Africa Case Study and a New Research Agenda." *ESCR-Net*. International Network for Economic, Social & Cultural Rights, 2003. Web. 1 Apr. 2014. <http://www.escr-net.org/usr_doc/Newman_Institutional_Monitoring.pdf>

platform being the reconciliation of the economic divide between blacks and whites. The Constitutional Court has faced questions, concerns, and skepticism about whether it and other institutional bodies can deliver on the multitude of promises made in the Constitution.

Today many of the aforementioned institutions such as the Human Rights Commission, various government economic programs aimed at redevelopment, and the government itself has come under criticism because they have proved ineffective at delivering on their promise to help rectify economic inequality. The change in government economic programs from the Reconstruction and Development Program (RDP) to the Growth, Employment, and Redistribution (GEAR) program largely abandoned the idea of development for the poor, the ANC dominated government has become increasingly criticized for corruption and ineffectiveness in lessening the inequality gap in the South Africa, and the Human Rights Commission has become largely impotent. Because of these factors, the Court has unfortunately been thrust to the center of the debate around socioeconomic rights. As other institutions and programs have failed or fallen short of the expectations around them, the Court has been forced to shoulder much of the burden of realizing socioeconomic rights and along with this the blame for failing to do so. In this way, the Court is more central than perhaps it should be in the debate around these rights, and may have been asked to do things that courts traditionally do not do. That being said, the Court must reimagine how its approaches its jurisprudence around socioeconomic rights so as to better provide institutional redress for socioeconomic rights violations.

The impact of poverty on millions of South Africans cannot be understated and warrants a brief exploration. The Court recognized the detrimental impact that economic inequality has on

the country. In the Court's inaugural socioeconomic rights case of *Soobramoney*, it observed that:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[5]

Written 12 years ago, it is important to note how little progress has been made in regards to inequality in spite of this sentiment.

Inequality and abject poverty persist in the post-apartheid period of South African history. While the level of income poverty has fallen in the last two decades this decrease is not significant. In fact in 2005, almost a quarter of South Africans lived under the lowest level of the poverty line, 174 rands per month, the equivalent of about 16 USD, while almost half of the population live on under 322 rands a month, or 30 USD. [6] It can also be observed that while racially defined income inequality has been falling, the average black worker still earns only a quarter of what the average white worker does and regardless, class based income inequality has increased exponentially. All of this has detrimentally affected South Africa's ranking on the Human Development Index (HDI), which also takes into account measures of things like life

[5] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. Para 8

[6] Hirsch, Alan. "The Unemployment Challenge in South Africa." *Journal for Economic Development and Co-operation* (2008): n. pag. Print

expectancy, literacy, and educational quality. In 2009 South Africa, while ranked 78th in terms of per capita income, was 129th under the HDI.[7]

One of the more apparent indicators of slow socioeconomic progress though is the extremely high unemployment rate of 25 percent that South Africa faces, which is one of the highest in the world and more than double the rate in fellow middle-income sub-Saharan African countries.[8] Unemployment is also heavily racialized and gendered. According to the South African Institute of Race Relations, using the strict unemployment definition, 27 percent of black South Africans, 20 percent of Coloured persons, and 10 percent of Indians were unemployed, as opposed to only 5 percent of whites. When the institute expanded the definition of unemployment, it found that African unemployment reached an astoundingly high level of almost 50 percent. In addition, women are also disproportionally affected, accounting for over 60 percent of the unemployed in this category. [9] While South Africa has tried to address these issues by giving social security to at risk individuals, such as the elderly and children, there are no benefits for working-age individuals who are unemployed.

There are also issues with healthcare, education, basic services and housing. Health issues have been hugely problematic and this continues to be the case. Maternal deaths remain high and communicable diseases, such as tuberculosis, plague South Africa. AIDS and HIV also remain a huge problem for the country, especially given the level of rape and gender based

[7] *Human Development Reports*. United Nations Development Program, 20010. Web. 28 Apr. 2014. <http://web.archive.org/web/20061027013029/ http://hdr.undp.org/statistics/data/indicators.cfm?x=10&y=1&z=1>

[8] Bhorat, Haroon. "Unemployment in South Africa: Descriptors and Determinants." Fourth IZA/World Bank Conference on Employment and Development. Bonn,Germany. 5 May 2009. Print.

[9] *South Africa Survey Online 2008/2009*. South African Institute of Race Relations, 2010. Web. 28 Apr. 2014. <http://www.sairr.org.za/services/publications/ south-africa-survey/south-africa-survey-online-2008-2009>

violence, which is poorly investigated and perpetually underreported. In spite of the high levels of funds that are channeled into schools, education remains poor for many, specifically certain disadvantaged groups and regions. Additionally the majority of students who do manage to get an education are unable to find employment after they complete their education. While there has been statistical progress in increasing access to water and housing, there are concerns about the definition of "progress" given the high number of service disconnections that disproportionally affect the poor, and housing constructed by the government has been criticized for questionable integrity.[10] In summation, the *State of the World's Cities Report* by UN Habitat in 2008 observed that," South Africa stands out as a country that has yet to break out of an economic and political model that concentrates resources."[11]

As can be seen, poverty is intimately affecting millions of South African citizens. The lack of tangible progress on the economic front has detrimentally impacted the legitimacy of institutions intended to ensure every individual has the basic services to ensure human dignity. What must now be explored, on the way to identifying the Court as the institution that now stands alone to handle socioeconomic issues, is how other supporting programs and institutions failed.

Confidence in the ANC's ability to carry out a systematic realization of socioeconomic rights through government programs have fallen drastically. The Reconstruction and Development program (RDP), the ANC's flagship development strategy, was intended to

[10] Langford, Malcolm, ed. *Socio-Economic Rights in South Africa Symbols or Substance?* Cambridge: Cambridge, 2013. Print. P.10

[11] *State of the World's Cities Report 2008/2009*. United Nations Habitat, 2009. Web. 28 Apr. 2014. <http://mirror.unhabitat.org/pmss/ searchResults.aspx?sort=relevance&page=search&searchField=title&searchstring=State+of+the+World%E2%80%99s+Cities++2008%2F2009&x=0&y=0>

generate rapid economic growth whilst simultaneously alleviating the poverty and deprivation affecting the majority of the black population. In the early days of the program, which set out a broad framework for socio-economic reform, it attracted virtually universal political support. However, the RDP came to mean very different things to different people: for some, it "constituted a 'vision for the fundamental (in the extreme, for the socialist) transformation' of South African society; for others, it represented little more than a set of loose quantitative targets for measuring progress in specific areas; for yet others, it offered a 'lever' for the reprioritization of government spending"[12]

Overall though, it has been strongly argued that the RDP had been used by the new government in general and the ANC in particular, to defer making some hard choices in respect of economic policies. According to Jesmond Blumenfeld, a Senior Lecturer in Economics at Brunel University, West London:

> "whether in terms of totally 'transforming' South African society, or of delivery of substantial 'developmental' improvements, the RDP must be adjudged to have failed….forthcoming 'growth and development strategy' will need to place rather more emphasis on the 'growth' than on the 'development' aspects of the problem"[13]

This forthcoming strategy, which would emphasize growth over develop came in the form of GEAR - standing for Growth, Employment and Redistribution. This program foresaw increased revenue along with responsible expenditure as a way to reduce the government deficit. In this respect and in raising South Africa's GDP, GEAR has been

[12] Blumenfeld, Jesmond. "RDPRIP? Reflections on Economic Growth and Development Policy in South Africa." *The South African Institute Of International Affairs* 10 (1996): 1-4. Print. P.2

[13]Blumenfeld, Jesmond. "RDPRIP? Reflections on Economic Growth and Development Policy in South Africa." *The South African Institute Of International Affairs* 10 (1996): 1-4. Print. P.3

moderately successful.[14] What it has been less successful at though, is curbing unemployment and improving the lives of the poorest South Africans. The Congress of South African Trade Unions argued in 2001 that:

> "In contrast to political progress, in socio-economic terms the legacy of apartheid remains entrenched and, with the massive loss of jobs in the past decade, even appears to be worsening.… Unemployment and underemployment are on the rise as more jobs are shed and people rely on survivalist activities to make ends meet. The complex nature of the transition [from apartheid] emerged in deeply contradictory government policies."[15]

The previous reflection on current poverty in South Africa further reflects the inability of GEAR to make a meaningful difference in South Africa. In spite of South Africa's strong constitutional protections for human rights the government repeatedly struggles to meet public demands for better realization of economic and social rights. Additionally problems with financial mismanagement, corruption, and deep concerns about the capacity of governmental leadership and administration—especially at the local government level—have contributed to inhibiting the progressive realization of economic and social rights.[16]

With increasingly few places to turn to have their needs met, many citizens have taken to the streets, protesting against numerous real and perceived injustices. Peter Alexander, professor of sociology and South African Research Chair in Social Change at the University of Johannesburg, argues that:

> "Since 2004, South Africa has experienced a movement of local protests amounting to a rebellion of the poor. This has been widespread and intense, reaching insurrectionary proportions in some cases. On the surface, the protests have been about service delivery and against uncaring, self-serving, and corrupt

[14] Walker, James. "South Africa's Economy: Much To Be Done." *BBC News* [London] 1996, Special Report: n. pag. Print.

[15] Knight, Richard. "South Africa: Economic Policy and Development." *Shared Interest*. Shared Interest:Investing in South Africa's Future, 2001.Web. 28 Apr. 2014. <http://richardknight.homestead.com/files/ sisaeconomy.htm>.

[16] *World Report 2013*. Human Rights Watch, 2013. Web. 28 Apr. 2014.<http://www.hrw.org/world-report/2013/country-chapters/south-africa>

> leaders of municipalities. A key feature has been mass participation by a new generation of fighters, especially unemployed youth but also school students. Many issues that underpinned the ascendancy of Jacob Zuma also fueled the present action, including a sense of injustice arising from the realities of persistent inequality"[17]

This is indicative of the poor becoming increasingly disillusioned with the ability of the government to meet their needs. Because of this they are desperately taking to the streets as a way to make themselves heard, having largely abandoned institutional methods of redress they see as having failed them. Their criticisms bear the inertia of years of vast economic inequality and injustice and have flown thick and fast and with the lack of change around the issues of socioeconomic welfare.

Having explored how economic programs have abandoned a development agenda and government is suffering from ever higher levels of distrust over issues like corruption a critical eye must now be turned to chapter nine intuitions, particularly the South African Human Rights Commission (SAHRC). Once envisioned as a way to monitor and promote the respect of human rights in the country, it has fallen short of its original goals. It was originally given a wide range of powers and envisioned as one of the primary drivers through which human rights could be realized and enforced. It may, for example, investigate human rights abuses and take steps to secure redress for these violations. Some methods for this include bringing cases to court and carrying out education about human rights. The SAHRC may also subpoena witnesses, a potentially powerful mechanism for its investigations. Finally, it also has powers of search and seizure, though these have not yet been exercised. At the risk of criminal penalty, all organs of state at all levels are obliged to give reasonable assistance to the commission if they require such

[17] Alexander, Peter. "Rebellion of the Poor: South Africa's Service Delivery Protests - a Preliminary Analysis." *Review of African Political Economy* 37.123 (2010): 25-40. Print

aid in order to pursue and complete its tasks. However, it has no power to enforce its recommendations, or even to require a response.[18]

In spite of the SAHRC's inability to enforce recommendations it was envisioned as a critical cog in the realization of human rights. The Asmal Committee, which recently conducted a review of chapter nine institutions in South Africa, including the SAHRC, found that, "the bodies do not use the existing mechanisms to ensure they exercise their powers fully. Many of the institutions under review do not at present perform to the best of their ability or capacity. We report on this more in sorrow rather than in anger."[19] This reflects a popular belief held by many South Africans, and in part demonstrated by the abundance of street protests.

The SAHRC has also been criticized for a lack of focus and thoroughness in its investigations, and in particular for spreading itself too thinly among many issue areas, rather than concentrating on a few where it could remain engaged and make a real difference. Others have criticized some of the SAHRC's interventions as being designed to grab headlines without achieving much. The multitude of monitoring bodies created by the Constitution and by legislation has led to further confusion as the proliferation of bodies created overlapping jurisdictions, which are very confusing for the public as they work to access the SAHRC. It is also costly for the taxpayer and it creates the possibility of unhealthy competition for media attention, resources, and opens different institutions to future manipulation by the government. Another weakness of the commission, and other chapter nine institutions, is the lack of clarity as

[18] "South Africa:South African Human Rights Commission." *EISA*. Electoral Institute for Sustainable Democracy in Africa, 2009. Web. 28 Apr. 2014. <http://www.content.eisa.org.za/old-page/ south-africa-south-african-human-rights-commission>

[19] Asmal, Kader. "Remarks at the Launch of the report of the ad hoc Committee on the review of Chapter 9 and Associated Institutions." Memo. 21 Aug. 2007.TS. Parliament of South Africa

to the action that should be taken on its recommendations.[20] While this is a brief overview of the criticisms of chapter nine institutions, there are two issues that warrant further interrogation.

One of these is the way in which these institutions lack accessibility to ordinary citizens, particularly the poorest. This is especially concerning given the fact they are constitutionally mandated to protect and promote the rights of these very citizens[21]. A number of chapter nine institutions have well-established provincial offices, but the overall effectiveness of these offices in providing access for citizens is uncertain. It is also unclear whether they have set up rural offices in line with the aforementioned Asmal Report's recommendation. Perhaps more shockingly, the Human Sciences Research Council (HSRC) has reported that citizens remain generally unaware of the existence of chapter nine institutions like the SAHRC and are poorly educated on their purpose, powers, and functions[22]. Ipso facto, they do not know where these institutions are situated, how to access them, or what their purpose is.

South African civil society has criticized the South African Human Rights Commission further for its cautious relationship with the government. This is attributed to the fact that commissioners don't want to aggravate government because "the leadership of institutions such as these are appointed by the president and also funded by state departments."[23] This is acutely

[20] "South Africa:South African Human Rights Commission." *EISA*. Electoral Institute for Sustainable Democracy in Africa, 2009. Web. 28 Apr. 2014. <http://www.content.eisa.org.za/old-page/ south-africa-south-african-human-rights-commission>

[21] The Democracy and Governance Research Programme of the Human Sciences Research Council. "Final Report: Assessment of the relationship between the Chapter 9 Institutions and Civil Society." *Human Sciences Research Council* (2007):n. pag. Print.

[22] The Democracy and Governance Research Programme of the Human Sciences Research Council. "Final Report: Assessment of the relationship between the Chapter 9 Institutions and Civil Society." *Human Sciences Research Council* (2007):n. pag. Print.

[23] The Democracy and Governance Research Programme of the Human Sciences Research Council. "Final Report: Assessment of the relationship between the Chapter 9 Institutions and Civil Society." *Human Sciences Research Council* (2007):n. pag. Print.

apparent as many commissioners belong to the African National Congress.[24] As academic Thomas Keil wrote, "Since the ANC has a dominant position in Parliament, there is the inherent danger that candidates are selected according to how convenient they are for the ruling party."[25] The result of this is that appointees are sometimes, potentially most of the time, ill-equipped to carry out the duties of the SAHRC, which detrimentally impact that effectiveness and transformational approach of these institutions. Reflecting on this development as the ANC nominated appointees for SAHRC commissionership in 2010, Pierre de Vos, a South African legal scholar, wonders:

> "Why did the ANC controlled committee nominate some of these characters when so much better candidates applied for appointment? Why was the process politicised? Why were candidates with a strong human rights background and a track record of fighting against racism and discrimination not appointed? It is not as if the SAHRC can declare invalid actions of the executive or the legislature. It is supposed to promote and protect the human rights of ordinary people and the more effective and passionate the Commissioners are, the better ordinary people will be served. Maybe some of these Commissioners will surprise us all and will do sterling work. But do not hold your breath.[26]"

The detriments of such a process are not merely hypothetical. A former Public Protector, Lawrence Mushwana, poorly investigated the Oilgate party funding scandal[27], in which the Mail and Guardian revealed that 11 million rands of tax payers' money had been funneled into ANC coffers through the oil trader Imvume. The ANC and Imvume were not held responsible, largely

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[24] The Democracy and Governance Research Programme of the Human Sciences Research Council. "Final Report: Assessment of the relationship between the Chapter 9 Institutions and Civil Society." *Human Sciences Research Council* (2007):n. pag. Print.

[25] Keil, Thomas. "Supporting Constitutional Development in South Africa: A Study of the Effectiveness of the Three Chapter 9 Institutions." *Chapter 9 Institutions in South Africa*. Democracy Development Program, 2010. Web. 28 Apr. 2014. <http://www.ddp.org.za/siteworkspace/ Final%20Report%20Thomas%20Keil.pdf/view>

[26] De Vos, Pierre. "Human Rights Commission Appointments Not Up To Scratch." *Constitutionally Speaking*. Pierre de Vos, 28 Sept. 2009. Web. 28 Apr. 2014. <http://constitutionallyspeaking.co.za/ human-rights-commission-appointments-not-up-to-scratch/>.

[27]Faull, Lionell. "Mushwana Unmoved by Oilgate Ruling." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 10 June 2011. Web. 28 Apr. 2014.<http://mg.co.za/article/ 2011%E2%80%9006%E2%80%9010%E2%80%90mushwana%E2%80%90unmoved%E2%80%90by%E2%80%90oi lgate%E2%80%90ruling>

because Mushwana argued that he "could not follow the money as his mandate did not extend to oversight of non-state entities such as Imvume and the ANC"[28]. He was sharply criticized for deliberately shielding the ANC instead of protecting the public interest. Unsurprisingly, this event and other similar occurrences have hurt the reputation of institutions such as the Public Protector, SAHRC, and others. In the end it is easy to ask the question-where has this left individuals looking for institutional means of redress for socioeconomic violations? In many instances, they have gone to the judiciary, specifically the Constitutional Court one of the few tools left in a shrinking toolbox.

The Constitutional Court has undertaken a number of actions in an attempt to carry out its mandate and develop a jurisprudence of socio economic rights so that it can continue on the path of transformative constitutionalism. One of the most important tools in this regard is the reasonableness standard, a review mechanism through which the Court evaluates state policies. It also has shown a strong tendency to protect encroachments upon individual's socioeconomic rights by the state. Additionally, a stipulation of meaningful engagement has been developed so as to provide more dialogue and communication between parties the hope that a solution can be found and alleviate the need to go to the Court.

There have also been some instances in which the legal mobilization that has occurred around the issue at hand in a case has resulted in positive change regardless of the eventual ruling of the Court. This can be seen in the case of *TAC,* in which many municipalities decided to expand access to the HIV treatment drug Nevirapine before the Court ruled in favor of the

[28] Sole, Sam. "The ANC's Oilgate." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 3 May 2005. Web. 28 Apr. 2014. <http://mg.co.za/article/ 2005-05-03-the-ancs-oilgate>.

applicants. Additionally, as could be observed in the case of *Olivia Rd* and *Thabelisha Homes,* the Court has taken measures and put up obstacles that have drastically lowered the rate of eviction in South Africa, and in many places have stopped to practice altogether.

However, in light dearth of further institutional support for the Court, its jurisprudential approach falls short of what is needed in the current environment. The Court today stands alone to tackle the vast array of socioeconomic issues as it is possibly the only institution with the capacity and legitimacy to do so. Because of this the Court must expand its jurisprudential approach to take up some of the tasks that were originally placed on other institutions in order to provide a more holistic approach to realizing socioeconomic rights as well as serving as a more open medium for institutional redress. Public opinion seems to be ripe for a more assertive and active Court. People are taking to the streets and engaging in illegal service reconnection to have their socioeconomic needs met. Issues of poverty and basic services have been identified as the most important issue of the upcoming 2014 elections.[29] While this paper could examine why other institutions have failed or why the Court cannot do any more than it has already done, that is not its goal. The economic situation in South Africa is not good, yet it is possible to envision how the Court, the one institution left substantively standing, might engage with socioeconomic rights differently in the future given the lack of institutional support around it. Identifying and articulating this differential approach is the objective of this paper.

This thesis will first look at the arguments surrounding the inclusion of these rights in the Constitution and the history of how they came to be enshrined there. In chapter two it will

[29] Gigaba, Malusi. "Soapbox: Radical Economic Change Should Be The Focus Of This Election." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 23 Apr. 2014. Web. 28 Apr. 2014. <http://mg.co.za/article/2014-04-23-soapbox-radical-economic-change-should-be-the-focus-of-this-election>

examine the development of jurisprudence the court has undertaken when deciding socioeconomic cases and look at the importance and contributions of foundational cases such as *Soobramoney, Grootboom, TAC, Olivia Rd, Thubelisha Homes,* and *Mazibuko*. In using the Constitutional Court's landmark rulings on certain key issues as case studies, it is possible to extrapolate the Court's developing jurisprudence around socio economic rights. Finally, chapter three will critically examine various aspects of the Constitutional Court's jurisprudence such as the reasonableness standard, the depoliticizing rhetoric around poverty the Court uses, as well as practical obstacles for individuals or groups pursuing litigation through the judiciary. As perhaps the strongest institution in the country of South Africa today, it is one of the few places for people to pursue institutional redress. If it does not recognize this, and address the critiques raised in the following pages, it runs the risk of standing on the sidelines while poor individuals walk away from its chambers, into the streets, and out of the institutional methods of redress altogether.

Chapter 1:The Making of the Constitution, Apartheid, and Socioeconomic Rights in South Africa

In 1910, the Union of South Africa was inaugurated and the resultant Constitution, negotiated by the Boers (white South Africans of Dutch heritage) and the British colonizers, provided for an all-powerful government which consisted of only white men and removed the minimal voting rights which black people had previously held. This was despite native South

Africans lobbying the conference where the constitution was drafted to include them in the process[30]

For non-white South Africans this marginalization would be a trend over the following 90 years, and foreshadowed the foundation of the apartheid system that would come later. Following the removal of native voting rights the new government moved quickly to implement a number of restrictive legislative measures, such as the infamous 1913 Land Act, which oppressed, dispossessed, and disenfranchised native South Africans of land. The Land Act set aside a paltry 7.5% of the land in South Africa non-whites, which were the majority of the population. The act also stipulated that non-whites could not possess any land outside of their tribal areas. The act created problems for non-whites who worked on white land but had their own piece of property. Essentially share-croppers, these people had to decide between working for the white farm owners and moving to the areas set aside for non-whites people.

The response of many Africans to these initial incursions on their rights was the formation of a single body under which Africans could unite and pursue their own interests. The end result of the desire for representation was the formation of the African National Congress (ANC), on the 8th of January, 1912. The birth of this organization served multiple purposes. Not only did it give Africans a clear avenue through which to work for change and articulate their plight, it also would become the headquarters of their eventual resistance. Perhaps most importantly though, the ANC provided non-white South Africans with a vision and hope of a better life, which would become necessary in the struggles the future held. Fighting a

[30] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa*. N.p.: Oxford, 1999. Print. P.10

constitutional order in which institutional segregation and economic disenfranchisement was legally enforced, the hope of many natives was for a South Africa that was democratic, equal, and just.

Apartheid South Africa

Over the next 50 years, the Afrikaner National Party was able to gain a strong majority in parliament. Strategists in the National Party invented apartheid as a means to cement their control over the economic and social system. Initially, the aim of the apartheid was to maintain white domination while extending racial separation. Starting in the '60s, a plan of "Grand Apartheid" was executed, emphasizing territorial separation and police repression.[31]

The origin of this system was the idea of maintaining control over and fully utilizing South Africa's extensive mineral resources by ensuring a continuous source of cheap labor. Through continuous legislative policies of segregation, which limited access by African people to advanced skills and the market in general, apartheid reinforced the place of Africans solely as a source of cheap labor to work in mines and other mineral industries. The need for cheap labor became even more acute when South Africa experienced a post-World War I economic crisis, resulting in a sharp dip in gold prices. To maintain any sort of profit margin, the state Chamber of Mines was forced to lay off large amounts of its white work force and employ cheaper, semi-skilled black workers at substantially lower rates. This directly exacerbated conflict between poor white workers and poor black workers.

[31] "Constitutional History of South Africa." *Constitution Net Supporting Constitution Builder Globally*. International IDEA, n.d. Web. 28 Apr. 2014. <http://www.constitutionnet.org/country/ constitutional-history-south-africa

To continue to have a source of cheap labor that would sustain their profitability, the government needed to make sure that people came to urban areas and for this reason they introduced taxes targeting non-whites. The result of this was that young men left their families to come to the cities to earn more money. This money was then given over to the chief of their community to pay these new taxes. This was essentially a system of migrant labor - people moved across the country, often far from home, to work for a short while and then return to their families. There were few job opportunities in the non-white areas and therefore the migration to the city was a necessary, precisely and what the government had envisioned when it introduced higher taxes.

The system of migrant labor caused problems to develop in black society. Young men sometimes could not marry until they had done a certain amount of labor for the chief. Families were disrupted. Farms were left in the hands of women and young children. Men in the cities became used to the western way of life, and did not want to settle on the farms again. The tribal and traditional society of native South Africans was broken up.

In urban areas, Africans were quickly becoming the majority of the poor working class, and increasingly dispossessing whites of jobs which whites felt they were entitled to, leading to greater Afrikaner nationalism. At the same time the introduction of an urban African working class allowed for greater unity among the working poor, which led to the rise of the South African Communist Party (SACP) as well as a strengthening of the ANC.[32]

[32] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa*. N.p.: Oxford, 1999. Print. P.14

In 1948, the National Party, firmly in power, introduced the policy of apartheid. With the enactment of apartheid laws, racial discrimination became firmly institutionalized throughout the country. The race laws of apartheid policy touched every aspect of social life, such as prohibiting marriage between non-whites and whites and the sanctioning of ``white-only'' jobs. In 1950, the Population Registration Act required that all South Africans be racially classified into one of three categories: white, black (African), or coloured (of mixed decent). The coloured category included major demographic subgroups of Indians and Asians. Classification into these categories was based on appearance, social acceptance, and descent. A person could not be considered white if one of his or her parents were non-white. The determination that a person was ``obviously white'' would take into account ``his habits, education, and speech and deportment and demeanor.''[33] A black person would be of or accepted as a member of an African tribe or race, and a colored person is one that is not black or white. All blacks were required to carry ``pass books'' containing their fingerprints, photos, and information on their degree of access to non-black areas.[34] These demeaning policies would exist for many years but also inspired opposition within the communities they were working to oppress.

In response to these oppressive laws, racial categories (blacks, Indians, and coloureds) found cause to unite, and led various campaigns of defiance, the most widespread of which occurred in 1952. Three years later, in June 26, 1955, a Congress of the People was called by the oppressed parties, to which all political parties were invited. Over several thousand delegates showed up, and after much consultation the Freedom Charter was drafted, which was in effect

[33] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa*. N.p.: Oxford, 1999. Print. P.14

[34] "Policies of Apartheid of the Government of South Africa A International Efforts to Eradicate Apartheid." *RefWorld*. UNHCR The UN Refugee Agency, 19 Dec.1990. Web. 28 Apr. 2014. <http://www.refworld.org/docid/ 3b00f18a10.html>

the initial draft of a new and inclusive constitution for South Africa[35]. This Congress illustrated the development of the various parties involved from a simple apartheid opposition movement to a more mature political movement that had leadership, goals, and an agenda. Heavily inspired by the Atlantic Charter, which was the initial document to articulate self-determination of peoples as a demand, the Freedom Charter would greatly influenced what a democratic South Africa would look like and left a mark on a generation of political leaders. The importance and sentiments of the document are reflected in the opening paragraph of the Charter, which reads:

> "We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birthright without distinction of colour, race, sex or belief; And therefore, we, the people of South Africa, black and white together equals, countrymen and brothers adopt this Freedom Charter; And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won."[36]

Here the ANC's commitment to recognizing the inequality that came as a result of apartheid is apparent, as is the emphasis on the recognition of multiple forms of injustice. There is also the hopeful overture for lessening the huge wealth disparity that had developed from years of exploitive labor laws and apartheid. Thus the nascent beginnings and contours of a new South Africa were traced.

In the years before 1960, there were increasing calls for an inclusive conference to discuss the upcoming referendum to declare South Africa a republic. In May of 1957, then ANC President-General Albert Luthuli appealed for a national convention to discuss the various issues

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[35] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa*. N.p.: Oxford, 1999. Print. P.14

[36] "The Freedom Charter." *African National Congress*. African National Congress, n.d. Web. 28 Apr. 2014. <http://www.anc.org.za/show.php?id=72>.

on hand, such as the continuation of apartheid policies in the new republic. His calls were ignored. Other calls for conventions were also ignored by the white elite in power, which led to a greater militant thinking within the ANC, and increased frustrations among African nationalists. In 1960 a massive campaign of defiance was launched, and over 10,000 people were arrested. Yet on May 31, 1961 the government held referendum for whites only which subsequently declared South Africa a republic.

This vote abolished the Union of South Africa created by the South Africa Act of 1909 and established the Republic of South Africa. Important departures from the previous constitution included a president, a prime minister, and an executive council (or cabinet) which would be based in Pretoria. A bicameral legislature was also created to be based in Cape Town and an independent judiciary in Bloemfontein.

One thing that didn't change though was the white dominance over political life, primarily through a discriminatory electoral structure that disenfranchised non-whites. The Bantu Authorities Act of 1951 restricted the political participation of blacks to the homelands called Bantustan and effectively removed their say in the national direction of South Africa. While there were selective reforms in 1964 and 1968 which opened some political space to Asians and Coloureds by allowing limited political participation in ethnic affairs, this was only a token participation. Following this, a Coloured Persons' Representative Council was created in 1964 and a South African Indian Council established in 1968. There was no creation of such a council for black South Africans. [37]

[37] "Constitutional History of South Africa." *Constitution Net Supporting Constitution Builder Globally*. International IDEA, n.d. Web. 28 Apr. 2014. <http://www.constitutionnet.org/country/ constitutional-history-south-africa

The 1961 referendum and the exclusion of blacks in the drafting of a new constitution marked an acute break in South Africa's history. Over the next 30 years, the country would slide into an armed conflict, drawn along racial lines. In March 1961 the leaders of the ANC and others conducted an All-In Conference which included fourteen hundred delegates from all around the country. These delegates represented one hundred and fifty different and diverse subsections of society, including various religious, social, political, and cultural groups. While the white elite and the National Party ignored the conference, there were two important resolutions that were decided upon and would allude to future conflict. The conference resolved that the government and constitution of South Africa, because it was decided without the participation or consent of the African people could not be legitimate and therefore could have no moral validity or merit any support. Secondly, it resolved to demand a National Convention that would be inclusive of all South Africans, that this convention be called by the government, and that the representatives decide a new and non-racial constitution for the Republic of South Africa. [38]

These resolutions were, expectedly, not heeded by the government. Instead, their reaction was to ban the ANC and other African nationalist organizations. The result of this was that these parties were left with no legal avenue through which to pursue their causes, which eventually led to the ANC concluding it had no option but to take up an armed struggle against the government. By 1964, after a number of years of government crackdowns, much of the ANC's leadership was in jail or out of the country and it seemed that the government had effectively silenced the movement. However this silence would not last long.

[38] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa.* N.p.: Oxford, 1999. Print.

South Africa became the focus of the world and was widely condemned for the practice of apartheid after the government suppressed a number of peaceful protests such as the Sharpeville Massacre, in which hundreds of people (including children) were killed. Throughout the ‘60s, ‘70s, and ‘80s, thousands of South Africans fled the country due to oppressive policies or to join the liberation movement. Through it all, the armed struggle was gaining momentum, buoyed by the international criticism of South Africa. With all these coming to bear on it, the government recognized the need for at least the appearance of reform.

In 1978, then Prime Minister Botha began changing the state to allow for various types of reform. One of the more significant changes he undertook was the creation of a new government department, The Department of Constitutional Development and Planning. This department was set up to introduce “reforms” while the military and security apparatus proceeded to take on a much more integral role in the strategic-decision making of the state. In 1983 with the help of the government he formed a new Tricameral Parliament and a President’s Council. These bodies were created to give the appearance of opening up the political realm for more equal participation by all races but in reality whites still dominated the institutional mechanisms of power.

This was South Africa’s last attempt at reform and lasted until the demise of apartheid in 1993 and the sweeping changes that would follow. During much of this time period though, non-white South Africans effectively lived under martial law due to the increased prominence the state security apparatus took in decision making.

Botha’s period of rule was shaped by a strategy that fought the militancy of the ANC and other parties with reform and repression. The strategies were heavily influenced by Botha’s

militaristic style of government, learned in part through his time in the armed forces and studying the strategies of the military dictatorships of Latin America. However this strategy was met with only limited success. By 1984 armed resistance had intensified and ANC military operations in South Africa had risen to 50 strikes a year. By 1985, the ANC had developed a presence in rural areas and had even taken up the use of landmines. Nineteen eighty six was declared the year of the people's army and Umkhonto we Sizwe(MK) was formed. Alternative local structures of government were set up in the townships along with peoples courts and these mechanisms proceeded to govern many townships and rural areas as the state was having difficulty governing large swathes of the country. With the formation of MK, and the formalization of the idea of a people's army, the number of attacks rose to between 250 and 300 per year from 1986 on. Within the various banned parties there was also debate at this time about how best to proceed with the liberation movement. Many within the movement wanted to start a guerilla war that some believed would force the government to the negotiating table. A decision had to be made, and the desire and drive for meaningful change was palpable.

While many in these organizations pushed for war, there were a core group of senior leaders such as Thabo Mbeki, Walter Sisulu, and Nelson Mandela who continued to hold out for a peaceful negotiation and transition. It was during this time period that negotiation began between Mandela and representatives of Botha's government, as Botha realized that the crisis in South Africa was reaching cataclysmic proportions and drastic political change was necessary.

In addition, there was mounting international pressure and the realization among the white political class that the apartheid system was unsustainable. This forced Botha and the NP towards dismantling the system of apartheid. The initial step was the lifting of the ban on political organizations, specifically and primarily the African National Congress (ANC) and the

release of Nelson Mandela after he spent 27 years in prison. After this there was a repeal of the apartheid legislation. These developments took place against a backdrop of intense political violence. In spite of the violence, between this period and 1993, the NP, the ANC and other political organizations, engaged in a series of negotiations under the umbrella of the Convention for a Democratic South Africa (CODESA), that, despite many starts, stops, and points of contention eventually led to the adoption of an interim constitution to govern the transition to a new South Africa. This came after an all-white referendum in which over 60 percent of whites voted in favor of absolute reforms, clearing the way for a new South African nation.

The Transition to a New South Africa

The transition to a new South Africa and what the new Constitution included many debates, the substance of which is too far reaching to cover here. Yet one set of rights and entitlements that was heavily debated was the idea of including socio economic rights in the Constitution. The African National Congress, throughout its history, had maintained a commitment to such rights. In fact, the implication of this commitment was that the inclusion of these rights in the Constitution was almost a requirement for the ANC in the eyes of its supporters. The ANC saw no separation between the political and socioeconomic rights. This is due to the fact that oppression of the South African people was not just political, but socioeconomic as well and left millions in destitute poverty.[39]

During the time that the Constitution was being negotiated the Cold War was coming to an end and the result was that civil and political rights and socioeconomic rights were no longer necessarily placed in a hierarchy, but was instead seen as mutually reinforcing and necessary.

[39] "Speech on the Parliament Floor on the Economic Oppression of South Africa." *African National Congress*. African National Congress, 2004. Web. 28 Apr. 2014. <http://www.anc.org.za/ancdocs/speeches/2004/sp0709.html>

The mutual realization of these rights, something that had been seen as near impossible because the Soviet Union aligned itself with the idea of socioeconomic rights and the United States with civil and political rights, did not seem insurmountable anymore. Thus an increased emphasis was placed on both civil and political and socioeconomic rights by the human rights movement. It was hoped that socioeconomic rights, pursued by the government and enshrined in the constitution, might be the way towards the actualization of the Universal Declaration of Human Rights ideal of "freedom from fear and want"[40].

A number of the ANC's important documents, such as the Freedom Charter, lend weight to the importance of socioeconomic rights, specifically as a means to rectify the vast economic inequality that existed in the country. For instance, the Charter states that:

> "Education shall be free, compulsory, universal, and equal for all children…All people shall have the right to..be decently housed, and to bring up their families in comfort and security…..No one shall go hungry; and free medical care and hospitalization shall be provided for all, with special care for mothers and young childen…"[41]

Though it was not a formal ANC document, the Charter represented the philosophical goals and expression of the general anti-apartheid movement and the ANC specifically, shaping their characters and actions. [42] It was also the precursor to a number of important other documents, which figured prominently into the shaping of the ANC constitutional priorities such as the 1988 *Constitutional Guidelines for a Democratic South Africa, Ready to Govern* in 1992, and the draft of the Bill of Rights that was written in 1990.

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[40] *The Universal Declaration of Human Rights*. The United Nations, n.d. Web. 28 Apr.2014. <http://www.un.org/en/documents/udhr/>

[41] "The Freedom Charter." *African National Congress*. African National Congress, n.d. Web. 28 Apr. 2014. <http://www.anc.org.za/show.php?id=72>.

[42] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Print

The *Constitutional Guidelines for a Democratic South Africa* was drafted by the ANC Constitutional committee and with the vast popular support the party enjoyed, seemed as if it could become reality. It included explicit references to the Freedom Charter, specifically stating that "The Constitution shall include a Bill of Rights based on the Freedom Charter….the state and all social institutions shall be under a constitutional duty to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination."[43]

As 1992 began, the ANC wrote *Ready to Govern,* expanding upon their constitutional guidelines they wished to see laid out at CODESA.[44] Whereas *Constitutional Guidelines* reinforced the commitment of the ANC to the values of the Freedom Charter, this document instead fleshed out a more nuanced and mature application of those. The result of this was a more coherent application of those values to the enormous project of constitution making within the unique context of South Africa. *Ready to Govern* grew out of years on internal debate in the ANC and demonstrated their clear intent to place affirmative burdens on the state in reference to socioeconomic rights:

> "The Bill of Rights will affirm the right of all persons to have access to basic educational, health, and welfare services. It will establish principles and mechanisms to ensure that there is an enforceable and expanding *minimum floor of entitlements for all*, in the areas of education, health, and welfare. It will commit the courts to take into account the need to reduce malnutrition, unemployment, and homelessness when making any decisions…..Special agencies linked to Parliament and the courts should be set up so as to ensure that national, regional, and local authorities apply appropriate shares of their budgets to achieving these rights, taking into account the problems of limited resources and affordability"[45]

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[43] African National Congress. "Constitutional Guidelines for a Democratic South Africa." *DISA*. Digital Innovation South Africa, n.d. Web. 28 Apr.
2014. <http://www.disa.ukzn.ac.za/ index.php?option=com_displaydc&recordID=pam19890000.026.021.000

[44] "Ready to Govern: ANC policy guidelines for a democratic South Africa." *African National Congress*. African National Congress, n.d. Web. 28 Apr. 2014. <http://www.anc.org.za/show.php?id=227>

[45] "Ready to Govern: ANC policy guidelines for a democratic South Africa." *African National Congress*. African National Congress, n.d. Web. 28 Apr. 2014. <http://www.anc.org.za/show.php?id=227>

The drafts of the Bill of Rights that were put forward intimately adhered to these principles and were pushed by the ANC's representatives for enshrinement into the Interim Constitution.

The National Party was against the idea of including socioeconomic rights in the Constitution. The traditional arguments against the justifiability of such rights and realpolitik arguments about the South African economy formed the bedrock of their opposition. The NP leader at the time, FW De Klerk argued that "only if economic security can be maintained together with political security will we have the stability that is necessary to build a new South Africa."[46] De Klerk saw socioeconomic rights as compromising South Africa's economic security due to the positive costs they placed on the government. The arguments of the NP are similar to the larger arguments against socioeconomic rights at the time. The opponents of the entrenchment of these rights in the Constitution argued that the indeterminacy of these rights, the positive nature of their obligation on the state, and their policy and financial implications rendered them unfit for judicial deliberation. The untethered idealism of such rights would risk the democratic legitimacy of the Constitution as a whole if the state was, as many believed, unable to meet the substantive demands for things like housing and basic services that it might be forced to act upon. [47]

In relation to courts, and Constitutional Courts in particular, it was argued that the unique nature of socioeconomic rights and the institutional limitations of courts would make the adjudication of these relatively new rights nothing short of impossible. One side of this debate was that socioeconomic rights were fundamentally different rights from those of civil and

[46] "Commentary No. 5: De Klerk and 'Law and Order' in South Africa." *Canadian Security Intelligence Service*. Canadian Security Intelligence Service, n.d. Web. 28 Apr. 2014. <https://www.csis-scrs.gc.ca/pblctns/cmmntr/ cm05-eng.asp>

[47] Davis, Dennis. "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles." *South African Journal of Human Rights* 475 (1992): n. pag. Print

political rights. This difference was articulated as the division between "negative" and "positive" rights. Traditional political practices and rights such as equal protection, freedom of expression, and due process, are largely seen as negative because they require the state to abstain from intervening with the individual's experience of the right. In short, these rights are to be free from interference by the government. Socioeconomic rights on the other hand are identified as positive rights because they place affirmative obligations on the state to push particular programs or policies that focus on various areas of social welfare. The traditional paradigm of rights supports and encourages this separation. Negative rights are justiciable because they involve a narrow interpretation of the law in discrete cases, examine precise rights, and to remedy them requires that the government only cease from taking some action that would violate the right. Positive rights necessarily aim to exhort something from the government because they are vaguely worded, involve increasingly complex issues, and assign unacceptable positive obligations to government, which the government might not even necessarily be able to meet.[48] In relation to the National Party, their rejection of social rights justiciability relies on socioeconomic rights inability to be effectively adjudicated. With this in mind, the real concern of the NP is not necessarily the nature of socioeconomic rights, but what they fear judges and courts might do with such rights.

Another contention of the conventional wisdom around socio economic rights and courts can be divided into two areas-political legitimacy and institutional competence. Arguments about legitimacy emphasize the blasphemy of assigning the task of interpreting social values and ills to the most undemocratic institution in a democracy-the judiciary. Perhaps most critically, the issue

[48] Alston, Philip, and Ryan Goodman. *International Human Rights in Context: Law, Politics, Moral*. Ed. Henry Steiner. N.p.: Oxford, 2007. Print. .

at hand is allowing the court to interfere in an allegedly core legislative task- the allocation of state monies. The task of crafting a remedy in a social rights case is too close to the legislature's traditional role of deciding and implementing policy. Through this lens, if socioeconomic rights are justiciable, they would intrude in an impermissible way on the duties of the legislative branch. This would especially be the case when a court overrides a legislative act regarding social values and welfare in a way that asserts the state must take a different course of action. Such an assertion would upset the traditional view of the separation of powers in a constitutional democracy.

Institutional competency is another core concern of the opponents of socioeconomic rights. This concern focuses on procedural limitations-a courts capacity to not only attain, but then assess the massive and extensive amounts of information that would come when deliberating on a social welfare case. Not to mention the potentially problematic aspects of a court's remedies. To detractors, it is unlikely that a court has the institutional capacity to properly adjudicate social and economic rights for many when coming into contact with a single complainant or group. Encountering individual claimants is a procedure that is inappropriate for adjudication because the limited deliberation and singularly focused remedies that a court creates to address the issue cannot easily account of all individuals that are in a similar situation. In short, how is it possible for the court to hear a singular complaint, assess all the available information on the subject, and then craft a directive or policy that would be effective for the broader population that the claimant represents?[49]

[49] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Print.

These were the arguments in the minds of the NP drew upon when they opposed the inclusion of these rights in the Constitution. At the heart of these concerns though was the ANC vision of the Bill of Rights, which would have the ability to upset the status quo that apartheid had left, one that preserved socioeconomic privilege for white South Africans and specifically Afrikaners even more than it harmed all non-white South Africans. Rights that would alter the domestic distribution of wealth were a direct threat the privilege of this demographic. [50]

The Interim Constitution was in effect from the first free and open non-racial elections in South Africa in 1994 until 1996 when the final constitution was approved. It was intended to be merely a framework document for governing the country during the period leading up to elections and the subsequent drafting of the final constitution. In it, there were few socioeconomic rights provisions. Additionally, these rights were not explicitly mentioned in the Thirty-four Principles that would shape the new Constitution. This is mostly attributed to the strength of the negotiating position of the NP in the initial stages of the drafting. It is also due to the fact that the negotiating parties, as they neared the end of the completion period of the Interim constitution, simply postponed some of the more contentious issues so that they could proceed with long delayed democratic elections. [51]

Following said election, the ANC was the dominant political force of country, garnering over 60% of the popular vote. With this support and their past commitment to include socioeconomic rights in the Constitution, the ANC brought the issue back to prominence within the Constitutional Assembly. Though the National Party and the Democratic Party were the main

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[50] Du Plessis, Lourens, and Hugh Corder. *Understanding South Africa's Transitional Bill of Rights*. N.p.: Juta, 1994. Print.

[51] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Print.

opposition to such rights, the ANC carried more political clout. The ANC was further supported by the Public Participation Programme, an ambitious and popular public education and involvement program that gathered submissions and comments from a variety of domestic groups on what should be included in the final Constitution. According to the Constitutional Assembly, "jobs, houses, the need to end crime and violence and better education" were the primary concerns for most South Africans"[52]

As the two year drafting window came to a close, the debates in the Constitutional Assembly focused on sharply divisive issues such as minority education, labor issues, and provincial power. [53] The enshrining of socioeconomic rights in the constitution had seemingly been recognized as a forgone conclusion because of the popular support of South Africans, the dominance of the ANC, and an overwhelming desire to "give real hope in legal form to those without hope."[54]

The Constitution of South Africa Act was approved with an overwhelming affirmative vote in the constitutional referendum. It has been described as a masterpiece of post conflict constitutional engineering in the post-cold war era, and this has remained the popular narrative. Designed in the context of South Africa's transition to democratic rule which started with the release of Mandela in February 1990, the constitution completely reconfigured South Africa's political institutions, injected new dynamics, resulted in transformative changes across the

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[52] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Print.

[53] Ebrahim, Hassen. *The Soul of a Nation: Constitution-making in South Africa*. N.p.: Oxford, 1999. Print. P.200-208

[54] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Print.

political landscape, and effectively ended decades of oppressive white minority rule. The Constitution has since been amended sixteen times but remains the basic law of the nation. Within it there are specific socioeconomic provisions, most explicitly in sections 26-29, which read:

> 26 Housing
>
> (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> 27 Health care, food, water and social security
>
> (1) Everyone has the right to have access to-
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> (3) No one may be refused emergency medical treatment.
>
> 28 Children
>
> (1) Every child has the right-(c) to basic nutrition, shelter, basic health care services and social services . . .
>
> 29 Education
>
> (1) Everyone has the right-
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.[55]

[55] *The Department of Justice and Constitutional Development*. Department of Justice, n.d. Web. 28 Apr. 2014. <http://www.justice.gov.za/legislation/ constitution/constitution.htm>

This chapter has sought to explain the origin and history of the struggle for socioeconomic rights in the South African Constitution as well as provide the conventional wisdom surrounding socioeconomic rights at the conception of the Constitution, arguments that still hold weight in South Africa to this day.

Chapter 2: The Development and Progress of a Socioeconomic Jurisprudence

The South African Constitutional Court came into existence at a trying and exciting time for the new democracy. By including socioeconomic rights in the Constitution, the writers had given the country a mission to strive towards throwing off the inequality that years of apartheid rule had engrained so deeply in the social and economic fabric of the country. The courts came into being with many arguments about what it should or should not do, especially in the realm of socioeconomic rights. In addition, it had to develop its own jurisprudence around such rights, as the judges were working in a new area that had not been substantially adjudicated on before. This chapter will look at how the Court worked to address the numerous questions surrounding socioeconomic rights as well as what a number of landmark court cases such as *Soobramoney,*

Grootboom, TAC, Olivia Rd, Thubalisha Homes, and *Mazibuko* have done to shape the understood jurisprudence around socioeconomic rights in South Africa today.

Before the Court could start ruling on socioeconomic cases and developing this jurisprudence though, it had to address and review the legitimacy of the new South African Constitution that was brought before it in 1996. The Court had to determine whether the Constitution was in adherence to the Thirty-four Principles, which were agreed upon by the NP, the ANC, and the other negotiating political parties at CODESA. These principles were strong guides to the writing of the Constitution, as they explicitly required or prohibited certain elements in the final draft. When the Constitution was brought before the Court so that it could rule on whether or not it adhered to and met the Thirty-four Principles, the Court had to answer many who critiqued the placement of socioeconomic rights in the Constitution as well as decide whether these rights should be included in the final Constitution.

There were a variety of groups that filed arguments in opposition to the inclusion of socioeconomic rights. These included the South African Institute for Race Relations, the Free Market Foundation, and the Gauteng Association of Chambers of Commerce and Industry.[56] These arguments generally centered on the core contentions that socioeconomic rights were not universally accepted fundamental rights, were not justiciable, and that they violated the constitutional separation of powers by intruding into the legislative and executive arena. These concerns echoed the contentions of the NP mentioned in the previous chapter.

[56] Certification of the Constitution of the Republic of South Africa v. n/a. 26 Southern African Legal Information Institute. Constitutional Court of South Africa. 1996. Print. paras. 76-78

When the Court certified the South African Constitution it addressed these contentions. First, the Court had already held that "universally accepted rights" such as those in the Universal Declaration of Human Rights did not make up the ceiling for human rights, but rather served as a floor, which could be added to or built upon by the Constitutional Assembly with a variety of "other rights that were not universally accepted."[57] In relation to the other two objections that were filed, the lack of justicability and the violation of the separation of powers, the court held that:

> "We are of the view that [social] rights are, at least to some extent, justiciable..many of the civil and political rights entrenched in the [proposed constitutional text] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability."[58]

In addition, the Court stated that:

> "At the very minimum, socioeconomic rights can be negatively protected from improper invasion" In doing so the Court delineated a floor of minimum justiciability, in that it would not permit government interference with access to social rights. Finally, in response to the argument relating to the violation of separation of powers, the Court held that, "it cannot be said that by including socioeconomic rights..a task is conferred upon the courts so different from that ordinarily conferred on them…that it results in a breach of the separation of powers."

By this it is meant that courts are usually given controversial matters on which they must rule and it will generally impact the legislature. This does not stand at odds with the traditional separation of powers, but is an important mechanism in the system of checks and balances, which is why the court dismisses this claim simply and without much analysis.

The significance of this is that it began to illuminate the Court's view of socioeconomic rights, answered some of the critiques of socioeconomic rights, and permitted the inclusion of

[57] Certification of the Constitution of the Republic of South Africa v. n/a. 26 Southern African Legal Information Institute. Constitutional Court of South Africa. 1996. Print. paras. 76

[58] Certification of the Constitution of the Republic of South Africa v. n/a. 26 Southern African Legal Information Institute. Constitutional Court of South Africa. 1996. Print. para. 78

socioeconomic rights in the final text of the South African Constitution. While the court had been able (to a certain extent) to answer the questions on justicability, there was still the looming question of enforceability that they had not addressed. The first opportunity to do so would come two years later in the first substantive socioeconomic case that the Court was presented with- *Soobramoney v. Minister of Health, KwaZulu Natal (Soobramoney).*

Soobramoney

Soobramoney involved a challenge to the resource rationing strategy of a state run hospital. This resource rationing policy caused Mr. Soobramoney, the claimant in the case, to be denied treatment (access to dialysis) because he suffered from chronic renal failure. He was not a candidate for a kidney transplant, and as such, he would need kidney dialysis for the rest of his life to prolong it, even though his condition was incurable. The KwaZulu Natal Department of Health's policy involved the limiting of access to dialysis to people suffering from acute or chronic renal failure while they were awaiting a kidney transplant. According to the Department of Health this was necessary to make sure that those kidneys could be cured had the best chance of living, eventually without dialysis. Mr. Soobramoney argued that the policy violated his right not to be refused emergency medical treatment, or alternatively, his right to life. The right to not be refused medical treatment fell under Section 27(3) of the Constitution and in the alternative he argued it breached his right of access to healthcare services in section 27 (1) (a). [59]

The Court unanimously rejected both of these claims. The claim under Section 27(3) was rejected because Mr. Soobramoney sought treatment for an ongoing and chronic medical

[59]Pieterse, Marius. "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience." *Human Rights Quarterly* 26.4 (2004): 882-905. Print..

condition. The Court held that Section 27(3) was intended to provide medical services for someone who is in a sudden and catastrophic medical situation that calls for immediate attention. In this event, they should not be denied services such as an ambulance or access to a hospital that would be able to provide the needed treatment. [60] The Court then chose to base its judgment on the right to have access to healthcare in section 27 (1) (a). The Court found that due to the rationality of the rationing policy, it could not be shown that the state was in violation of its constitutional duties. In doing so, the court showed deference to the administrative mechanisms that had imagined and implemented the rationing policy. Writing for the majority of the Court, J Chaskalson wrote that, "a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[61] This demonstrates a conscious practice of judicial deference on the part of the Court.

It isn't difficult to justify the Court's decision. Healthcare rationing is widespread in all states, and to a certain extent, unavoidable. In any situation involving Mr.Soobramoney's claim, it would be hard (aside from a challenge to where resources were being allocated) to fault the idea that it is more logical or "rational" to treat those who can be cured rather than those who cannot. In this case the Court, in outlining its jurisprudence, was confronted with the challenge of developing some sort of model for the enforcement of the positive duties imposed by Section 27 of the Constitution.

[60] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. para. 20

[61] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. para. 29

Tellingly, the Court rejected the idea that this Section imposed a direct and immediate burden on the state to provide healthcare, or services in general, to anyone on demand. In doing so, the Court addressed the concerns of people that thought justiciable socioeconomic rights would place too much of a demand on states that could not afford, quite literally, to realize them. The Court also demonstrated its reluctance to step too far into the territory of the legislature or executive, by indicating that it would be slow to interfere with programs that are undertaken in "good faith". Additionally the Court brought to the forefront the idea of rationality. To be justifiable, a decision to limit healthcare or other programs in general needs only to be rational. This notion would emerge in greater detail in *Grootboom* but this is the place where it makes its first appearance. The Court's overall approach illuminated its reluctance to dive into the substantive nature of socioeconomic rights, such as determining what entitlements might fall within the scope of the right to access to healthcare. By deciding not to address socioeconomic rights substantively, they also side stepped the potential issue of having to indicate how these entitlements might impact how the state had to allocate its resources.

In an overall minimalist approach, the Court did not attack socioeconomic rights as substantively as many detractors might have feared. Instead they took a cautious and nuanced approach, choose not to make a substantive ruling on entitlements, instead deferring to the Ministry of Health, and brought the issue of rationality to prominence. Yet the Court sympathized with the plight of Mr. Soobramoney. To end his concurring judgment, J Sachs wrote:

> "The applicant in this case presented his claim in a most dignified manner and showed manifest appreciation for the situation of the many other persons in the same harsh circumstances as himself. If resources were co-extensive with compassion, I have no doubt as to what my decision would have been.

> Unfortunately, the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made."[62]

The idea of rationality raised in *Soobramoney* would be tackled more expansively in the next seminal case to come before the Court.

Grootboom

The next substantive case to come before the Court in 2001, five years after *Soobramoney*, was *Government of the Republic of South Africa v. Irene Grootboom and Others* (*Grootboom).* During this period there was lethargic economic progress and an increase in crime and violence for many poor South Africans. There was an acute lack of economic opportunity and a vast proportion of South Africans were living in poverty. Many had hoped that the Court would take a more active role in the advancement of socioeconomic rights, but thus far, this hope had come to naught. J Sachs during these years actually acknowledged "the harsh reality that the Constitutions promise of dignity and equality for all remains for many but a distant dream"[63]In *Grootboom* the Court took a more expansive approach to the socioeconomic rights adjudication.

Grootboom concerned the adjudication of socioeconomic rights in relation to housing rights. The facts in the case are representative of the all too often failings of the South African housing infrastructure. The applicants in *Grootboom* became homeless when they were required to leave an informal, or squatter, settlement which was located on private land that had been selected for the construction of low-income housing, sponsored by the state. The eviction

[62] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. Print.

[63] Sachs, Albie. "Social and Economic Rights: Can They Be Made Justiciable?" *Southern Methodist University Law Review* 53 (2000): n. pag. Print.

affected 510 children and 390 adults who joined resident Irene Grootboom's suit over the matter. They were forcefully evicted from their new informal settlement, while their possessions were burned and their homes destroyed. When Irene Grootboom brought her suit forward national, provincial, and local governments challenged an order from the Cape High Court which held that the relevant government bodies had met their constitutional duty under Section 26(housing) but had failed to meet their duties under Section 28 (minimum services for children). The High Court held that the "spirit" of Section 28 required that the order "should take account of the need of the child to be accompanied by his or her parent" and thus a parent was to accompany the child in the shelter provided.[64] As a result the High Court found that the evictees should be temporarily provided with adequate shelter until they were permanently set up with housing through a provincial housing plan.

The Government of the Republic of South Africa appealed to the Constitutional Court and the Court unanimously overturned the High Court decision. It found that "neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand"[65] but also that the community's right to access to adequate housing under Section 26(2)[66] of the Constitution had been violated. This was, in essence, because the relevant provincial government's housing plan did not pass the threshold of reasonableness imagined by

[64] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. paras 14-16

[65] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 95

[66] See the end of Chapter 1 for an explicit explanation of this Section

the Court in Section 26(2) of the Constitution.[67] The Court recognized that housing was "a constitutional issue of fundamental importance to the development of South Africa's new Constitutional order. [68] Yet housing still remained unavailable to many South Africans."[69] The Court first stipulated that state's negative obligation to housing would cause it to "desist from preventing or impairing the right of access to housing"[70] The more important aspect of the ruling though focused on the positive obligations of the state. The Court focused on three aspects of Section 26. It called for legislative, as well as other measures to address the situation, recognized the limitations of available resources, and finally, permitted progressive realization. The Court then combined these three aspects in a reasonableness analysis, which was essentially a more detailed extension of the idea of rationality that it had put forward in *Soobramoney*.

It then applied this analysis to the state housing program, where this time it was confronted not with a matter of resource allocation within an existing program but the lack of a program altogether for the immediate needs of evicted individuals. The failure of the state in this instance was identified as its lack of a program to take any steps to assist those in desperate and immediate housing need. The Court, in keeping with its approach in *Soobramoney*, rejected the contention that the right to housing had any interpretive content independent of the duty to take reasonable measures for its realization. Specifically, the Court rejected an interpretive approach

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[67] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 65,95,99

[68] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 2

[69] *Towards Ten Years of Freedom Review*. Government of the Republic of South Africa, Oct. 2003. Web. 28 Apr. 2014. <http://www.10years.gov.za/review/ documents.htm

[70] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 34

based on the idea that socioeconomic rights had a minimum core of content. This idea was based on the Convention for Economic and Social Rights General Comment 3 on the nature of states parties' obligations under the ICESCR and stipulated that socioeconomic rights consisted of a basket of goods and services to which all rights bearers were entitled.[71] Writing the judgment of the Court, J Yacoob stated:

> "The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core"[72]

The Court found that the state's primary obligation under Section 26 of the Constitution was largely to adopt and implement a reasonable policy within its resource capacity that would ensure access to housing over an extended period of time. The Court then devoted much of its judgement to the idea of reasonableness previously mentioned, further embellishing it. The Court held that, to be "reasonable", a state housing policy must:

- Be comprehensive, coherent, and effective (para 40)
- Have sufficient regard for social, economic and historical context of widespread deprivation(para 43)
- Have sufficient regard for the availability of the state's resources (para 46)
- Make short, medium, and long term provisions for housing needs (para 43)

[71] "UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)." *RefWorld*. UN Committee on Economic, Social and Cultural Rights, 14 Dec. 1990. Web. 28 Apr. 2014. <http://www.refworld.org/docid/ 4538838e10.html>.

[72] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 33

- Give special attention to the needs of the poorest and most vulnerable(para 42)
- Be aimed at lowering administrative, operational, and financial barriers over time. (para 45)
- Allocate responsibilities and tasks clearly to all three spheres of government(para 39)
- Be implemented reasonably, adequately resourced and free of bureaucratic inefficient or onerous regulations (para 42)
- Respond with care and concern to the needs of the most desperate (para 44) and;
- Achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most valuable are catered for. (para 44)[73]

The Court held that the reasonableness of measures are determined by the context they are undertaken in. It also found that the minimum core argument that was laid our previously could possibly be relevant to what is reasonable in a given context, but would not be determinative of that state action in such a case. This reasonableness standard taken in a contextualized account is significant. It allowed the court to develop a meaningful interpretive scheme by which it could evaluate state action, while also allowing it to steer away from developing concrete entitlements of widespread application. With this in mind, the court held the current housing system unreasonably neglected to consider and address those most in need. The program "fell short of constitutional compliance" because it "failed to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing."[74] The Court then proceeded to issue a declaratory order that required the state to remedy this failure. The Human Rights Commission of South Africa was assigned to monitor and report of the status of the implementation intermittently. Furthermore, the Court gave some direct guidance to what the plan might look like, when it said that the program should

[73] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print.

[74] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 99

be implemented "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[75]

There are a number of important developments to examine within the context of this case. Arguably, the most important aspect of this case is the reasonableness standard that the Court developed. Many have compared the Court's development of this standard as a retreat into administrative law.[76] Yet, in a necessary transition away from a traditional and formalistic view of law to the transformative approach of the new Constitution, this is not necessarily a negative. The Courts falling back upon principles of administrative law makes sense because in many legal systems, the review of administrative policy involves striking a difficult balance between judicial activism and judicial deference. In retreating to the comfort zone of administrative law, the Court made an important gain in *Grootboom*- it laid out what it considers to be an appropriate role for itself in adjudicating the multilayered and connected issues raised by claimed violations of socioeconomic rights. In this way, socioeconomic rights are vindicated in not being as far removed from courts "traditional" function of review, and therefore their justicability is not nearly as implausible. Additionally, the reasonableness standard gave the Court a specific and outlined way to consider the policy of the state and its accordance with the Constitution. This is something that the Court would use going forward, and is one of the major takeaways from this case.

Secondly the Court substantially rejected the idea of a minimum core of rights and the enforcement of socioeconomic rights through this means. The idea of the UN in formulating a

[75] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 99

[76] Liebeneberg, Sandra. *Socio-economic Rights: Adjudication Under a Transformative Constitution*. N.p.: Juta, 2010. Print

minimum core was to set a "floor" for rights, but such an idea was robustly rejected by the Court. While the ruling of *Grootboom* did result in the formulation of a national emergency housing policy and gave poor people a means to resist eviction, the Court did not issue any order to directly address the situations of the plaintiffs. The Court stated that neither of the rights violations "entitles the respondents to claim shelter or housing immediately upon demand."[77] The UN idea of a minimum core was deciphered through a multi-year study by the UN Committee of country reports submitted by its state signatories. The Court rejects creation of a similar core for South Africa because the Court lacks the same resources as the UN with which to conduct such a study. While the Court rejects this procedure and ultimately rejects the idea of a minimum core, it does agree with the UN Committee in the necessity for a determination in "regard to the needs of the most vulnerable group that is entitled to protection of the right in question."[78]

These were two of the main ideas to come of the Court's decision and further embellish its developing jurisprudence. While many consider this the peak of the Court's action, because it resulted in a national housing policy, added a contextualized element to court evaluations of policy, and gave evictees a line of reasoning with which to resist eviction, the limits of the Court's ability to enforce such decisions in the future is still unclear. The Court was well aware they were building a jurisprudence that had not been attempted before, and the result was "a

[77] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 68, 95

[78] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 31

cautiously crafted opinion."[79] So what would the case of *Grootboom* be? Would it be the farthest extent to which the Court would go for enforceability? Or would it be a small step towards a more expansive jurisprudence? The following case, *TAC*, shows the Court is willing to go further, while later cases call this idea into question.

TAC

The *TAC* case, or *Minister of Health v.s. Treatment Action Campaign,* came before the Court in 2002 and has proved to be one of the Court's more forceful rulings. A group of NGO's, led by the Treatment Action Campaign, challenged a government health policy that related to the prevention of HIV transmission from mother to child. The drug Nevirapine had been shown to drastically decrease the chances that a mother who contracted HIV would transmit the deadly virus to her child in the midst of childbirth. The manufacturer of the drug was providing it to the South African government for free for five years. In the midst of this window, the government created a program for distributing the drug. The government would distribute it at a limited number of pilot sites, of which there would be two in each of South Africa's eleven provinces. Doctors outside of these pilot distribution sites were barred from distributing this drug, even though it had previously been rigorously tested and approved for widespread use. The government stated that it planned to conduct a multi-year study and analysis of the drug before implementing a national plan. Meanwhile, only ten percent of the estimated 70,000 annual births that involved the transmission of HIV were affected or covered by the approved pilot sites. [80]

[79] Christiansen, Eric. "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court." *Columbia Human Rights Law Review* 38.2 (2007): n. pag. Prin

[80] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. paras 10-12, 19, 62

The TAC challenged this program on the basis that it violated the state's constitutional obligation to "respect, protect, promote, and fulfill the rights in the Bill of Rights,, especially when these rights in question related to the right of access to health care services for pregnant women and children."[81] The TAC requested that the Court lift the barring of the distribution of Nevirapine outside of those sites included in the pilot program and that it issue an order requiring the government to immediately create an expansive national program. In a far reaching judgment, arguably its farthest reaching to date, the court granted both requests.

The Court ordered that the government make the drug Nevirapine available outside of the designated pilot sites. It also ordered that the drug be administered in public hospitals for cases in which doing so was medically indicated and where there was the capacity to provide HIV testing and counseling as well as the administration of the drug. The government was instructed to remove bureaucratic restrictions that prevented the drug from being administered in these circumstances. The Court found that the government had breached the right of access to health care services under Section 27 of the constitution. In its opinion the Court referenced a large amount of information, drawn "from a variety of specialized perspectives, ranging from pediatrics, pharmacology and epidemiology to public health administration, economics and statistics"[82]

Then the Court applied the reasonableness test that it had developed in *Grootboom* to *TAC* , finding that the governments goals did not justify the lack of impact the pilot program had

[81] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print.

[82] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para. 6

on the vast majority of South African women and children for whom HIV treatment was needed. The drugs proven effectiveness, the fact that the human and financial capital were available to administer it, and the vulnerability of poor mothers and children all contributed to the finding that the government policy was unreasonable. Specifically, the Court in its judgment stated that:

> "The Government policy was an inflexible one that denied mothers and their newborn children…a potentially lifesaving drug..It could have been administered within the available resources of the State without any known harm to mother or child..The policy of government..constitutes a breach of the State's obligation under Section 27(2) read with Section 27(1)(a) of the Constitution"[83]

Subjected to a high level of scrutiny, the government argument in *TAC* ultimately did not hold up. The Court ordered extensive remedies and actions to be taken on behalf of the government to rectify the breach of rights it found. This ruling came closest to either the nightmare scenario of judicial overreach that critics of socioeconomic rights predicted or, as argued by supporters, the judicial realization of the transformative values found in the Constitution. In this case, the Court further developed the reasonableness standard it created in Grootboom, applying it to an even greater extent on government policy and finding that said policy did not meet the criteria of the standard.

In essence, this is one of the most important developments to come out of these three landmark cases of *Soobramoney*, *Grootboom*, and *TAC*. The Court's borrowing of a reasonableness standard from administrative law has "enabled it to forge remedies for socioeconomic rights claimants without much transformative adjudication, at least at the interpretive level".[84] The reasonableness standard is sufficiently flexible to enable the Court to

[83]Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para 10

[84] Wilson, Stuart, and Jackie Dugard. "Constitutional Jurisprudence: The First and Second Waves." *ESCR-Net*. ESCR-Net, n.d. Web. 28 Apr. 2014. <http://www.escr-net.org/sites/default/files/ Wilson_and_Dugard_-_2nd_Wave_SA_Constitutional_Jurisprudence.pdf>

defer to the executive's choices in policy (as was the case in *Soobramoney)* or on the other hand outline the purposes of specific socioeconomic rights much more distinctly(which occurred in *Grootboom*).

Two other developments that the case of *TAC* reinforced were the idea of judicial restraint and the unequivocal dismissal of the idea that the Court should only issue declaratory orders. In this ruling, even with the strong stance of the Court, judicial restraint was evident as the court rejected a request for ongoing judicial oversight of the governments HIV treatment programs. The Court also did not push forward a lower court's order that the state provide infant formula to poor mothers. In regards to this, the Court stated:

> "We do not consider it appropriate to deal with the use of formula feed in the order. Whether it is desirable to use this substitute rather than breastfeeding raises complex issues, particularly when the mother concerned may not have easy access to clean water or the ability to adopt a bottle-feeding regimen because of her personal circumstances. The result of the studies conducted at the research and training sites may enable government to formulate a comprehensive policy in this regard. In the meantime this must be left to health professionals to address during counselling. We do not consider that there is sufficient evidence to justify an order that formula feed must be made available by the government on request and without charge in every case."[85]

This stipulation, along with client counseling, were the most expensive aspects of the lower court's order. The Court found that there was not enough evidence to justify an order that the government had to provide formula upon request and free of charge in every case. There is the implication here though that such an order does not overstep the reach of the authority of the Court. In this instance, the Court was just unable to obtain the necessary facts to make such an order in this context. So while the Court engaged in judicial restraint, it alluded to the fact that it might not always in the future.

[85] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print para 128

Finally, the Court soundly rejected the government's argument that the courts were not empowered to issue any order other than a declaration of rights in complicated and multifaceted socioeconomic matters. This addressed any lingering critics that might have argued the non-justiciable nature of these rights. The Court acknowledged that it was not ideally suited to issues orders that had a plethora of consequences and that the judicial role in matters such as these should be "rather restrained and focused" [86] while also highlighting its role in requiring the state to take measures to meet its constitutional obligations and subjecting these measures to critical examination to assure their reasonableness. In fact that Court stated that:

> "Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of the State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so."[87]

The result of this ruling is the view that the Court is, contrary to the belief of some, not rendered powerless by the doctrine of separation of powers when tasked with the domestic enforcement of socioeconomic rights. Whereas traditionally courts have been hesitant to affect and jar the budgetary and policy processes, the judgment of *TAC* shows that socioeconomic rights are as capable of vindication as civil and political rights.

Taken together, these three initial landmark cases tell us much about how the Court chose to begin to build its unique jurisprudence. In *Soobramoney* the Court laid the foundation for the reasonableness standard by utilizing the idea of rationality in its ruling. It also showed judicial

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[86] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002.Print. para, 38, 98, 113

[87] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para. 99

restraint and deference to the State in taking their plan in good faith, while simultaneously tacitly objecting to the idea of a minimum core of socioeconomic rights as laid out in the ICESR. In *Grootboom* the courts codified the idea of rationality into a reasonableness standard by falling back onto administrative law as a way to measure the justice of state policy. It also took steps forward by explicitly rejecting a core minimum of rights in much stronger language than what it had used previously. In this case, the result ended up being a new national housing policy. Finally, in *TAC*, the Court issued one if its most directive rulings. It answered questions about whether the Court could issue more than simply declaratory orders by issuing orders requiring certain action from the executive. In this case, it forced the executive to expand its program to a much larger cross section of the country. In this way, it showed in some sense that the Court does have "teeth", or enforcement mechanisms, when it comes to socioeconomic rights issues. In summary, the Court has demonstrated it will sometimes choose to be directive, that it will generally defer to the state when it comes to policy development, it rejects a core minimum of rights, stating instead that rights should be implemented gradually, and that the Court has developed a standard for measuring the reasonableness of State policy. Yet there are many questions still remaining. How far will the Court go in its enforcement of the rights it protects? Will the Court ever articulate a substantive ruling on these rights, articulating what entitlements they entail? Will their rulings have a tangible impact on the large population of poor people in South Africa? The Constitution assigns the power to determine the meaning of socioeconomic rights not to the legislature, but to the Court itself, and still the Court has appeared hesitant to enact this power. While the Court has done much, there are still avenues of socioeconomic rights it has not explored. Arguably, the *TAC* case represented the strongest push the Court has made for the realization of these rights. In a second wave of cases, the Court fleshed out other aspects

of its jurisprudence. The cases which will be discussed next came after these foundational cases and show both the growth and perceived regression of the Court's jurisprudence.

As the Court held in *TAC*, socioeconomic rights do not "give rise to a self-standing and independent positive right"[88] that is enforceable regardless of whether the State's policies to realize the right are reasonable. The prospects for individual claimants who are seeking specific benefits, in light of the previous statement, are less than optimistic and therefore the incentive to litigate is fairly low. A result of this is that the next few court cases outlined have exclusively been brought by, or in coordination with, a small number of organizations and movements working to vindicate the interests of groups. The following cases have also required a thorough knowledge of state policy so that a case might be successfully framed in relation to the reasonableness standard. Movement building and legal strategizing between these groups takes time, and this could be one explanation for the three and a half years, from 2005 to 2008, in which the Court did not rule on any socioeconomic cases.

Olivia Rd

In February of 2008, the case of *Occupiers of 51 Olivia Rd v. City of Johannesburg (Olivia Rd)* came before the Court and placed socioeconomic rights again at the forefront of the Courts decision making. Hundreds of incredibly poor individuals came before the Court to have an order that they be evicted from buildings in the inner city of Johannesburg, which the city alleged to be unfit to live in, revoked. While the occupiers of these buildings, the claimants,

[88] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para 39

admitted that the condition of the buildings were problematic, they argued that these buildings were the only thing standing between them and being homeless. In spite of this the City had refused to provide or offer the occupiers with alternative housing or support. The response of the occupiers was to claim that if this was the case the order for their eviction should not have been granted by the South African Court of Appeals.

They also claimed that the City's procedure for evicting them was only part of a grander strategy to remove close to 67,000 people from 235 supposedly unsafe buildings in inner city Johannesburg. There was no plan by which the City would provide alternative accommodations for these people when the evictions went through. According to the occupiers, the lack of a plan to provide alternative housing or accommodation was a violation of section 26(2) of the Constitution. They then went one step further and asked the Court to oversee the creation of a reasonable housing policy through a structural interdict. A structural interdict:

> "is an extreme remedy and should be applied only in cases where there are no other judicial remedies capable of setting matters right. Structural interdicts represent an assertion of judicial power that goes significantly beyond that of propitiatory and mandatory interdicts. Structural interdicts involve the court itself in ongoing supervision of an institutional or public agency as a last resort. Most acutely, structural interdicts may involve courts in budgetary questions and raise difficult issues of the legitimate limits of court power"[89]

At the time that the case came before the Court, the City was actively taking steps to develop a housing policy for poor people in the city, but was still silent on the issue of providing alternative accommodation for those it evicted or planned to.

The Court observed that the first issue that the occupiers raised was the procedural unfairness of the very decision of the City to evict. The City had made little to no attempt to

[89] "Structural Interdicts." *Law Teacher*. Law Teacher, n.d. Web. 28 Apr. 2014. <http://www.lawteacher.net/human-rights/essays/structural-interdicts.php>

figure out the housing needs of the occupiers or what the consequences of the eviction might be for those involved. This, in addition to the City demonstrating its willingness to consider the demands for shelter by the occupiers at the time of the hearing, led the Court to do something it had never done before-issue an engagement order. This order effectively required the City and the occupiers to enter into negotiations and "engage meaningfully" in such a way as to attempt to solve the issue at hand. After this engagement, a solution was reached according to which the occupiers would vacate the condemned buildings in return for guaranteed housing in a property managed by the City elsewhere in inner Johannesburg. The rent for these individuals would be 25% of their income and they would be allowed to occupy these properties until permanent accommodation became available.

The vast majority of the Court's decision focused on the concept of "meaningful engagement" and what it means in the context of socioeconomic rights. According to the Court, it is linked to reasonableness and because of this, a procedural requirement of Section 26(2). The Court held that before seeking an eviction, the state is required to show that is has engaged on multiple levels with the evictees who might become homeless due to the eviction and respond reasonably to the issues and concerns raised in the process of engagement. While the Court did not pin down what such a response might look like, it did lay out that there were a range of remedies that existed between the poles of providing alternative accommodation and providing nothing. The Court held that:

> "Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in this process. If this happens, a municipality cannot walk away without more. It must take reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with the

> poor, vulnerable, or illiterate people that the engagement process should preferably [be] managed by careful and sensitive people on its side."[90]

There are a couple of points to note that came out of the case of *Olivia Rd,* but the most important is certainly the creation of the idea of meaningful engagement. It added another way for the Court to add to the reasonableness standard while also creating a space in which concrete entitlements could be negotiated and implemented by contractual agreement. This was a significant resource for the poor. As a prerequisite for eviction it provides a resource through which the community can rally and plead its case. It also reinforces the proceduralisation of socioeconomic rights.

Additionally though, this case also reiterated the reluctance of the Court to take a substantive view of rights. It chose not to ground its ruling on the right to housing in substantive norms, which would define what a right to housing might entail, but instead further extended the reasonableness standard, which while useful, does not help define what, for example, a reasonable response to homelessness may be. Indeed, the Court indicated, as pointed out earlier, that in some cases the reasonable response to such a situation might be not providing any alternative accommodation at all. Another issue is that without a substantive view of housing rights, the group that the state is engaging meaningfully with does not have an idea of what it can reasonably expect. This puts the group at risk to be the recipients of a predetermined state policy that might not be appropriate or address their needs.

Thubelisha Homes

[90] Occupiers of 51 Olivia Road v. City of Johannesburg. 36 Southern African Legal Information Institute. Constitutional Court of South Africa. 2008. Print. para 15

The next landmark case to come before the Court was the case of *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* (*Thubelisha Homes).* The case included more than 20,000 people who lived in the informal settlement of Joe Slovo outside of Cape Town, who were appealing to the Court to set aside an order for their eviction, which had been granted by the Cape High Court. The eviction had been brought forward by a number of parties including Thubelisha Homes, the Minister of Housing, and the Member of Executive Committee (MEC) for Housing in the Western Cape. These parties argued that the community must be evicted in order for the N2 Gateway housing project to be implemented and carried out. The N2 Gateway housing project was the development and construction of formal housing for poor families on the site of the informal settlement. Thubelisha Homes was the housing company that the state employed to complete the project and they applied for the occupier's eviction in order to do so. We can imagine that the company kept the *Grootboom* ruling in mind because they planned to provide temporary accommodation about 15 kilometers away in a housing development near Delft until they could be provided with permanent housing. Importantly though, Thubelisha Homes did not ensure that the occupiers, upon the completion Of the N2 Gateway development, would be assured permanent housing in the project. In fact, they were unable to say where or when the occupiers would be provided with permanent housing post-relocation.

The occupiers focused their protest on three general arguments. First, they claimed that they were not illegal occupiers, and therefore could not be evicted from their location. Second, the eviction was being pursued in order to avoid complying with their expectations that 70% of the houses in the N2 Gateway development would be reserved for them. Third and lastly, they claimed the eviction had been sought without the meaningful engagement that the Court had

outlined in *Olivia Rd*. Of particular issue here was the lack of dialogue around the option of upgrading the settlement of Joe Slovo without disturbing it and relocating the inhabitants. The evictees also argued that the eviction, if carried out, would cause acute hardship because the site which they were to be relocated to lacked a number of standard social amenities, including hospitals and schools. It also took them a great distance from their access to employment, and therefore their livelihoods. If they had to travel the distance from the proposed temporary accommodation to work each day, their cost of commuting would likely double, adding up to more than half of their already meager monthly salaries.

The Court took ten months to decide on its ruling and then delivered 5 separate judgments. To the surprise of some though, the Court unanimously affirmed the eviction order. J Sachs in his concurring judgment writes:

> "In my view, prior to the institution of the present proceedings, the applicants were aware that Joe Slovo was going to be upgraded and decent houses were to be built in accordance with the N2 Gateway Project, a policy that was adopted to upgrade all informal settlements. The residents of Joe Slovo, including many of the applicants, embraced this Project. And they knew that they would have to relocate to temporary relocation units (TRUs) in order to allow the project to be implemented. Indeed, when they were requested to relocate, a considerable number of the residents relocated voluntarily to Delft. At the time of the institution of these proceedings, the applicants, who did not relocate, therefore knew that they had no consent to remain on the land. The applicants were, therefore, at the time of instituting these proceedings, unlawful residents of Joe Slovo within the meaning of PIE. All my colleagues at least agree that this was the position."[91]

This was on the condition that the eviction was staggered out over a period of 45 weeks, ensured that social amenities such as clinics and schools were provided at the relocation site, and the Court laid down rigorous conditions as to the services and nature of the houses that would be provided at the relocation site of Delft. The housing at Delft also had to be ready and available at the time of eviction. The Court also directed the government to fulfill the occupier's expectations

[91] Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 178

that 70 percent of the houses in the new housing project would be allocated to the relocated residents upon its completion, which Thubelisha Homes had already conceded at the hearing of the issue. J O'Regan wrote that:

> "I have no doubt that the occupants would prefer to stay at Joe Slovo because it is convenient and constitutes a community where they feel at home. This view is worthy of respect but it is indisputable that the situation at Joe Slovo is undesirable and unacceptable and cannot be a long-term solution. The alternative accommodation which must be provided to those who must move from Joe Slovo must meet basic standards, as stipulated in the order. Moreover, the respondents are asked to engage meaningfully with the applicants concerning issues relating to transport between Delft, and the occupiers' places of work and education, as well as clinics. The solution may be far from ideal, but in the circumstances I have not been persuaded that it is not just or equitable."[92]

The government also had to engage with individual households currently living in Joe Slovo and report back to the Court at regular intervals as to the progress of the eviction order.

As of today, the eviction has not been carried out, and the Joe Slovo Settlement still lies at the base of Table Mountain outside of Cape Town. In light of the hearing of the case and the 10 months that passed before the judgment was handed down the Western Cape Provincial Government, which controlled funding of subsidized housing in the province, passed hands from the African National Congress to the Democratic Alliance. The Democratic Alliance had long been critical of the N2 Gateway project and soon after coming to power agreed to revisit the issue of the relocation to Delft. The government then looked again into upgrading the existing settlement of Joe Slovo, long sought by the inhabitants, in large part because of the difficulty of meeting the stringent expectations for eviction the Court had laid out in its order.

The Court dealt with the issues at hand primarily on the basis of reasonableness. The question of whether the eviction was just and equitable was boiled down to weighing variables

[92] Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 321

and deciding whether it was reasonable to evict some in order to help realize the right of access to adequate housing. Additionally, they split this question into two parts, the first of which was whether the eviction was reasonable in light of the lack of meaningful engagement and second whether it was reasonable in relation to the broader housing policy it was helping to implement. The Court found that the answer to both of these questions was yes, but there was only a small overlap in their disparate reasons for thinking so.

The separate judgments delivered by the justices concurred that the adequate housing at Delft that was stipulated by their order and the allocation of 70 percent of the newly constructed homes to the evictees were the primary reason that the eviction as considered reasonable, even though meaningful engagement had not occurred. The majority of the justices admitted that the relocation would be "an inevitably stressful process"[93] that would "entail immense hardship. Yacoob J expressed their justification for this when he stated that "there are circumstances in which no choice but to undergo traumatic experiences so that we can be better off later"[94].

By and large, the main developments to come out of this case were in reference to how the Court viewed its role in the case and then its enforcement of government promises in an authoritative way. The Court largely seemed to think of its role as ensuring the government implemented to best possible version of the policy that it had presented to them. Here, reasonableness was primarily about realizing the expectations of the Joe Slovo evictees in line with the state's housing policy. That being said the role of the Court as the justices saw it was not

[93] Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. Para 399

[94] Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 107

to decide the question of whether the policy put forward was appropriate to the communities objectively based needs. Yet, the Court was willing to require the government to abide by its own policy in terms of what that policy was supposed to provide and ensure these measures were implemented. This proved important because for practical and political reasons, the government was unable to implement to Court's stringent orders. Subsequently, the government has reviewed the possibility of upgrading the Joe Slovo settlement itself, which was the original desire of its inhabitants. This had established one way that the Court can help give effect to socioeconomic rights concerns- by requiring the government to meet its promises and expectations as they were originally laid out. In this case, doing so prevented the evictions from occurring and caused the government to return to the occupier's original wishes.

Mazibuko

The final case that will be reviewed is the case of *Mazibuko and Others v. City of Johannesburg and Others (Mazibuko),* which was decided in 2009. Five poor households from Phiri, Soweto, brought the case before the Court, arguing that the City of Johannesburg's Free Basic Water (FBW) policy was unreasonable. The FBW policy limited the amount of free water to six kiloliters per household per month, regardless of the size of the household. The households argued that such a policy was unreasonable due to the fact that it was unable to meet the needs of impoverished households, many of whom had many people living there. They argued that there were two reasons for this. Firstly the policy relied on a calculation of 25 liters per person per day. This was despite the fact that the Convention on Economic, Social, and Cultural Rights set the international standard on water rights in General Comment 15 when it suggested that 50 liters per day was the minimum amount of water necessary to meet basic

human health and dignity needs. [95] Their second argument related to the large number of people that lived in poor multi -dwelling households. The 6kl FBW policy was premised on a calculation of 8 people per household, yet in Phiri there were commonly over 15 people per household as most properties had multiple backyard shacks which they collected rent from and shared the monthly allocation of water.

The effect of the installation of prepayment meters, which cut of the flow of water after 6kl and the implementation of the FWB policy, was that the households' water supply cut off halfway through each month when they used up their 6kl. When they could not afford to pay for more water, which was usually the case, they had great difficulty engaging in everyday tasks, such as cooking, washing clothes, and health and sanitation needs. They challenged this result through a number of arguments:

1. The FWB policy was not a reasonable policy capable of giving effect to the applicants right of access to sufficient water;

2. The decision by Johannesburg Water (Pty) Ltd (Johannesburg Water) to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation, violated section 4(1) of the Promotion of Administrative Justice Act 3 of 2000(PAJA)

[95] "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)." *RefWorld*. UN Committee on Economic, Social and Cultural Rights (CESCR), 20 Jan. 2003. Web. 28 Apr. 2014. <http://www.refworld.org/docid/ 4538838d11.html>

3. The automatic disconnection of prepayment water meters violated section 4(3)(b) of the Water Services Act 108 of 1997 (Water Services Act), which requires reasonable notice and an opportunity to make representations prior to the limitations or discontinuation of water services[96]

The Court was essentially had to consider whether the City's FBW policy was reasonable in terms of section 27(1)(b) of the Constitution, which guaranteed everyone right of access to sufficient water. It also had to decide whether the installation of the prepayment meters was lawful.

The Court proceeded to reject the previous claims. It focused on the large amount of data the City presented demonstrating its difficulties in supplying water to Soweto. The Court applied the reasonableness standard in light of this, and found that the policy fell "within the bounds of reasonableness"[97] It decided this based on the data presented as well as the fact that over the course of the litigation of the case, the City had altered various features of the policy. The Court concluded this was evidence of flexibility[98], one of the features of a reasonable policy. It decided this through the admission of sizable quantities of new evidence that were presented by the City on appeal. This was a departure from previous approach by the Court, especially since in previous cases it had strictly monitored the presentation of new evidence. It justified this by pointing to the unique nature of socioeconomic rights litigation, where the introduction of new

[96] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print.

[97] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print.

[98] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 9, 93

evidence could be seen to promote the values of responsiveness, accountability, and finally, openness.[99]

The Court also struck down the households' argument that the decision to install prepayment meters should have been preceded by some sort of meaningful engagement. It did so on the grounds that the decision to install the meters was an executive, not administrative action. [100] Additionally, the Court held that meters did not constitute illegal disconnections. Writing the judgment, J O'Regan explained that, while the ordinary meaning of discontinuation being that something ceases to exist, here:

> "The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply, whereupon the water supply recommences. It is better to understood as a temporary suspension in supply, not a discontinuation."[101]

There are a number of important themes to note in the case of *Mazibuko*. Many in the legal community see the ruling as a step back for the Court. Sandra Liebenberg noted that, while the *Grootboom* standard of reasonableness required that state conduct be "assessed in the light of the rights entrenched in the first subsections of section 27, in *Mazibuko* the Court was only prepared to use reasonableness as an over-flexible, abstract, and decontextualized standard of governance"[102]. This is a far cry from the standard as applied in cases such as *Grootboom*, as Liebenberg notes, and *TAC*. If nothing else this demonstrates the flexibility inherent in the

[99] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 161

[100] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 131

[101] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 120

[102] Liebeneberg, Sandra. *Socio-economic Rights: Adjudication Under a Transformative Constitution*. N.p.: Juta, 2010. Print. p.470

reasonableness standard, which is sometimes helpful and sometimes harmful. The second theme to recognize is the large degree of deference the Court afforded the executive in this instance. The Court takes the city's changes to the policy mid-litigation in good faith and rules against the implementation of meters as administrative action, identifying it instead as executive action. Finally, and perhaps troubling, is the fact that the Court explicitly lays out what it saw as its role here and potentially in the future. The Court held that the purpose of socio-economic rights litigation is served because the government has been given the option and opportunity to justify and in some instances revise its policy. Litigation is not so much a process through which people who claim their rights have been violated enforce their entitlements, but instead an elaborate form of participation in policy making[103]. This idea, taken in conjunction with the Court's unwillingness to make a substantive ruling on the nature of socioeconomic rights, does not encourage the poor to bring cases before the Court because it is possible they might not see any remedy to their situations, even if the Court rules in their favor. With the gradual failing of other institutional remedies, as explored in the introduction, this is particularly concerning.

This chapter has sought to lay out the contours of the socioeconomic jurisprudence developed by the Constitutional Court by examining a number of cases it has faced. Some of the main tools and readings that have emerged from its analysis include the rejection of a minimum core of rights, the reasonableness standard, meaningful engagement, and the keeping of promises by the state. On the other hand, the Court has yet to substantively rule on socioeconomic rights, sometimes uses the reasonableness standard in an incredibly abstract manner, and still views itself as having a limited role in the process of policy formulation as well as the extent to which

[103] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 159-169

is can step into the realms of executive and legislative powers. The next chapter will reflect on these, among other, issues where the Court's jurisprudence seems to be lacking, and in light of the lack of effective supplemental chapter nine institutions and government policy, offer a variety of approaches that should be taken into consideration as the Court moves forward.

Chapter 3: Identifying Gaps and Potential Remedies in the Constitutional Court Jurisprudence

"If we don't find a way to move a serious and rational discussion of the question of substantive equality to the centre of our politics we'll be left with the sorry spectacle of the politics of big men trying to rally their troops behind nothing but the promise of their protection on their turf."[104]

Thus, Richard Pithouse characterizes the current situation of South Africa, all the while alluding to the potentially devastating consequences of things to come. With these ominous words in mind, this chapter calls attention to the shortcomings of the jurisprudence of the Constitutional Court and how the current jurisprudence, taken in the context of an untrustworthy government, hollow institutions, and struggling economic programs, could better address the concerns of incredibly poor South Africans in need.

[104] Pithouse, Richard, 2010, "Enter a wide range of ranting stupid men-stage right", *South African Civil Socirty Information Service*, 16th April, www.sacsis.org.za/site/article/655.1

The Court's mandate gives it numerous powers through which it might exercise greater remedial capacity. The Constitution states Section 167(3) that the Constitutional Court:

- is the highest court in all constitutional matters;
- may decide only constitutional matters and issues connected with decisions on constitutional matters; and
- makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Additionally, Section 167(4) goes on to give the Constitutional Court exclusive jurisdiction in deciding disputes about the powers and constitutional status of branches of government. Only the Constitutional Court may:

- decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- decide on the constitutionality of any parliamentary or provincial Bill;
- decide on the constitutionality of any amendment to the Constitution;
- decide that parliament or the president has failed to fulfil a constitutional obligation.

All courts in South Africa have to apply the Constitution and the law "without fear, favour or prejudice" according to Section 165. Additionally, Section 39(2) of the Bill of Rights makes special mention of the judiciary's duty in interpreting and developing the law: it has to promote the spirit, purport and objects of the Bill of Rights.[105]

As a reminder, the specific parts of the Bill of Rights that are pertinent to socioeconomic rights are:

[105] "Historical Background of the Constitutional Court." *South African History Online*. South African History Online, n.d. Web. 28 Apr. 2014. <http://www.sahistory.org.za/topic/courts-position-justice-system>

1. **Housing**
   A. Everyone has the right to have access to adequate housing.
   B. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
   C. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
2. **Health care, food, water and social security**
   A. Everyone has the right to have access to-
      A. health care services, including reproductive health care;
      B. sufficient food and water; and
      C. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
   B. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
   C. No one may be refused emergency medical treatment.[106]

Former Chief Justice Pius Langa described the transformative spirit of the Constitution in light of these sections as:

> "Not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected, and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional, constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals, but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformations"[107]

The Constitutional Court and those that write about it have possessed high hopes for what actions it can take to contribute to this spirit. Indeed, tasked with developing a jurisprudence around socioeconomic rights, the Court in a sense was able to write upon the blank slate of

[106] "Bill of Rights." *Constitutionally Speaking*. Pierre De Vos, n.d. Web. 28 Apr. 2014. <http://constitutionallyspeaking.co.za/bill-of-rights/>.

[107] Roux, Theunis. *The Politics of Principle The First South African Constitutional Court, 1995–2005*. N.p.: Cambridge, 2013. Print. p. 30

jurisprudence in the most exciting and hopeful period of modern South African history. Sandra Liebenberg, in describing how the Constitution envisions the Court, states:

> There is no other institution with both the authority and responsibility to make final binding pronouncements on the nature and scope of the rights in the Bill of Rights. If the courts adopt formalistic or overly narrow interpretations of the rights in the Bill of Rights, the normative force of human rights guarantees in governance and society as a whole will be diminished. This is contrary to the constitutional conception of the Bill of Rights as a 'cornerstone of democracy in South Africa.'[108]

The Court is, according to Liebenberg, the single most significant body and branch of government through which to ensure that rights such as socioeconomic rights are realized and respected. In marrying the vision of transformation with the role of the Court that Liebenberg purports, we can begin to appreciate the crucial role of the Court in South Africa.

The Court has generally been appreciated though in terms of striving to fulfill its mandate. American constitutional scholar Cass Sunstein has written glowingly about the Court, specifically in relation to the ruling in *Grootboom.* He said that:

> "In the Grootboom decision, the Court set out a novel and promising approach to juridical protection of socioeconomic rights. This approach requires close attention to the human interests at stake and sensible priority setting, but without mandating protection for each person whose socio economics needs are at risk. The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met. The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio economic rights do not belong in a constitution. It suggests that such rights can serve , not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate." [109]

All in all, as reflected in the introduction, the Court has been praised for its actions, for being seen as ushering in a new era in human rights law, specifically socioeconomic rights, and for taking part in this ever present action of transformation that J Langa describes. However the

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[108] Liebeneberg, Sandra. *Socio-economic Rights: Adjudication Under a Transformative Constitution*. N.p.: Juta, 2010. Print. p. 329

[109] Roux, Theunis. *The Politics of Principle The First South African Constitutional Court, 1995–2005*. N.p.: Cambridge, 2013. Print. p. 39

direness of the current socioeconomic situation, coupled with the lack of other institutional mechanisms for addressing socioeconomic rights violations necessitates the Court alter its current approach.

There are a number of ways that the Court could improve upon its existing jurisprudence, open up poverty to greater political debate, and encourage access for the poor to the Court. It can do so by ruling in a more substantive manner and re-evaluating its use of the reasonableness standard, recognize the depoliticizing nature of the rhetoric it is using when ruling on issues of poverty, and removing various barriers to litigation, such as allowing greater direct access, mandating a method for paying court costs, and taking greater steps to ensure a return on the rulings that it issues, specifically for the parties that brought the case to the Court in the first place. Certainly there are further ways that the Court could work to alleviate the various inequalities and injustices described previously, but this paper cannot hope to address all of them. In essence, while the Court has done an admirable job developing this jurisprudence, there are numerous factors that necessitate that the Court take on a larger role, particularly the lack of other institutions to effectively address the issues of poverty and socioeconomic rights.

The Reasonableness Standard

The reasonableness standard is one of the foundational practices of the Court's jurisprudence. Though articulated explicitly in *Grootboom*, the argument of rationality, the precursor to reasonableness, emerged even earlier, in *Soobramoney*. At its heart, the reasonableness standard is an adaptation of administrative law to evaluate compliance with the positive duties imposed by socio economic rights as laid out in ss26 and 27. At the center of this evaluation is a state policy, which is judged to be reasonable or not in light of the social,

economic, and historical context. Consideration is also given to the capacity of institutions responsible for implementing the program.[110] According to the Court, a reasonable government program in the realm of socio economic rights will:

- Be capable of facilitating the consideration of the right;
- Be comprehensive, coherent, and coordinated;
- Have appropriate financial and human resources made available for the program;
- Be balanced and flexible and make appropriate provisions for short-,medium-, and long-term needs;
- Be reasonably conceived and implemented;
- Be transparent, and its contents must be made known effectively to the public.
- Make short-term provision for those who needs are urgent and who are living in intolerable conditions. [111]

The standard is intended to allow the state a level of discretion in relation to the intimate policy choices it has to make when realizing socio economic rights. In appropriate cases though, the Court will apply a stringent standard of scrutiny to the government regarding their policy choices. In the process of doing so, it will be specific regarding the means that need to be implemented so that the rights infringed upon are remedied. This standard and the flexibility with which it has been applied to many cases such as *Soobramoney, Grootboom, TAC, Thubelisha Homes,* and *Mazibuko* warrants further inquiry.

The reasonableness standard has been praised by numerous scholars as a flexible and useful tool for realizing socioeconomic rights. In his article *Social and Economic Rights?*

[110] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 43

[111] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print

Lessons from South Africa, Cass Sunstein argues that the Court's resort to the known principles of administrative law in the reasonableness standard makes sense, particularly because in many legal systems the review of administrative policy consists of striking a balance between the ever competing principles of judicial deference and activism. In utilizing administrative law, the Court, specifically in the case of *Grootboom*, scored an important conceptual victory by laying out its perceived role in adjudicating the complicated issues raised by socioeconomic rights claims. By laying out this idea, Sunstein argues, the Court illustrated that clarifying social rights is not removed from the ordinarily held idea of court's review function.[112]

In his book *The Politics of Principle,* Thenius Roux argues, similarly to Sunstein and Michelman, that the implementation of the reasonableness standard is a "shrewd" development. It has a distinct advantage over other possible approaches because of its flexibility, which allows it to identify vulnerable groups and unreasonable policies in a context sensitive approach and allows the standard of scrutiny to be adjusted based on the micro-politics of particular cases. The very features of the reasonableness review that other scholars decry, according to Roux, are in fact its strengths. The open ended nature of the categorization of vulnerable groups is one example, in that the reasonableness standard allows the approach of the Court to be shaped to the character of a group of claimants. "This contentlessness of the standard..enables the Court to enforce significant changes to social and economic policy, without appearing to set Government's priorities for it".[113] Roux believes that that all of these capacities are demonstrated

[112] Sunstein, Cass. "Social and Economic Rights? Lessons from South Africa." *Chicago Law Review*. University of Chicago, n.d. Web. 28 Apr. 2014. <http://www.law.uchicago.edu/files/files/124.CRS_.pdf>

[113] Roux, Theunis. *The Politics of Principle The First South African Constitutional Court, 1995–2005*. N.p.: Cambridge, 2013. Print. p. 292

in the *TAC* case, where the Court rejected a government program and opened up the widespread dissemination of pre natal HIV drugs.

However, Roux admits that the lack of substance in the reasonableness standard "detracts from the usefulness as a programmatic guide"[114] and there are many critics who bear similar concerns. In *Grootboom,* the case that developed the reasonableness standard most explicitly and concerned itself with housing rights, David Bilchitz argues that the lack of substance in the ruling detrimentally affected the development of a remedial program by the state. The declaratory order that was issued by the Court established that the state is constitutionally obliged to create a comprehensive and coordinated program designed to progressively realize the right to access to adequate housing enshrined in the Constitution. The program must include relief for, specifically, those who do not have housing, land, and/or are living in intolerable conditions. Additionally, the Court declared the program that had existed in the Cape Metropolitan area didn't meet the constitutional obligations of the government because it had unreasonably failed to make a plan for those who fell into the categories of desperate need and intolerable conditions. The Court held that:

> "Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their *basic human needs*. A society must seek to ensure that *the basic necessities of life*[115] *are provided to all* if it is to be a society based on human dignity, freedom, and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavor to realize. Those whose needs are most urgent and whose *ability to enjoy all rights*[116] before therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right..If the measures,

[114] Roux, Theunis. *The Politics of Principle The First South African Constitutional Court, 1995–2005*. N.p.: Cambridge, 2013. Print. p.292

[115] My own emphasis

[116] My own emphasis

> though statistically successful, fail to respond to the needs of those most desperate, they many not pass the test"[117]

While this may appear a sweeping judgment, with effective remedies stipulated in the declaratory order, the enforcement of the order proved delayed and problematic. This was exacerbated by the Court not providing clear content of the right to housing in its order. A study conducted two years after the order was handed down by Kameshni Pillay found that the *Grootboom* order had not been fully implemented by the government. The study showed that "at the time there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate need or crisis situations."[118] After the ruling the government spent an additional year deciding where the responsibility to carry out the *Grootboom* order lay in the provincial government of the Western Cape. Pillay found that on the local level the implementation of the judgment was focused specifically on the Grootboom community and didn't go beyond the scope of this into the realm of establishing and effective and comprehensive program that catered to all communities in similar or crisis situations. Finally, Bilchitz argues, the government interpreted the order narrowly so that it saw disasters such as floods or fires as crisis situations and chose not interpret it as mandating the adoption of a policy which would meet the needs of those that didn't have a place to live or a roof over their heads.[119]

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[117] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000.Print para 44(emphasis added)

[118] Pillay, Kameshni. "Implementing Grootboom: Supervision Needed." *ESCR-Net*. ESCR-Net, n.d. Web. 28 Apr. 2014. <http://www.escr-net.org/docs/i/ 401420>.

[119] Bilchitz, David. *Poverty and Fundamental Rights:The Justification and Enforcement of Socio-Economic Rights*. New York: Oxford, 2007. Print

As can be seen, the intention behind the order and the practical application of the order leave much to be desired. Academic Marius Pieterse argues that courts, at least in South Africa, are sufficiently equipped and constitutionally empowered to give tangible effect to socioeconomic right without straining their capacity or infringing on the separation of powers. To him, a significant obstacle to realizing socio-economic rights through the improved living condition of the most impoverished individuals is the abstract and conceptually empty articulation of socioeconomic rights, allowing for institutional containment and the subsequent suppression of the needs they represent. He states that, "In order for this tendency of socioeconomic rights discourse to be effectively countered, constitutional drafters, legislatures, litigants, activists, academic, and judges must increasingly concentrate on clarifying the concrete content of entitlements embodied by socioeconomic rights and on explicitly link such content to the satisfaction of material need."[120] In essence Pieterse argues that for socioeconomic rights litigation to be an effective means of recourse for poor individuals, through the Court as well as the government programs that flow from the judiciary, the content of socioeconomic rights must be articulated so it can be linked to satisfying material needs of impoverished individuals in a tangible way.

Examining this idea from a different angle, the scholar Danie Brand illuminates the difficulty of fashioning an effective government policy without some articulation of the content of socioeconomic rights by the Court. He contends that if the Court had made more substantive interpretations of the rights it addressed in *Grootboom*, then it would have been beneficial for the practical implementation of the order. One main issue with the reasonableness standard is that

[120] Pieterse, Marius. "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited." *Human Rights Quarterly* 29.3 (2007): 796-822. Print.

even though the Court stipulated a number of standards that a policy must meet to be reasonable, it has not actually defined what the program or policy should be moving towards. Brand states:

> ..the Court's eventual discussion of the content of the right predictably focuses on concepts of 'reasonableness', 'progressive realization', and 'within available resources'. Nowhere is there a sustained and coherent attempt to describe the substantive standard that the government's policies are supposed to work towards. The one such reference (the Court stating that the right to housing 'entails more than bricks and mortar' and that for the right to be realized, 'there must be land , there must be services, there must be a dwelling[121]) is cursory, without any reasoning provided to sustain it. Furthermore this brief description of the content of the right occurs in the course of a broader argument that housing needs are diverse and determined by the geographic, social, and economic context in which they play out and that, as such, it is impossible for a court to prescribe particular substantive duties in terms of the right"[122]

Brand argues that the Court never tells the government what goals it should actively be pursuing through its programs. It does not lay out what the right to access to housing should be, nor does it provide the government with direction, or point to an alternative policy. It merely states that the existing one is unreasonable and the next one should take into account those people in desperate situations (which the government, as Pillay uncovered, is less than willing to do). To expect an unwilling government to construct and implement a policy without any direction from the Court is, in its own way, unreasonable.

Furthermore the Court flirts with the substantive interpretation that Brand advocates when it alludes to the fact that housing is something more than simply bricks and mortar. Even when discussing the reasonableness standard above, the Court uses phrases such as basic human needs and the basic necessities of life, implying that it has some idea about what these needs may be, though they are never made explicit. By not doing so, the Court gives the government no guidelines as to what it should be striving for with its policies. This allows the government to

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[121] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000.Print para 35

[122] Botha, Henk, Danie Brand, and Andries Johannes Van der Walt. *Rights and Democracy in a Transformative Constitution*. N.p.: SUN, 2003. Print. p.46

take liberties with their interpretation and implementation that would be more difficult with more substantive interpretations of socioeconomic rights, Brand argues.

This flight from substance into the procedural has many implications, but Brand perhaps describes the paradox of the reasonableness standard best when he says:

> "..the Court does not ask whether state policies are reasonable in the sense they are reasonably capable of achieving the progressive realization of the rights in question—it cannot, because it never adequately describes the rights against which reasonableness should be tested. Rather, in the absence of a substantive referent for a proper means-end reasonableness test, the Court asks whether those policies are reasonable simply in the sense they are rational, coherent, comprehensive, inclusive, and so on and so forth. Its concern therefore seems not to be with the possible outcome of government policies (whether they will actually provide in the basic needs of people)- its concern is whether the government acts in a manner consistent with procedural good governance standards in its attempts to realize socioeconomic rights."[123]

This embrace of procedure over substance does little, as can be seen in the case of Grootboom, to help alleviate the lived experience of poverty. The case of *Mazibuko* also provides an account of how reasonableness standard, when applied without substantive interpretations, can be detrimental to realizing socioeconomic rights.

Mazibuko, as related in the previous chapter, consisted of poor families in Phiri fighting the city of Johannesburg's decision to implement pre-paid water meters on their local water taps. Their main three contentions were that the water policy of Johannesburg was not reasonably capable of realizing the applicants right of access to sufficient water, that the installation of prepayment water meters was undertaken without consultation(in relation to the meaningful engagement stipulation that the Court laid out in *Olivia Rd*), and that the automatic disconnection of the water meters was illegal because the Water Services Act 108 of 1997 required reasonable

[123]Botha, Henk, Danie Brand, and Andries Johannes Van der Walt. *Rights and Democracy in a Transformative Constitution*. N.p.: SUN, 2003. Print. p.49

notice and an opportunity to make representations prior to the cut off of services. The Court subsequently rejected all of these claims, using the reasonableness standard.

When tasked with deciding whether the amount of water the city was providing for free was sufficient, the Court hid behind a shield of bureaucracy, finding that it did not have the capacity to determine what the reasonable amount of water was, though when deciding *TAC* it had engaged in exhaustive research and referenced a large amount of information, "from a variety of specialized perspectives, ranging from pediatrics, pharmacology and epidemiology to public health administration, economics and statistics[124]. It also focused on the large amount of evidence the government gave outlining its difficulty in supplying water to Soweto. Given another opportunity to rule substantively on the issue of the right to water in the argument that prepayment meters resulted in unlawful disconnections, it chose not to do so. Instead it sidestepped the issue. Explaining that the "ordinary meaning of discontinuation is that something is made to cease to exist", the Court found:

> "The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation."[125]

By giving a fairly convoluted explanation, legal scholar Sandra Leibenberg argues the court not only chooses not to address the issue substantively, but also uses a bizarre semantic line of reasoning that is difficult to understand and seemingly should not be utilized to characterize the effect of state policy on access to basic human needs. By not addressing the issue substantively

[124] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para 6

[125] Mazibuko and Others v. City of Johannesburg and Others. 39 Southern African Legal Information Institute. Constitutional Court of South Africa. 2009. Print. para 120

and in focusing on the governments purported difficulty in getting water to Soweto, the Court not only retreats again into the proceduralism that has become characteristic of it, but also shows a deference to the state that demonstrates its perceived role of itself for determining socioeconomic rights. This is a very limited role, that seemingly would not offer much hope to applicants, whether the Court finds in favor of them or not. With this in mind, the Court at the end of the *Mazibuko* judgment holds that the purpose of socioeconomic rights litigation is served simply because of the fact the state has been given an opportunity to justify and resolve its policy. Litigation is apparently less a process by which people can claim their rights and the subsequent entitlements and more so an elaborate and expensive form of policy making, which results in few tangible results for the applicant.

Marius Pieterse echoes this point when he argues that for socioeconomic rights to function as legal tools of recourse through which denial of need can be confronted and hopefully remedied. They must be connected intimately and concretely to their subjects, not grounded in an abstract standard of good governance evaluation. His thoughts on the reasonableness standard could succinctly be summed up as a critique of the formulation of abstract legal standards for measuring compliance with socioeconomic rights. This is because the abstract standards are of indirect importance to the poor, the primary beneficiaries of socioeconomic rights. Instead, poor individuals are primarily concerned with the actual alleviation of their poverty, or articulations of dire need. Legal tools, such as the reasonableness standard, which do not reflect or acknowledge

this focus will not "easily correct the diminution of human dignity suffered as a result of such hardship."[126]

Taking both accounts of the reasonableness standard into consideration, it cannot be denied that the reasonableness standard has had an important effect on South Africa, and in some cases, such as *TAC* , has resulted in the immediate realization of a solution to one part of a larger problem, that of HIV. But in many cases, such as *Soobramoney, Grootboom, Thubelisha Homes,* or *Mazibuko,* these immediate and effective remedies have not materialized. In essence, it seems that for the Court to be more effective in aiding the government in formulating effective and reasonable plans it needs to provide explicit guidance by giving greater content to socio economic rights. Without doing so, the government can exploit the situation if it so chooses, the overall effectiveness of litigation as a remedy for need comes into question, and government policies are left flailing in the dark for a program that can target a goal that has not been articulated yet.

In light of this, what can the Court do to take a more substantive approach to socioeconomic rights and help mend some of the gaps that have been identified in the reasonableness standard? Essentially, what must be undertaken is movement towards a reasonableness standard that values substance as much as the current Court does procedure. It can recognize the responsibility of the Court to, according to J Sachs, achieve justice for claimants that come before them (the Court) even though their claims occur against a background of endemic inequality. J Sachs states that:

[126] Pieterse, Marius. "Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited." *Human Rights Quarterly* 29.3 (2007): 796-822. Print. p.804

> "The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimize the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails."[127]

To do so, the Court must begin by approaching cases involving a deprivation of essential human needs with a high level of judicial scrutiny and be less deferential to the government. In taking a contextualized approach to the case at hand, the Court should ground its consideration in the position of the claimant in society, the nature and historical background of the deprivation experienced, and the impact of the rights violation on the ability of the individual or group to participate in South African society.

When hearing the justifications the state offers for failing to meet the needs of its citizens, the courts should conduct a rigorous proportionality analysis. In doing so it could balance the lived hardships of the individual or group before it against the various obstacles the state offers for improving the situation. Interestingly, if it approached cases with a higher level or scrutiny, it is possible that the Court might have found it in its capacity to ensure basic needs of individuals. For example, in *Mazibuko*, although the state offered evidence showing its difficulty delivering water and the Court deferred to the state on this matter, soon after the ruling was handed down the state not only did away with prepayment meters that shut off water completely (in favor of ones that only substantially limited the outflow of water) but also increased the monthly allocation of free water that households would receive. Doing so implies the resources were available, and while legal mobilization is what brought the action about, not the ruling of the Court, it is worth pointing out that had the Court conducted extensive research, as was the case in *TAC* and not been so deferential to the state's role, then it might have been able to mandate that

[127] Port Elizabeth Municipality v. Various Occupiers. 53 Southern African Legal Information Institute. Constitutional Court of South Africa. 2004. Print. para. 38

such action be carried out. The Court is in a unique position in the country to examine the micro-injustices that result due to policy, and highlight the effect of these of claimants in everyday situations[128] as well as give them some means of recourse.

To conduct such a proportionality test though, the Court must rule substantively on the issues it faces. It must articulate what the basic entitlements of a right are, and in doing do, not only give the state much needed direction and objectives when formulating policy, but also give themselves a baseline by which to analyze cases and issues of allocation or violation that come before them. Additionally, it is important to note that the 'progressive realization' of such rights that are stipulated in the constitution should not just end at the substantive levels that the Court should set out. The idea of progressive realization implies a dynamic that is continuously moving forward as advances in social and economic rights are made, so that when basic needs have been met, it is possible to strive for more and constantly bolster and uplift the situations of the poor and marginalized in South Africa.

By adopting these measures, and therefore developing a substantive reasonableness standard, the Court would facilitate greater realization of socioeconomic rights. It would provide the state with a clear objective to strive for, encourage greater actions around socioeconomic rights, and ensure a transformational jurisprudence by constantly pushing the envelope forward to benefit South Africa and its citizens. This is important because with the lack of other institutions to articulate clear programmatic guidelines or objectives, there is the risk of programs constantly oscillating between the Court and the government. By oscillating I mean the pattern of a government policy being brought before the Court and that policy subsequently being declared

[128] Liebeneberg, Sandra. *Socio-economic Rights: Adjudication Under a Transformative Constitution*. N.p.: Juta, 2010. Print.

unreasonable but with no clear articulation of the tangible goals it should be striving for. The government then tries to remedy the program (or doesn't) without clear direction and upon implementation could again find itself before the Court where the pattern begins anew. Thus a cycle occurs where programs are created but are not causing tangible results. Such a cycle occurs at the detriment of those they are supposed to help, namely, the poor. If the Court fails to substantively rule on rights so as to provide some semblance of a programmatic guide it is likely that South Africa will continue to be stuck in its current socioeconomic situation.

Another action the Court should take is to recognize, and subsequently avoid, the way that their judgments commonly reflect a depoliticizing rhetoric around the interpretation of poverty and need. While not an area that is typically given much attention, by depoliticizing poverty in much the same way that the legislative and executive branch do, the Court has a depressing effect on the agency of poor individuals in South Africa and discourages public interest litigation, by seemingly naturalizing the individuals lived experience of poverty. Karl Klare asked an important question when he wrote that, with the idea of a transformative constitution in mind, "whether the judgments produced by judges eroded or reinforced discursive politics, opens up space for political contestation, and in doing so, deepens democratic culture, or ignores it?"[129] The Constitutional Court occupies a unique place in moving forward South Africa's transformative constitution. By occupying this place, it needs to be aware of the weight that its adjudication can carry in closing down the space for political contestation. I will lay out the ways in which this occurs, and then draw examples from a number of cases, involving *Soobramoney, Grootboom,* and *TAC*.

[129] Klare, Karl. "Legal Culture and Transformative Constitutionalism." *South African Journal of Human Rights* 146 (1998): n. pag. Print. p. 164-165

The Court's De-Politicization of Poverty and Need

Poverty and basic need-these two words encompass a number of specific social problems that the Constitution and socioeconomic rights in particular hope to help alleviate. As noted in previous chapters many have contended that the rectifying of these situations are essentially political questions, not to be ruled upon by the courts. While the Court can affect these issues in a number of ways through its rulings, in the venue of politics, different understandings of issues are argued and debated daily. These debates are of primary importance to participatory forms of politics that South Africa holds dear. As mentioned at the beginning of this chapter, issues like the lack of access to basic services such as sanitation or water are increasingly resulting in popular movements that are aimed seeking remedies-essentially these movements are engaging directly in political action that helps contribute to an overarching political debate (in Parliament, among individuals, and in the media) about where the responsibilities to address these issues lie and how a solution might be carried out. According to social theorist Nancy Fraser, in South Africa, "talk about people's needs is a species of political discourse..has been institutionalized as a major vocabulary of politics, and is an idiom in which political conflict is played out and through which inequalities are symbolically elaborated and challenged".[130]

However, in South African government there is a tendency to depoliticize these issues, or to speak of them as though they are not political, or not capable of being politically contested. When, as has been the case in both the US and South Africa, the government warns about the supposed culture of dependency that extending social welfare fosters, they are pointing to poor

[130]Fraser, Nancy. "Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies." *Research Gate*. Researchgate.net, n.d. Web. 28 Apr. 2014. <http://www.researchgate.net/publication/ 240561257_Talking_about_Needs_Interpretive_Contests_as_Political_Conflicts_in_Welfare-State_Societies> p.291

people as being responsible for the current shortcomings of their situation. Many times, poverty is laid at the feet of forces supposedly beyond our control, such as a lack of natural resources, or globalization, so as to show that political action on this issue is somehow useless or futile.

Political discourse around poverty and our basic needs is a repetitive process of politicization, de-politicization, and re-politicization of the various issues in contention. In doing so, a variety of methods are usually utilized by marginal groups, such as those in poverty, to argue for remedies such as social security, or adequate housing. More dominant or powerful groups usually oppose these arguments, intent on preserving their various privileges, and try to remove these arguments from the political areas in which they could be argued, and potentially remedied. This is usually done in a number of ways, including domesticating issues of poverty and need, the personalization of need and dependence, the naturalization of poverty, and the instrumentalizing of needs talk. All of these tools come together to turn the issue of poverty away from political debate and remedies, and push it back onto those experiencing it.

The first of these tools, domestication, seeks to describe issues of poverty and need as concerns that fall solely within the domestic sphere (primarily the family) as opposed to the political sphere. At its heart this casts these issues as private and familial issues instead of private political. Law professor Martha Fineman offers further embellishment:

> The private family is the social institution that is relied upon to raise children and care for the ill, the needy and the dependent. Ideally it performs these tasks as a self-contained and self-sufficient unit without demanding public resources to do so. In the societal division of labor among institutions, the private family bears the burden of dependency, not the public state. Resort to the state is considered a failure. By according to the private family the responsibility for inevitable dependency, society directs dependency away from the state and privatizes it."[131]

[131] Fineman, Martha. "Masking Dependency: The Political Role of Family Rhetoric." *Virginia Law Review* 81 (1995): n. pag. Print.

By placing the onus on the family to provide for themselves, the issue of poverty is removed from the political, where it ostensibly cannot be solved, and to the familial realm, whose responsibility it is to take care of those within it.

Another common strategy that is used by privileged groups is the personalization of need and dependence. In this case, the quality of being in poverty or dependent is due to the personal characteristics, flaws, and shortcomings of poor people themselves. The social, economic, and political forces and systems that perpetuate poverty are not held responsible for what they create. This refrain is heard time and time again- that poor people are lazy, ignorant, or generally just bad people. In doing so, groups label the poor as an "other", something that is deviant. Indeed, perceptions and assumptions about the moral failings of the poor and their resulting responsibility for their own hardships are common in South Africa. This can perhaps be best seen through the way in which South Africa's social assistance system is built on a division between, allegedly deserving and undeserving poor. It is predominantly special needs based, as regular grants are only paid to vulnerable groups such as the elderly and children, while no assistance is provided for the "able-bodied" poor, tacitly endorsing the idea that these individuals should be able to earn their own living.

The next strategy that is commonly employed by powerful groups in political discourse is the adoption of rhetoric that naturalizes poverty. In the way that the previous strategy avoids taking social, political, and economic forces into account, this strategy reverses that and attributes poverty to forces that are entirely outside the control of society, such as capitalism or globalization. This can occur in two ways. First, the state or other groups can fall victim to the enormity of poverty, simply stepping back and saying that there is so much of that it will always

be here in one form or another. The second is the placing of responsibility for poverty on forces outside of society's control, such as the de-personified and mysterious forces of the global market. What these arguments both share is the notion that poverty is in one way or another natural and part of the structure of our society-ipso facto is will always be there, no matter what we do. [132]

The final strategy for depoliticizing poverty is the instrumentalization of needs talk.[133] The political discourse around need occurs in a number of different spaces and between a variety of actors- NGO's, academics, social movements, as well as more official organs of discourse like Parliament or special administrative agencies. These actors occupy different areas of power in the dialogue, with the descriptions of poverty and need in places such as Parliament or administrative agencies officially sanctioned. Because of this, these institutions have an authoritative power over the political dialogue in reference to these issues, yet they consistently depoliticize them. They do so by, in the process of transforming politicized needs in to administrable solutions, talking about political issues of poverty in a way that makes them "technical problems for managers and planners..in contradistinction to political matters"[134]. What this does is reduce the issue to a technically complex problem with which an average citizen cannot meaningfully engage. Additionally, those who are not experts yet participate in the

[132]Ross, Thomas. "The Rhetoric of Poverty: Their Immorality, Our Helplessness." *Georgetown Law Journal* (1991): n. pag. Print.

[133] Fraser, Nancy. "Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies." *Research Gate*. Researchgate.net, n.d. Web. 28 Apr. 2014. <http://www.researchgate.net/publication/ 240561257_Talking_about_Needs_Interpretive_Contests_as_Political_Conflicts_in_Welfare-State_Societies> p.299

[134] Fraser, Nancy. "Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies." *Research Gate*. Researchgate.net, n.d. Web. 28 Apr. 2014. <http://www.researchgate.net/publication/ 240561257_Talking_about_Needs_Interpretive_Contests_as_Political_Conflicts_in_Welfare-State_Societies> p.299

discourse, mainly those claiming that their needs be met, are recast as passive recipients of services, not as active political participants in how their needs are determined or met. Essentially, their political engagement is negated. All of the aforementioned strategies are employed in South Africa and are a cause for concern because they are at their core attempts by society to purport its helplessness in the face of extreme poverty and to do nothing about that which it undeniably has some control over.

The Court, in its socioeconomic rights judgments, has formed and will continue to form a significant aspect of the South African process of juridification, or the growth of regulation or law in the welfare state. Specifically, this law is regulatory or instrumentalized law, not aimed at resolving particular disagreements or predicaments, but at guiding, constituting, and giving effect to the social welfare programs and objectives of the government. Because of this, the Court is part of, and sometimes cardinal to the political rhetoric around areas of poverty. Juridification, which includes some of the work of the Court in the instances which it interprets and applies socioeconomic rights, has the ability to exercise a depressing effect on critical political action by utilizing rhetoric in its judgments that breaks down or subverts the variety of social movements and organizations upon which political action is dependent.

Through the interpretations of need and poverty that the Court authorizes in its rulings it legitimizes the depoliticizing strategy that political actors employ by drawing the limits of the political and determining which issues related to poverty and need are susceptible to political contestation. In some of its rulings, the court has employed similar depoliticizing strategies to the ones explored previously and in doing so has identified aspects of poverty and need as falling outside the scope of politics and therefore potential political remedies. These have traditionally

occurred when the Court is faced with an argument for an affirmative Constitutional right, one that would mandate the state do something.

One instance of the Court engaging in a domestication strategy was in J Sach's concurring opinion in *Soobramoney*. In addition to the depoliticizing rhetoric Sachs offers, there is also an element of, as mentioned previously, the Courts unwillingness to engage substantively with issues. The majority of Sach's judgment deals with an explanation of why the Court could not intervene in this instance, specifically on behalf of Mr. Soobramoney. Sachs calls upon traditional arguments of those that argued against the justicability of socioeconomic rights, particularly the arguments about institutional capacity and limited resources, specifying that with respect to the issues the Court faced in *Soobramoney*(medical treatment) the Court was not equipped to decide resource allocation. He argues that, "If governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody."[135] He concludes that "courts are not the proper place to resolve the agonizing personal..problems that underlie these issues….our country's legal system cannot replace the more intimate struggle that must be borne by the patient..and those who care about the patient."[136] Normative debate about what impact this might have on healthcare or access to medicine is not invited. In a few decisive sentences Sachs has limited the space for debate around the issue, and with phrases such as "agonizing personal problems" and "intimate struggle that must be borne by the patient and those who care about the patient" he has effectively removed the issue from political contestation and relegated it to the role of the

[135] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997 para 58

[136] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997para 58

private, or familial setting. In searching for ways to justify the Court's inaction, which could certainly be justified, Sachs ended up utilizing rhetoric that detrimentally affect the ability of groups to argue about the nature of healthcare in the political sphere, by determining that such debate or decision making was not actually political but personal and private. In doing he depoliticizes this issue by domesticating it.

Another example of this can be found in the case of *Grootboom.* The claimants argument was partially based upon children's section 28(1)c right to shelter. While J Yacoob's judgment on the issue, was decided in favor of the claimants under section 26(1), he did interpret the aforementioned section. The mainstay of this interpretation was the synthesis of section 28(1) c with section 28(1) a, which stated a child's right to "family care of parental care, or to appropriate alternative care when removed from the family environment"[137] According to J Yacoob this meant that the state only had an indirect duty to provide shelter for children as the primary responsibility to do so rests on parents and family and the state should only become involved in the absence of this unit.[138] Where children are cared for by parents or families, the only duty of the state is to "provide the legal and administrative infrastructure necessary to ensure that Children are accorded the protection contemplated by s 28".[139] Yacoob concludes, quite unambiguously, that:

> "It was not contended that the children who are respondents in this case should be provided with shelter apart from their parents. Those of the respondents in this case who are children are being cared for by their

[137] *The Department of Justice and Constitutional Development.* Department of Justice, n.d. Web. 28 Apr. 2014. <http://www.justice.gov.za/legislation/ constitution/constitution.htm>

[138] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 76

[139] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 78

> parents ; they are not in the care of the State, in any alternative care, or abandoned. Therefore, there is no obligation upon the state to provide shelter to those of the respondents who are children."[140]

The rhetorical effect of this ruling is that J Yacoob moves dependency away from the state and onto the family. In doing so, he, like J Sachs, privatizes the issue and depoliticizes it. He ignores the fact that children who are with their families, but families that are very poor, are often worse off than those receiving alternative care from the state, because their parents are often too poor to properly care for them. By doing so he is alleviating the state of taking action to help alleviate the living situations of children of poor families, specifically in relation to housing, instead deciding that families are responsible for their children and themselves. He also is able to avoid the question of whether children needs should take priority over those of others. Though later reversed in the *TAC* case, this is still evidence of the Court, subconsciously or not, succumbing to rhetoric that shuts down the political space of contestation that is so essential to the transformative aspect at the heart of South Africa politics.

Lastly, it is worth noting the recurring instrumentalization of needs, specifically institutional capacity arguments, which the Court engages in throughout the cases of *Soobramoney, Grootboom,* and *TAC*. In dealing with these three cases the Court regularly utilizes the institutional capacity argument to justify its inaction. This argument touts the lack of the requisite technical expertise and institutional capacity to properly engage with the issues at hand and therefore justifies its inaction while also justifying its choice not to decide a particular question that is raised by socioeconomic rights litigation. For example, in *TAC*, which is commonly seen as the apex of socioeconomic jurisprudence in the country, the Court chooses not to decide whether the State's constitutional obligations in relation to s 27(1) forces it to

[140] Irene Grootboom and Others v. The Government of the Republic of South Africa. 11 Southern African Legal Information Institute. Constitutional Court of South Africa. 2000. Print. para 79

provide formula feed to HIV-positive mothers. Though doing so would prevent the transmission of HIV to their breastfeeding children, the Court says this area "raises complex issues"[141] which the Court does not have the capacity to decide. The Court utilizes instrumentalization to also justify taking a general stance of deference towards the executive and legislature and a restrained view of how it analyzes state conduct with the reasonableness standard.[142][143]

While these actions are generally perceived as uncontroversial, and in line with the separation of powers that the Constitution lays out, the Court directly and indirectly instrumentalizes the questions it encounters, describing these issues as "technical problems for managers and planners..in contradistinction to political matters"[144] In doing so the Court is washing its hands of the issues, saying they are too complex for it to address. The Court is reducing the issue to a technically complex problem with which those who are not experts in the area cannot meaningfully engage. The message is that socioeconomic rights are technical rather than political in nature and that it is the responsibility of the other branches of government to deal with said issues. The idea the Court conveys to other unofficial actors such as NGO's or social movements is that not only are the issues that they seek to address difficult in a technical sense that they might not have the capacity for, but also that these are issues are simply none of

[141] Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para 128

[142]Minister of Health and Others v. Treatment Action Campaign and Others. 9 Southern African Legal Information Services. Constitutional Court of South Africa. 2002. Print. para 38

[143] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997para 29

[144] Fraser, Nancy. "Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies." *Research Gate*. Researchgate.net, n.d. Web. 28 Apr. 2014. <http://www.researchgate.net/publication/ 240561257_Talking_about_Needs_Interpretive_Contests_as_Political_Conflicts_in_Welfare-State_Societies> p.299

their business. The rhetoric of the Court relegates those who are not experts or part of the official organs of democracy, yet participate in the discourse, to the status of passive recipients of services, not active political participants in how their needs are determined or met. The political branches of government will determine what the poor need, and then deliver it to them. The poor, or others who work on their behalf, are not to be part of the process, because if the Constitutional Court of South Africa recognizes it is not its role to substantively engage with socioeconomic issues, why should these various unofficial actors think otherwise?

While based on sounds logic or the separation of powers, the language and rhetoric the Court uses in its judgments is guilty of depoliticizing poverty in a number of ways, that signal to the rest of South Africa that the issues of poverty and need are not political, and therefore shut down the spaces in which they can be contested. This certainly has an impact on socioeconomic rights legislation, as well as what perceived gains can be made through the political system. Furthermore, this sort of issue could certainly be part of the motivation for non-institutional political actions like street protests and the illegal reconnection of services like water and electricity. In further developing its jurisprudence, the Court must be highly cognizant of this language, and avoid it at all costs.

Practical Obstacles to Public Interest Litigation

The three practical barriers to public interest litigation that most stand out in how they affect the Court's role as an institutional voice for the poor are issues with direct access to the Court by individuals, how the costs of Court cases are decided, and the lack of returns that litigants see, even when cases are ruled in their favor. These three issues combine to produce substantial technical and practical obstacles to pursuing public interest litigation as a strategy for

having rights realized. This is an important human rights strategy, and therefore these obstacles should not be overlooked.

The Constitution empowers the Constitutional Court to function as the Court of first instance by allowing direct access "when it is in the interests of justice and with leave of the Constitutional Court"[145] Yet even though poor people generally pursue two means of getting their rights realized, protest and litigation, there are incredibly few poor people that bring cases before the Court in relation to the number of decisions that the Court hands down each year. The Court has only granted direct access eight times from 1995-2006 and even so, has never allowed and 'off the street' complaint by a poor person to be heard or voiced.[146] Jackie Dugard, a lawyer at the Socioeconomic Rights Institute, observed that:

> "While spending two weeks in the Registry conducting archival research during February 2005-poor people who came to the Court registry window were sent away with a copy of the Court rules, regardless of whether their complaint raised substantive Constitutional issues. Such severe gate-keeping occurred in the context of a low caseload, which suggested to me that the Court could hear a number of direct access cases each year, if these were appropriately screened for raising Constitutional issues in the public interest."[147]

How could this be pursued differently, and what might Dugard mean by appropriate screening? For examples one can look to Latin America, another place at the forefront of progressive judiciaries, and see how courts there have handled this issue. The Constitutional Court of Costa Rica accepts any sort of direct claim, written in a variety of forms, and in doing so, considers

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[145] Section 167(6)(a) of the Constitution, *The Department of Justice and Constitutional Development*. Department of Justice, n.d. Web. 28 Apr. 2014. <http://www.justice.gov.za/legislation/ constitution/constitution.htm>

[146] Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr. 2014. <http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte>

[147] Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr.2014. http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte p.11

around 17,000 direct claim cases each year.[148] Another place to look for an example is Columbia, where the Constitutional Court of Columbia has generally considered around 800 direct access cases each year.[149] If the Court continues hear a paltry number of direct access cases, it risks losing levels of legitimacy and recusing itself from the important debate around socioeconomic rights.

To allow greater access and facilitate the hearing of constitutional matters that might not make it through the traditional judicial system, the Court would be wise to adopt a more ably and appropriately staffed Court Registry office. Such a system can be seen once again in the Constitutional Court of Costa Rica, which is only able to consider the massive number of direct access cases due to the intensive use of trained legal clerks who typically screen direct access applications for merit while the Court hands down concise rulings on the applications that do make it though. The Court would be wise to adopt a similar system in which interns, volunteers, or law students might scan the applications of direct access applicants for substantive constitutional issues before moving them onto the Court registry. Additionally, in cases that seem to be particularly contentious or substantial in relation to the Constitution, Court Registry employees or volunteers might refer the case to a relevant civil society or public interest organization that might consider representing the applicant in a direct access case. In this vein, the Court should also encourage and allow these organizations to access the direct access route.

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[148]Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr.
2014. <http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapter>

[149] Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr.
2014. <http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapter>

In doing so, it would be encouraging more people or organizations to bring cases forward because it would greatly reduce the costs and time involved in litigating the issues in question. By pursuing a more open process of direct access, the Court would have greater contact with the very people it aims to help, be fostering a dialogue around socioeconomic rights, and pursuing a transformative vision.

The issue of cost that was briefly raised in the previous paragraph brings us to the second barrier at issue here- the way that cost orders are currently carried out. The general practice of litigation is that "the successful party should be given their costs", [150] which occurs at the judge's discretion. That being said there is usually an exception made for public interest matters, due to the potentially disastrous consequences to public interest organizations if they experience one adverse order and are forced to therefore pay their own costs as well as those of the party they took to court. Therefore it is critical that the judiciary holds to this exception and does not just burden an organization that loses a public interest case with all the costs of the litigation. If judges choose not to adhere to this strictly, then there is the ever present threat that one adverse ruling could bankrupt an organization, a threat that will discourage many individuals and NGO's from bringing their issues before the Court at all. This is unacceptable for litigation that seeks to uplift people, and further develop South Africa's transformative constitutionalism. Yet the Constitutional Court, while having made several proclamations reinforcing the idea that judges should adhere to the aforementioned exception, continues to see this as a secondary concern to

[150] Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr.
2014. <http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapter>

the more common law approach that costs should be awarded at the discretion of the judge[151] This is despite the Court recognizing that costs and the awarding of them play an important role in litigation, stressing that:

> "One can think off-hand of at least one reason why this general rule[that costs follow the results] might not apply to constitutional litigation, mainly that it could have a chilling effect on litigants, other than the wealthiest, desirous of enforcing their constitutional rights. In might also no apply where the constitutionality of a statue is challenged, a matter which would usually be one of public interest"[152]

Due to this apparent awareness of the issues such a practice could promote, it is surprising that the court has not been more decisive in establishing binding orders or rules in relation to the awarding of costs in public interest litigation. One case that represents the fears of all parties is that of *Biowatch,* in which the NGO Biowatch took Monsanto South Africa to court in order to gain access to information about genetically modified organisms. After a long an drawn out battle in the courts, the case was ruled in favor of Biowatch, who was then awarded with its own court costs, as well as Monsanto's. Though it appealed this decision a number of times (the Constitutional Court chose not to hear this case) it was eventually ruled that Biowatch would pay the court costs of itself and Monsanto. This resulted in the liquidation of Biowatch because the organization could not in fact do so. This is the worst case scenario and a visible deterrent to public interest litigators or organizations unless the Constitutional Court takes further measures to make explicit and binding the guidelines and exceptions around costs.

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[151] Makhalemele, and Sorensen. "Costs in Public Interest Litigation: The Biowatch Case." *De Rebus- The South African Attorneys' Journal* (2005): n. pag. Print.

[152] Ferreira v Levin NO and Others; Vryenhoek and Others v. Powell NO and Others. 95 Southern African Legal Information Institute. Constitutional Court of South Africa. 1996. Print. para 155

Finally there needs to be a greater return on substantive relief for individuals who come to the Court seeking relief from the hardship of their current situations. At its onset, the Court recognized that:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[153]

Yet many, including the applicants in *Grootboom,* see little tangible change in their immediate lives from Court rulings. In *Grootboom*, many of the applicants are still waiting on viable housing. In *Thabelisha Homes,* the victory was merely not being evicted, in spite of the Court ruling it was legal to do so, and the proposals to upgrade the existing settlement have not yet been put into effect. Certainly there are benefits to each ruling, and in some where the Court ruled against the applicants, such as *Mazibuko*, the legal mobilization around the Free Water Policy of Johannesburg actually applied enough pressure to the city that it changed the policy, providing more water of their own accord. However, the fact that legal mobilization was carried out is a testament to the organization and steadfastness of the applicants, because as in the previously noted cases, the tangible returns to them had the potential to be nonexistent. Specifically, the Court needs to make it a point, in its orders, to address the lived situation of the people coming before it, especially when it finds in favor of them. While changes to national housing policy or an inadvertent stay to evictions is beneficial, the Court needs to take a more supervisory role in seeing that its orders are carried out, because as noted before in *Grootboom*, the government dragged its feet and this resulted in the suffering of citizens. While this might

[153] Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. paragraph 8

seem a secondary issue, the hope to improve their own lives is what brings people to the Court in the first place. When they win a case, the result should not be that they die "homeless and penniless"[154] in a shack in Wallacedene, as was the case with the lead applicant in the *Grootboom* case, Irene Grootboom.

[154] Joubert, Pearlie. "Grootboom Dies Homeless and Penniless." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 8 Aug. 2008. Web. 28 Apr. 2014. <http://mg.co.za/article/ 2008-08-08-grootboom-dies-homeless-and-penniless>.

Conclusion

First examining the momentum that necessitated socioeconomic rights be included in the South African Constitution of 1994, this thesis has sought to outline a slightly different approach to socioeconomic jurisprudence that the Constitutional Court should consider in light of the failure of other civil pillars to deliver substantive change around the issuing of economic inequality. It has done so by initially examining a number of cases that have been brought before the Constitutional Court since its conception, focusing specifically on landmark rulings on certain key issues. Some of the main mechanisms and readings that have emerged from this analysis of the Court's jurisprudence include the rejection of a minimum core of rights, the reasonableness standard, meaningful engagement, and the keeping of promises by the state. These mechanisms are certainly useful and represent the culmination of the Court's struggle with contradictory forces in South Africa-a market economy that is supported by a largely capitalistic government and a strong populist desire and movement to rectify seemingly entrenched economic inequality that leave millions in poverty. However, in light of the ineptitude of Chapter Nine Institutions, the rampant distrust of government and economic agendas that have largely abandoned the idea of comprehensive development, the Court must alter its approach.

The Court is perhaps the strongest institution in the country of South Africa today. It is one of the few places for people to pursue institutional redress. In light of this, this thesis critically examined the reasonableness standard, the depoliticizing rhetoric around poverty the Court uses, as well as practical obstacles for individuals or groups pursuing public interest litigation through the judiciary. It has found that for the Court to be a more effective institution

in light of the failings of other bodies conceived of by the Constitution, a number of the Court's approaches must be altered slightly. The reasonableness standard must function more effectively as a programmatic guide for the government by substantively articulating a minimum core, one which will give the government programs a goal to pursue and halt the vicious circle of programs that don't know what they are aspiring to.

Secondly the Court, as one of the few mediums of institutional redress, should also be more cognizant of the tacit message it is delivering in its judgments. Language plays a particularly important role in human rights claims and even articulating grievances in the language of human rights is a conscious choice that appeals to certain emotions and institutions. When reading between the lines of the Court's judgments, it can be seen that it legitimizes the depoliticizing strategy that participants in the political debate employ by drawing the limits of the political and determining which issues related to poverty and need are legitimately susceptible to political contestation. In some of its rulings, the court has employed depoliticizing strategies such as domestication, naturalization, instrumentalization, and personalization. In doing so has identified aspects of poverty and need as falling outside the scope of politics and therefore potential political remedies. The resulting message to other unofficial actors such as NGO's or social movements is that not only are the issues that they seek to address difficult in a technical sense that they, like the Court, might not have the capacity for, but that these are issues are simply none of their business. Moving forward, the Court needs to better recognize the cost of the language it uses in its judgments.

Finally, there are various practical barriers that prevent individuals from accessing the Court. One is issues with direct access to the Court by individuals and how a lack of institutional

facilitation in regard to direct access discourages applicants to the Court. Creating a Court Registry similar to those of courts in Costa Rica or Columbia would provide some measure of remedy for this. The costs of Court cases also stand as a potential obstacle in that there is no codified method for awarding costs, meaning that sometimes, based on the discretion of the judge, applicants who win public interests cases are forced to pay the costs of the party they took to court, which has resulted in the liquidation of public interest organizations. The fear of a similar result can potentially dissuade NGO's or individuals from taking parties that chose not to respect human rights, particularly socioeconomic rights, to court. Finally the lack of returns that litigants see, even when cases are ruled in their favor, does not motivate further public interest litigation. Claimants come before the Court hoping to have their lived experience addressed and rectified-whether they wish to not be evicted, have better access to services, or be provided healthcare. Time and time again these benefits, even when the case has been ruled in the claimants favor, have not materialized. The lack of tangible benefits for claimants makes them wonder why they even came to the Court in the first place. Unless the Court takes a more stringent and supervisory approach to its rulings, particularly when they involve the implementation of a new program, this lack of return on a case seems unlikely to change. These three issues combine to produce substantial technical and practical obstacles to pursuing public interest litigation as a strategy for having rights realized.

In conclusion, the Court has done many great things in guiding a new South Africa through the past 20 years of freedom that the country has enjoyed. It has been at the forefront of developing a jurisprudence of socioeconomic rights and will more than likely continue to do so in the future. But the situation has changed from when the Court initially started functioning. Institutions and economic programs have changed or fallen away, the

government has lost much of the trust it had immediately after negotiating the end of apartheid, and many poor people have taken to the streets in desperate protest. There is still a vast economic divide between the privileged and the un-privileged in South Africa, one that bears a deadly burden of poverty for those who are not among a lucky few. In a hallway of Old Fort Prison in Johannesburg, where Gandhi and Nelson Mandela were once held, there is a proverb is inscribed in the stone wall that states, “If you want to walk fast walk alone, if you want to walk far walk together.” As the country moves forward, the Constitutional Court must shoulder a greater load of responsibility and take more holistic jurisprudential approach as it works to enforce the Constitution. It can do so by changing its current approach, and in doing so, attempting to ensure that millions are not left behind in poverty as the country hopes to realize the lofty potential of its Constitution.

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