ADJUDICATING THE SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTION: TOWARDS ‘DEFERENCE LITE’?

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ABSTRACT
The record of adjudicating the socio economic rights in the Constitution of the Republic of South Africa, 1996 reveals a judicial and academic retreat into administrative law and the occasional, mechanistic application of international law. The Constitutional Court has been reluctant to impose additional policy burdens on government or exercise supervision over the executive. This approach has its source not only in the restrictive legal repertoire employed by the Court, but also in the political and economic context in which current legal practice is located. The Constitution invites a transformation of legal concepts. This requires breaking down the division between negative and positive rights, in addition to the adoption of different remedies. The focus should move from ss 26, 27 and 28 of the Constitution towards the distributional implications of all constitutional rights. There is already a small but significant body of decisions of the Court which support the development of more fused conception of rights, including the recognition that the concept of legality may impose positive obligations on the state.

I INTRODUCTION
The Constitution¹ promises a society based upon freedom, equality and dignity. It includes the concept of substantive equality and an anti-discrimination clause of great boldness which outlaws discrimination on a wide range of grounds including race, gender, sex, ethnic or social origin, age, sexual orientation, religion and language.² It contains rights which promote multi-culturalism.³ Its ambition is to operate both vertically and horizontally, thereby seeking to hold accountable abuses of power wherever sourced.⁴ It entrenches the right to strike and the right of workers to organise collectively.⁵ In addition, it includes a range of socio-economic rights which are designed to be judicially enforceable. The

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2 Section 9.
3 Sections 31 and 32.
4 Section 8.

301
vision of the Constitution points in the direction of a social democracy in which the state must play an important role.

The socio-economic rights and the obligations they impose go to the heart of the developmental role of the state. Before turning to the record of the treatment of these rights by the judiciary, it is useful to reflect on the manner in which the rights became part of the Constitution as well as the ambition of those who drove this part of the constitutional process.

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

> The danger exists in our country as in any other, that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and oppressed. The only difference would be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have nonracial oppression.6

In arguing for the inclusion of social and economic rights in the Constitution, Sachs also cautioned against the use of the ordinary courts to enforce these rights. Instead, he contended that a series of commissions would be a better means by which to promote a new jurisprudence. His concerns were clearly focused on the legacy of the judiciary which had served the apartheid system so conscientiously. As he wrote:

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

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

application of affirmative action to areas of social and economic life, while a Land Commission could deal with the question of access to land.\(^7\)

The interim Constitution\(^8\) did not implement these ideas, but the issue remained firmly on the agenda. It was thus not surprising when a number of social and economic rights were included in the 1996 Constitution. In particular, s 26 provided a right of access to housing, s 27 a right of access to health care and s 28 a range of children’s rights which included a guarantee for each child of a right to basic nutrition, shelter, basic health care, services and social services.

A number of significant objections were raised early in the debate about the inclusion of these rights. First, it was contended that these rights were not universally accepted fundamental rights to be included in a Bill of Rights. Secondly, it was argued that the inclusion of these rights would be inconsistent with the doctrine of separation of powers because the judiciary would, in effect, encroach on the powers to determine policy which resided in the legislature and executive. These objections were formally raised in the certification process by a number of objectors.\(^9\)

Significantly when it came to the question of separation of powers, the Constitutional Court said:

> It is true that the inclusion of socio economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of State benefits to a class of people who formally were not beneficiaries of such benefits. In our view, it cannot be said that by including socio economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers.\(^10\)

A further objection was raised concerning the justiciability of these rights. Again the Constitutional Court adopted the view that these rights were, at least to some extent, justiciable. Furthermore it added that ‘[t]he fact that socio-economic rights will almost inevitably give rise to . . . [budgetary] implications does not seem to us to be a bar to their justiciability’.\(^11\)

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\(^7\) Ibid 20 2.
\(^9\) The certification process involved the implementation of an agreement that was concluded between the African National Congress (ANC) and the National Party (the white minority governing party) and then enshrined in the interim Constitution. The process entailed requiring the Constitutional Court to certify that the draft constitution passed by the Constitutional Assembly (the ‘final Constitution’) complied with 34 constitutional principles agreed to by the negotiators at the talks which gave rise to the interim constitution. For an overview, see the First Certification decision: Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) paras 12 19.
\(^10\) Ibid para 77.
\(^11\) Ibid para 78.
The Constitution having been certified, the socio-economic rights contained in ss 26–28 of the Constitution posed challenges for courts new to constitutional jurisprudence and for judges mainly schooled in legal positivism. It is about these challenges that this article is mainly concerned.

My argument is as follows. Although the introduction of socio-economic rights in the Constitution followed the traditional route of being ‘judicially centred’, Sachs’s vision of ‘orderly redistribution’ by means of a floor of rights appeared to be capable of implementation. Certainly, the text was open to this reading, but that entailed a new and different approach to constitutional rights which had predominately been seen in negative terms. However, the record of adjudicating these rights over the first decade since the advent of democracy in South Africa reveals both a judicial and academic retreat into administrative law and the occasional, mechanistic application of international law. Disappointingly, there has not even been a suggestion of the development of a new legal method which could assist in the implementation of the promise entailed in the inclusion of social and economic rights in the constitutional text.

In general, the Constitutional Court has been reluctant to impose additional policy burdens on government, notwithstanding the imperative to give some content to these rights as contained in the text of the Constitution. The less the burden on the Constitutional Court to exercise supervision over the executive, the more comfortable it feels in its role as the ultimate enforcer of accountability. Thus, the Court provides an interpretation to these rights and then approaches the question of appropriate relief in a manner that that proclaims its constitutional custodial role without forcing the hand of the executive. The source of this approach is to be found not only in the restrictive legal repertoire employed by the Court, but also in the political and economic context in which current legal practice is located. Expressed differently, the Constitutional Court is well aware of international jurisprudence and its ambitious reach but it is reluctant to cross a judicial boundary which it has established for itself and it employs an administrative law model to justify this cautious approach.

If South African constitutional law is to engage with ‘orderly and fair redistribution’, the focus should move away from s 26–28 of the Constitution and towards the distributional implications of all constitutional rights. A review of the relevant case law reveals that the jurisprudence relating to ss 26–28 has run its course. No amount of jurisprudential gnashing of analytical teeth or academic concern about the failure to follow comparative or international law will change an approach which is reluctant to give clear content to the rights contained in ss 26–28. If the Constitutional Court does define these rights with any
precision, the burden placed upon the executive by the courts is significantly increased. That is precisely what the Court’s approach to these sections is designed to prevent.

The Constitution invites a transformation of legal concepts. Inter alia, this implies breaking down the division between negative and positive rights that is very much a part of present legal culture, but is unsustainable. The right to vote or the right to a fair trial, for example, impose positive obligations on the state; they hold distributional consequences for the public purse. Hence, the question arises as to how a division can be sustained on the basis that only positive rights impose financial burdens on the state. If the Constitution is read differently, recognising that many of the rights it contains may impose positive obligations upon the state, a more coherent jurisprudence for social and economic rights begins to emerge. The nature of the right to be claimed is more precisely defined and the relationship between the right and a justified limitation is established. There is already a small but significant body of decisions of the Constitutional Court which support the development of more fused conception of rights. Recognition that the concept of legality may impose a positive obligation on the state or that the rights to life and freedom and security of the person can be read in favour of the imposition of positive duties upon a state-controlled corporation to its customers are indicative of a transformed conception of rights.

The final, ancillary question addressed in this article concerns the argument that a rights-based strategy to secure economic claims holds severe dangers for the claimants who would be better advised to explore ‘political avenues’ to secure their demands.

II THE RECORD OF THE CONSTITUTIONAL COURT IN RESPONDING TO SOCIO-ECONOMIC RIGHTS LITIGATION

It took some time before the social and economic rights in the 1996 Constitution were litigated, thereby postponing any immediate judicial response to the implementation of these rights. When the first challenge was launched the Constitutional Court began with great caution. In Soobramoney12 the appellant was a diabetic who suffered from ischaemic heart disease. His kidneys had failed in 1996 and his condition was diagnosed as irreversible. He asked to be admitted to a state hospital for dialysis treatment. The hospital adopted a policy that it would only admit patients who could be cured within a short period as well as those patients who suffered from chronic renal failure, if they were eligible for a kidney transplant. Soobramoney was ineligible because of his heart condition.

12 Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC).
Sooobramoney brought an application, claiming that he had a right to receive treatment from the hospital in terms of s 27(3) of the Constitution, namely the right to emergency medical treatment. The Constitutional Court confined the scope of s 27(3) to a right to receive immediate remedial treatment that is ‘necessary and available’.

The right did not cover, the Court held, ‘ongoing treatment of chronic illnesses for the purpose of prolonging life’. The Court also held that the right had to be construed in the context of the general availability of health services. The Court found that, within its available resources, the hospital could not be expected to provide treatment to patients who matched the appellant’s health profile. Formulation of an appropriate policy lay with hospital authorities who had acted in good faith; hence the Court was slow to interfere with the kind of decisions made within the context of scarce resources and compelling demands and exhibited a clear reluctance to impose an obligation on the State to extend or create emergency facilities.

Two years later, in Grootboom the Constitutional Court set out a framework for a South African socio-economic rights jurisprudence. In this case, Ms Irene Grootboom and some 899 squatters had been evicted from their informal homes which had been erected on private land earmarked for formal low cost housing. Many of the litigants had applied for subsidised low-cost housing from the municipality but had been on the waiting list for many years. The key question for decision was whether the measures already taken by the state to realise housing rights in terms of s 26 of the Constitution were reasonable. In considering the test for reasonableness, the Constitutional Court considered that it should not enquire ‘whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent’. The Court accepted that a measure of deference must be given to the legislature and particularly the executive to implement a proper housing programme. However, the Court insisted that the concept of reasonableness meant more than an assessment of simple statistical progress and that evidence had to be provided to show that there was sufficient attention given to the needy and most vulnerable within the community, for they were to be considered to be a priority in the development of any sensible and constitutionally valid housing policy.

In other words, those most desperately in need were the first group which the state was required to consider in the implementation of a policy which fell within the framework of s 26.

15 Ibid para 29.
17 Ibid para 41.
18 Ibid para 44.
Although invited to follow the approach of the United Nations Committee on Economic, Social and Cultural Rights to the effect that there was ‘[a]t the very least, a minimum essential level of each of the rights’, the Court acknowledged that while ‘it may be possible and appropriate’ to consider the contents of a minimum core to determine whether measures taken by the State were reasonable, in this case it did not have ‘sufficient information’. The Court concluded: ‘It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core of a right’.

The Court did provide some indication as to the meaning of s 26(1). In his judgment for the Court, Yacoob J drew a distinction between the right of access to adequate housing as contained in the constitutional text and the right to adequate housing as provided in the International Covenant on Economic, Social and Cultural Rights. The significance of this distinction is that s 26(1) recognises that housing ‘entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself’. The right envisaged a measure of flexibility, in that the obligations of the state would alter in response to applicants with differing levels of economic resources. Where a person possessed resources to acquire a house, the obligation would, for example, be to provide access to housing stock, whereas in the case of the poor their needs would require ‘special attention’ which would include financial assistance and social welfare.

The Court next encountered the socio-economic rights in the Treatment Action Campaign case (’TAC’). This case concerned government policy which had confined the use of an anti-retroviral drug called Nevirapine which could prevent mother-to-child transmission of the HIV virus to a limited number of research and training sites. Two rights were invoked by the applicants in support of a challenge to government policy with the aim of extending the public sector provision of the drug to all HIV-positive pregnant mothers. These were s 27, which provides that everyone has the right to have access to health care services and s 28(1)(c) which provides that every child has the right to basic nutrition, shelter, basic health care services and social services.

The case ultimately turned on the challenge based on s 27. The Constitutional Court declined to conclude that s 27(1) gave rise to a self-standing and independent positive right enforceable, irrespective of the

20 Grootboom (note 16 above) para 33.
21 Ibid.
22 Ibid para 35.
23 Ibid para 36.
24 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC).
qualifications contained in s 27(2), namely that the state must take reasonable or legislative and other measures within its available resources to achieve the progressive realisation of each of these rights. The reasoning for its approach is to be found in the following passage of the judgment:

The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.25

The Court proceeded to apply to s 27(2) the approach that it had adopted in the *Grootboom* decision:

The policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their new born children who did not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother to child transmission and the need to provide access to health care services required by those who do not have access to the sites. . . to the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer?26

The Court found that, as the government’s own evidence did not dispute the safety and efficiency of Nevirapine administered at the research sites, it was not open for government to raise this defence. Its policy was inflexible and did not protect the poor. It was thus unreasonable in terms of s 27.

Its potential for controversy notwithstanding, the Constitutional Court’s decision in the *TAC* case was unsurprising in that, prior to the judgment having been delivered, the government had already retreated from its blanket refusal to provide Nevirapine in cases where it would assist in the reduction of mother-to-child transmission of HIV. However the judgment was important for two reasons, namely the reluctance to find that s 27(1) constituted a self-standing right to health care and, further, the refusal by the Court to grant a structural interdict as a key element of the order.

The Court was faced with a series of arguments to the effect that s 27(1) contained an independent right to health. The Court declined to follow this line of argument, holding that ‘the socio—economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them . . . All that is possible, and all that can be expected from the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis’.27

25 Ibid para 38.
26 Ibid paras 67 70.
27 Ibid paras 34 35.
The Court appeared reluctant to go further than it had in *Grootboom* in order to give content to s 27(1). In *Grootboom* it had held that s 26(1) prevented the State from impairing the right to access to housing; or medical care in the case of s 27(1). That remained the outer limit of s 27(1) or, for that matter, s 26(1). It determined the *TAC* dispute exclusively in terms of s 27(2) by way of an application of the *Grootboom* reasonableness test.28

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

The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution. ... In appropriate cases they (courts) should exercise such a power if it is necessary to secure compliance with a court order. That may be because of the failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.29

The next dispute heard by the Court which concerned socio-economic rights was in *Khosa v Minister of Social Development*,30 which produced a curious majority judgment. Mokgoro J confirmed that ss 27(1) and (2) cannot be viewed as independent rights which create separate entitlements so that any rights alleged in terms of s 27(1) cannot be interpreted or given any force and effect without recourse to s 27(2).31 However, according to Mokgoro J, the state may be able to justify its refusal to pay social benefits to non citizens who are permanent residents, as in this case, on the basis of s 27(2), but this refusal ‘must be consistent with the Bill of Rights as a whole. Thus, if the means chosen by the Legislature to give effect to the State’s positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account.’32 For this reason, Mokgoro J found that the exclusion of applicants on the grounds of their lack of citizenship alone ‘does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.’33

This reasoning raises the question as to whether the majority decision invites the equality provision to do all the work, thereby releasing s 27(2) from any practical application. It appears that Mokgoro J’s judgment should be read to support an argument that the discriminatory treatment of non-citizens (in this case) constituted a breach of s 9, the equality

28 There are passages in the *TAC* judgment (ibid) that refer to the removal of restrictions placed upon the use of Nevirapine, but read holistically the Court bases its finding on s 27(2).
29 Note 24 above, para 129.
30 2004 (6) SA 505 (CC).
31 Ibid para 43.
32 Ibid para 45.
33 Ibid para 82.
guarantee, and that, for this reason alone, the applicants were entitled to relief.

Having adopted an equality approach to the problem, the majority of the Constitutional Court in *Khosa* could have been expected to examine the state’s defence, based within the prism of s 36(1), the general limitation clause. The state had raised an argument about limited resources with which to pay these benefits to non citizens. Had the case expressly turned on s 9, the limitation clause would have been employed for the purpose of interrogating the limited financial resources argument. But, reverting to s 27(2), the majority expressed doubt as to whether the concept of reasonableness as employed as an internal limiter in s 27(2), differed from general imitation test contained in s 36. Mokgoro J held that, even were there to be differences, the exclusion of non-citizens in this case could not be justified in terms of s 36. As noted by Kevin Iles, once the Court had determined that the right applied to applicants, the problem of available resources should have been determined in terms of s 36. The implications of this observation will be discussed below within the broader examination of the Constitutional Court’s approach.

III IMPLICATIONS OF THIS JURISPRUDENCE

The judgments in both the *Grootboom* and *TAC* cases reveal the Constitutional Court’s willingness to implement the constitutional commitment to certain socio-economic goods and services. However, the Court has been exceptionally cautious in the development of this area

34 Ibid para 84.
35 K Iles ‘Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses’ (2004) 20 SAJHR 448, 464. Iles is correct to criticise the *Khosa* decision as missing ‘the analytical distinction between first-stage rights interpretation and second-stage justification’ (457). Iles is also ‘textually’ correct to argue that resource allocation and administrative convenience should not play a role in the determination of the content of a socio-economic right, but does assist in the decision as to the extent of the core of the right that can be claimed and granted at a particular time. Once this stage is reached, then the s36 enquiry ‘serves to determine whether failures by the state to deliver that which is claimable is justifiable or not’ (464). For the reasons articulated in this article, the Constitutional Court was, in my view, reluctant to adopt this two-stage approach because of its cautious approach to socio economic rights: that is, on Iles’s line of argument the Court would have to determine a defined, albeit loose, definition of the socio-economic rights, thereby giving up on the greater flexibility which the administrative model allowed the court to stay within its self-defined level of authority. In this way, the right is not defined to compel the executive to prepare the budget, for example, on the basis of clearly defined rights which would significantly narrow its scope to decide upon allocation of the public purse. In her judgment in *Khosa* (ibid), Mokgoro J concedes that ‘section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) right cannot therefore be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1)’ (para 43). Once s 27(1) and (2) are read together to determine the content of the right, it should follow that the right, as defined, is then subject to limitation if such limiting measures pass muster in terms of s 36. Thus, if the right taking account of the internal limitation is defined, a failure to grant the right to litigants should fall within the general limitation clause. The Constitutional Court, however, prefers a more extensive role for the internal limiter: one that conflates the two-stage enquiry, because it does not force the Court to define the right with any clarity.
of constitutional jurisprudence. In the *TAC* case, it rejected an argument that the principle of separation of powers prevented a Court from enforcing socio economic rights on the ground of a breach of this key constitutional principle. The Court reasoned thus:

Where State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.36

However, the Court’s reluctance to follow the approach to the minimum core of socio-economic rights in the International Covenant on Economic, Social and Cultural Rights which has been adopted by the United Nations Committee and Economic Social and Cultural Rights is significant. In this regard, its refusal to follow the Committee’s jurisprudence is consistent with its unwillingness to grant a structural interdict. As the Court said in the *TAC* case: ‘Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.’37

It is a key argument of this article that the same reasoning holds for both the Constitutional Court’s reluctance to interpret s 26(1) and s 27(1) as constituting a self-standing guarantee of a minimum core of rights and for its unwillingness to grant a structural interdict as part of the relief ordered against the government. In both situations, the Court does not want to impose any excessive burden on the state. By making either s 26(2) or s 27(2) do all the work in a case dealing with a socio-economic right, the Court ensures that no direct claim can be made by a litigant against the state for the delivery of a minimum core of rights. Every case must be tested in terms of the concept of reasonableness. In turn, this allows room for a court to mould the concept of reasonableness so that, on occasion, it resembles a test for rationality and ensures that the Court can give a wide berth to any possible engagement with direct issues of socio-economic policy. As one commentator has noted: ‘At present reasonableness seems to stand for whatever the Court regards as desirable features of state policy. The problem with this approach is that it lacks a principled policy basis upon which to found decisions in socio- economic rights cases.’38

The effect of the Court’s refusal to engage with either s 26(1) or s 27(1) is well described by Marius Pieterse in the following terms:

The failure to link this standard explicitly to a more detailed elaboration of the content of individual rights and obligations is lamentable, because it removes the compliance

36 Note 24 above, para 99.
37 Ibid para 38.
38 D Bilchitz ‘Towards a Reasonable Approach to the Minimum Core’ 2003 (19) *SAJHR* 1, 10.
measuring standard from its context and fails to acknowledge the explicit prioritisation of socio economic rights abundantly evident from a purposive reading of the constitutional text.  

In both *Grootboom* and *TAC*, the action of the Constitutional Court suggests a policy of deference to the other institutions of the State. The Court refused even to engage with the contours of the rights, thereby leaving as vague as possible the determination of the anchor point from which reasonable conduct can be determined. As noted, there is a singular absence of a clear standard to measure compliance. A refusal to grant a structural interdict prevents the Court from monitoring the efficacy of any order granted and hence being compelled to engage in the very mechanisms of policy implementation. The Court asserts the rights of unsuccessful litigants and then, unlike the approach adopted in at least two decisions of the High Court, the Constitutional Court is very cautious in maintaining a measure of control over the progress of the implementation of the relief.

The decision of the Constitutional Court in the *Modderklip* case may, on one reading of the judgment, indicate the adoption of a different approach. Briefly, some forty thousand people had occupied the farm Modderklip over a period of time. The owner obtained an eviction order which it was unable to enforce, the police refused to enforce the order because it regarded the matter as a private dispute between the owner and the unlawful occupier.

The matter reached the Constitutional Court by way of an appeal from the Supreme Court of Appeal (SCA). Langa ACJ held, on behalf of a unanimous Constitutional Court, that the state had breached its obligation under s 34 of the Constitution, the right of access to courts. The state’s failure to enforce an order of court undermined the rule of law and was a recipe for anarchy as parties would be forced to take the law into their own hands. In short, ‘only one party, the state, holds the key to the solution of Modderklip’s problem’. In so concluding, the Court

40 Sandra Liebenberg contends that courts do not escape the interpretative difficulties ‘of clarifying the State’s obligation in relation to socio economic rights by way of a rejection of the concept of a minimum core of rights in favour of a standard of review based upon reasonableness’. (The Interpretation of Socio-Economic Rights’ in S Woolman et al (eds) Constitutional Law of South Africa (2ed) chapter 33, 33 40.) This argument does not appear to engage with the reasons why the Court employs the plasticity of the reasonableness standard to avoid making a finding in respect of core right. The very point of this exercise is to ensure that a core right determined by the Court is not established. Were it to be so established, the Court would be forced to engage far more actively with government policy. The wording of the provisions contained in ss 26 and 27 allows the court to avoid the problem; hence the futility of pressing for the establishment of two delineated rights.
41 Apart from the decisions of the courts a quo in *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 227 (C) and the *TAC* case (Treatment Action Campaign v Minister of Health 2002 (4) BCLR 356 (T)), see *City of Cape Town v Rudolph* [2003] 3 All SA 517 (C ), 557 559.
42 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).
43 Ibid para 42.
declined to decide on the argument that the state’s failure to provide the occupiers with alternative accommodation breached the landowner’s right under s 25. It did not deal with the possible clash between s 25, the right to property, and the guarantee of access to housing contained in s 26, nor did it seek to employ s 7 of the Constitution to ground the nature of the state’s obligations to the occupiers.44

However, the Court did give positive content to s 34. In this connection Langa ACJ said:

The obligation on the state [under s 34] goes further than the mere provision of . . . mechanisms and institutions [for the resolution of legal disputes] . . . . It is also obliged to take reasonable steps, where possible, to ensure that large scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the state’s obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.45

This reasoning appears to be powered by a concern that state inaction could erode the rule of law. To that extent, the Court considered it necessary to impose a positive obligation on the state to deal with the interests of both occupiers and the landowner. Viewed in terms of the order, the judgment could have been based on s 26 or the more general provisions of s 7 of the Constitution. That the Court chose to classify the problem as a ‘rule of law’ issue may be seen as an exercise in judicial pragmatism, particularly in the face of the similar order granted by the SCA. It was able to follow the SCA judgment without developing precedent for the extension of the application of s 26 or the development of the content of s 7. Modderklip may, on one reading, represent a restrictive approach to positive obligations on the part of the State but, even so, it does hint at a more coherent rights jurisprudence which does not eschew an embrace of positive rights.

IV LEGITIMACY: A POLITICAL QUESTION

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

A further problem with the Constitutional Court order, which also stems from the declaratory nature of the order, is that the order does not contain any time frames within which the State has to act. The result is that, more than a year after the Grootboom

44 There was also a third potential area for decision, that is the horizontal application of s 25. In the Supreme Court of Appeal judgment in Modderklip there is a suggestion that s 25 does apply horizontality: Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) para 21. This question was avoided by Langa ACJ in his judgment (Modderklip (CC) note 42 above).
45 Modderklip (CC) (ibid) para 43.
judgment was handed down, there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations.46

A failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long term illegitimacy of the very constitutional enterprise with which South Africa engaged in 1994. A right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation, is rapidly transformed into an illusory right and hardly represents the kind of conclusion designed to construct a practice of constitutional rights so essential to the long-term success of the constitutional project.

The Constitutional Court could not have been unaware of the danger of an unfulfilled constitutional promise; indeed its judgment in *Modderklip* reveals a deep seated concern for the rule of law in cases where the state fails to fulfil its constitutional obligations. But the record of the Court, particularly in *Soobromoney*, *Grootboom* and *TAC* is one of studied caution predicated upon a clear concern for remaining within defined operational boundaries. In order to balance its deference to the other arms of state together with an imperative to give tangible meaning to the text, it has employed the lexicon of administrative law. Socio-economic litigation becomes less of a demand for a new approach to rights and more a recourse to legal materials with which the legal community has been comfortable.

But the choice of a legal method is not only a product of legal culture of which more presently; it has as much to do with broader political questions. The Court’s reluctance to become an activist court is reflective of prevailing political and economic concerns which are inherent in this area of jurisprudence. As the South African Human Rights Commission’s annual reports on Economic and Social Rights have consistently indicated, there has been a significant gap between the promise of housing, medical care, basic infrastructure and the delivery thereof.47 In a careful examination of these reports, Dwight Newman remarks:

> It was fortunate for the government that the [SA Human Rights Commission’s] damming words of constitutional violation for falling budgets and inappropriate management of existing budgets came thirteen months after the *Grootboom* decision was handed down rather than promptly enough to precede that decision. In *Grootboom*, the judges essentially operated from a premise that the government had a reasonable housing policy as a whole and that it was unreasonable basically only in that it failed to contemplate temporary shelter for those most in need. Who knows how they might have reacted to the government’s argument of a reasonable housing policy in the wake of such realisations by constitutional rights monitoring institutions.48


47 The Commission, acting in terms of its mandate in s 184(3) of the Constitution, has issued five Reports. The most recent is the *Fifth Economic and Social Rights Report 2002 2003* (2004). The reports are available from the Commission’s website at <http://www.sahrc.org.za/>.

The Commission’s reports are critical of the government’s record. But the record requires a rather more complex explanation than a reliance on the usual levels of administrative incompetence. A turn to the relationship between the Constitution and the development of government economic policy is a starting point for a more complete explanation.

In 1994 and 1995, when the final Constitution was negotiated by members of the Constitutional Assembly, government had not yet reached a clear decision as to the direction of its economic policy. Accordingly, the Constitution reflected a social-democratic view of the future South African society. By the time that the Grootboom case was decided, government economic policy had begun to take clear shape. A maximum tax-to-GDP ratio of 25 per cent, inflation targeting designed to ensure that inflation would be in relatively low single digits, deficits on the budget which did not exceed 2 per cent all contributed to a particular form of economics which began to be incongruent with the economic vision contained within the Constitution. Whereas the ANC government had begun its term of office in 1994 with a commitment to an economic policy entitled the Reconstruction and Development Policy (the RDP), within the first five years of its rule, it had shifted direction in favour of a policy favouring financial austerity and a more minimalist role for the state. The government saw the solution to the economic burdens bequeathed by apartheid in a so-called Growth and Redistribution Policy (GEAR) in which the development of an economy which could be competitive on the global stage would produce a growth rate sufficient to release resources to redress the poverty of the majority.

It is in the vortex of economic policy that we may begin to locate a basis for the Constitutional Court’s theory of deference. We need to view the Court’s performance in the context of the argument that, were the Court to do more, it may place the Constitution at war with government policy on a key issue, that is the shape of the economy. In my view, academic commentators have either been naïve or somewhat arrogant to believe that only they, and not the members of the Constitutional Court, have knowledge that a particular minimum core approach to a text such as s 26(1) and 27(2) has been established in international jurisprudence, this being the nub of the criticism of the Constitutional Court’s refusal to

49 I accept immediately that it was not simply the underdevelopment of economic policy that allowed the social-democratic vision to be promoted in the constitutional test. The history of the ANC, most certainly from the time of the adoption of the Freedom Charter in 1955, reveals a commitment to a series of rights which would not have been found in traditional liberal constitutional instruments. Accordingly, the political discourse of the ANC promoted the idea of second- and third-generation rights and thus became a major factor determining the form in which the Constitution emerged. For a detailed exposition of the development of ANC economic policy see WM Gumede Thabo Mbeki and the Battle for the Soul of the ANC (2004), particularly chapters 2 and 3.
50 Gumede (ibid) chapter 2.
follow this jurisprudence. The Court’s approach does not reflect an ignorance of international jurisprudence nor a lack of cognisance of the implications of s 26(1) and 27(1) of the text, but rather the knowledge that the text itself holds out a promise of a kind of society predicated on a very different approach to economics from that which currently prevails in the Ministry of Finance and which holds sway over government policy. Were the Court to be more activist, it would have run the risk of placing itself in an increasing level of conflict with the state.

This conclusion may well run a risk of over-emphasising an anxiety about a transient issue, namely the nature of current government economic policy. But the caution adopted by the Constitutional Court can be located in some of its earliest cases. In *Ferreira v Levin NO* the Court divided on the question of the scope of the right to freedom and security of the person as contained in s 11 of the interim constitution. Ackermann J employed the work of Isaiah Berlin to develop a definition of a ‘right to freedom’ as a negative right, being ‘the right of individuals not to have obstacles to possible choices and activities placed in their way by . . . the State.’ Conscious of the ‘Lochner problem’, Chaskalson P observed that, were this negative concept of freedom to be adopted by the majority of the Court, we will be called upon to scrutinize every infringement of freedom in this broad sense . . .

In a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the function of the courts and others that are properly the concern of the legislature. At times, these functions may overlap. But the terrains are in the main separate, and should be kept separate.

Justice Chaskalson was clearly concerned that an interpretation of freedom which could ‘overshoot the mark and trespass upon a terrain that is not rightly ours’ could disturb the relationship between the court, the legislature and the executive and thus jeopardise the status of the Constitutional Court at a stage of its very birth. The pragmatism of

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52 An examination of General Comment 3 (note 19 above) reveals the adoption of an ambitious range of core rights which is hardly compatible with economic policy which was designed to move speedily away from the RDP. For an examination of the jurisprudence on core obligations see M Magdalena Sepulveda *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003) particularly 368 9.
53 1996 (1) SA 984 (CC).
56 Note 53 above, para 54.
57 Ibid paras 181 183.
this approach is perhaps best highlighted by a comparison with the more normatively based rejection of the concept of negative freedom within the South African constitutional scheme adopted by Justices Sachs and O'Regan. They source a positive concept of liberty within the very vision of the Constitution which they find in the foundational values of freedom, equality and dignity as well as the history of the country within which the Constitution must be located.58

The majority of the Court who signed on to the judgment of Justice Chaskalson articulated a concern that constitutional review needed to take account of majoritarian impulses, particularly within a context of a democratically elected government being mandated to implement policies that were designed to redress the past. The clear concern with judicial modesty began in Ferreira, but would only have been reinforced by the recognition of the role of the Court in giving content to those socio economic rights which formed part of the final Constitution.

The Court’s jurisprudence has not only been subjected to uncritical comparative writings. Some commentators who have a greater intellectual ambition than the usual Cook’s Tour of comparative law, have favoured the Court’s approach. Thus, Cass Sunstein contends that the Constitutional Court has remained faithful to the transformative character of the South African Constitution by developing an approach to socio economic rights that gives tangible effect to these rights without undermining the need for democratic judgment about how to set priorities. In short, Sunstein contends that the test, as formulated in Grootboom, follows an administrative law model in which the Court calls on the government to act reasonably in designing a plan to ensure that relief will be forthcoming to a significant number for whom the rights were intended to benefit, namely the poor.59 By the employment of this model, Sunstein contends that the Court has carved a path between the establishment of a juristocracy in which judges assume the exclusive role of setting the allocation priorities and being the distributors of the public purse and the unfettered exercise of the power of a transient majority in which these rights may well be honoured more in the breach then in the implementation. Mark Kende is even more complimentary to the Court. He contends that its decisions have rendered socio economic rights enforceable without undermining the principle of separation of powers.60

V DEFERENCE AND ACCOUNTABILITY
To an extent, Sunstein and even Kende may be correct. The present

58 Judge Sachs’ approach is to be found in Ferreira v Levin NO (note 53 above) paras 245ff. Judge O’Regan develops her response in Bernstein v Bester NO 1996 (2) SA 751 (CC) paras 134ff.
strategy may, to an extent, have been partially successful. The judgments of the Court have set out a framework for, at the very least, holding government accountable to the constitutional commitments imposed upon it. A jurisprudence which is based on a principle that the poorest must be given priority is not a development that should be discarded as being unhelpful to the vision of the Constitution.

The long-term success of this approach will depend upon the extent to which delivery of basic rights improves significantly beyond that reflected in the reports of the South African Human Rights Commission. For example, in a recent report, the Commission expresses concern about the lack of environmentally sound housing, housing with adequate infrastructure, the levels of maladministration and corruption. Here lies the risk in the Constitutional Court’s strategy. The problem of delivery has, to an extent, been exacerbated by the reluctance of the Court to follow through with the implementation of its chosen model. Its consistent refusal to grant structural relief which would empower the Court to supervise the implementation of its own order has produced unfortunate results. Litigants have won cases and government has done little to produce the tangible benefits that these litigants were entitled to expect from their success. The Court has, in effect, surrendered its power of sanction of government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of the judgments promised in so clear a fashion.

Viewed thus, this approach, sourced as it is in a theory of deference, is derived from modern work in administrative law. It has trumped the principle of democratic accountability that should lie at the heart of the adjudication of these rights. Albie Sachs’ early work cautioned against judicial enforcement of these rights because, he thought, the judiciary would be hostile to this challenge. I have tried to argue that the record of the Constitutional Court to date has been cautious but not hostile to the challenges posed by socio-economic rights. That caution is sourced both in the Court’s acute awareness of judicial borders and in a conservative legal culture in which an inadequate attempt is made to consider a transformation of the legal methods inherited from the pre-constitutional era. Examine most of the academic work in the area of socio-economic rights and you will find a detailed argument about the plain meaning of ss 26(1) and 27(1) accompanied by a lengthy exposition of the implications of the International Comment on Social and Economic Rights in support of an argument for, at the least, a minimum core to these rights. What is not to be found is a new animating principle on which these rights can be developed nor much attention to the problematic ideology of negative versus positive rights.

62 See Liebenberg (note 40 above) for an example of this kind of jurisprudence.
What is first required is a theory of accountability which takes into account the essence of the constitutional promise, that citizenship in a post-apartheid society means more than the provision of a range of negative rights, which alone cannot power the model of a society prefigured in the Constitution, read as whole, being one based upon the cardinal values of dignity, freedom, equality and democracy read as coherently as possible. The value of public participation inherent in the concept of deliberative democracy warns against the judicial activity of a Hercules, who is possessed of the right answer, and always does better than the imperfect product of politics. However, the remaining three foundational values should guide the courts to an approach where government is given a margin of appreciation to implement a range of positive commitments, but remains accountable not only for the conceptualisation of an appropriate plan but also for its implementation.

In this way, the courts can become a mechanism by which those most in need can engage with government and thus ensure that government is forced to account to them for the manner in which it has decided to respond to its constitutional obligations. This form of accountability must be distinguished from political accountability which depends upon the manner in which government is elected and, if so provided in the constitution, recalled. But that is a matter of political design and the exercise of popular sovereignty in the way elections take place. By contrast, a constitution of the ambition of the South African text, introduces another form of accountability, one in terms of which the government, howsoever elected and supported, owes a fidelity to the preservation and promotion of the very basic cornerstones of the society of which it has been elected government. Whatever its particular policies, it is required to fulfill certain essential obligations, sourced within the Constitution. That it may seek to fashion a response in the image of its own core policies is one thing, that it remains accountable to those who are the beneficiaries of these basic commitments is quite another consideration. It is with regard to the latter that the court plays a vital role as a transmission belt between the government of the day and the constituencies which seek to rely on these most basic of constitutional commitments.

(a) The ‘D’ Word.

I have often employed the ‘D’ word in this paper. Deference may be an unfortunate use of term within this context. But it is inextricably linked to the administrative law model which is presently hegemonic in this area of South African law. It holds the connation of passivity on the part of the courts. The courts concern themselves with ‘rights’ and leave policy to the democratically elected institutions. But, other than offering some guidance to courts to ‘defer’ to greater levels of institutional competence when it comes to the formulation of social and economic policy and the
allied question of the distribution of limited public resources, a theory of
deerence fails to capture the positive, dialogic role that a court is
required to play within the scheme of socio-economic rights. In addition,
it can be argued within the South African historical context, that
deerence is far too closely aligned with the jurisprudence of apartheid to
constitute a model for the transformation of the legal landscape.63

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

An animating principle of democratic accountability can give rise to a
reconsideration of rights jurisprudence and in particular the present
divide between negative and positive rights. The inclusion of ss 26 and 27
into the South African constitutional text tends to exhaust the debate
about positive rights, as if no other right imposes any positive duty upon
a State. But a transformative jurisprudence, buttressed by s 7 of the
Constitution should engage seriously with Henry Shue’s important
contention:

[W]hile some duties are at the negative end of the spectrum and others are at the positive
(and many are in between), no right can, if one looks at social reality, be secured by the
fulfillment of only one duty, or only one kind of duty. If one looks concretely at specific
rights and the particular arrangements that it takes to defend or fulfil them, it always
turns out in concrete cases to involve a mixed bag of actions and omissions . . . what one
cannot find in practice is a right that is fully honoured, or merely even adequately
protected, only by negative duties or only by positive duties. It is impossible, therefore,
meaningfully and exhaustively to split all rights into two kinds based upon the nature of
their implementing duties, because the duties are always a mixture of positive and
negative ones.64

Rather than restrict a positive duty on the part of the State to the
provisions of ss 26 and 27, constitutional jurisprudence should examine
the potential for positive duties created by the various rights in the Bill of
Rights. There is some precedent to support this move. In Khoza, the
apparent conflation between s 27 and equality notwithstanding, the
Court invoked the equality guarantee to impose a positive duty upon the

63 See D Davis & H Corder ‘A Long March: Administrative Law in the Appellate Division’
State. As Mokgoro J said: ‘In the present case, where the right to social assistance is conferred by the Constitution on ‘everyone’ and permanent residents are denied access to this right, the equality rights entrenched in s 9 are directly implicated’.65 The Court then went on to impose an obligation on the state to provide permanent residents who were not citizens with social security.

In Modderklip, the Court imposed a positive duty on the state, being payment to a land owner on whose land squatters had settled in circumstances where the Court considered the state to have a duty to provide land to these squatters. The obligation was based on s 34 of the Constitution, the right of access to courts.

Most recently, in Metrorail,66 the Constitutional Court showed a further willingness to impose a positive obligation on an organ of state. Briefly, the case turned on the obligations of respondents to provide safe conditions to rail passengers while transported in trains operated by second respondent. O’Regan J began her judgment cautiously: ‘It is clear that rights other than the social and economic rights in the Constitution do at times impose positive obligations.’67 This careful approach to positive obligations notwithstanding, O’Regan J, on behalf of a unanimous Court, held that ‘Metrorail has the obligation to provide rail commuter services in a way that is consistent with the constitutional rights of commuters’. She located this duty in the South African Transport Services Act 9 of 1989 read with the applicable provisions of the Constitution.

These cases all provide some important, albeit tentative, support for the existence of a principle of democratic accountability to which the organs of state should be held by the courts and where applicable, for the imposition of duties to fulfil the mandate of democratic, accountable government contained in the Constitution.

VI Conclusion

The initial debate about socio-economic rights turned on a fear of a judicial role in policy, particularly as a result of the nature of the judicial institution inherited from apartheid. But that concern was rapidly overtaken by significant developments. The past decade reveals that government economic policy parted company from the social democratic model of society prefigured in the Constitution. Courts, which sought to build solid constitutional foundations over the apartheid quicksand, were hardly likely to challenge this kind of economic policy, save where manifestly necessary. To the extent that such challenges were justifiable in terms of the Constitution, little assistance was provided to the courts by

65 Note 30 above, para 49.
66 Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC).
67 Ibid para 70.
way of a legal approach other than one that was inherited from a bleak past.

However, in its cautious approach, the Constitutional Court was not unique. The experience of the United States is illustrative; in particular the landmark decision in *Brown v Board of Education*.\(^ {68}\) When he came to the question of the appropriate remedy, Warren CJ on behalf of a unanimous Supreme Court, after outlining the potential obstacles to implementation, said ‘the courts will require that the defendants make a prompt and reasonable start toward full compliance.’ Without insisting that integration of schools take place within a short and defined period, the court ordered that its finding be implemented with ‘all deliberate speed.’\(^ {69}\)

As Brest el al have remarked ‘the effect of *Brown I* and *Brown II* was that the right to be free from segregation was severed from the remedy. As a result none of the students in the Deep South benefited from the cases that they brought.’\(^ {70}\) It appears, however, from the historical record, that the crafting of the remedy was undertaken with a clear purpose. The justices had reached an agreement that the order in *Brown* would be implemented gradually. This approach may well have been initiated by Justices Jackson and Clark, but eventually all the justices accepted that an order for immediate implementation would inflame those parts of the country that were not ready for an integrated schools system.\(^ {71}\)

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

Can it not be argued that the approach in *Brown* supports the cautious decisions in the *Grootboom* and *TAC* cases, on the premise that, in cases where the court imposes distributional obligations upon public agencies which the latter have resisted tenaciously until so compelled by the court, the judicial function should not extend to the mechanism for achievement of the result claimed? The manner in which the Supreme Court conducted itself in *Brown* illustrates the anxiety of courts in deciding a case which


\(^{69}\) *Brown II* (ibid) 297.


\(^{71}\) I am indebted to Prof Morton Horwitz of Harvard Law School who provided me with a relevant part of his manuscript of a study on the Warren court on which the reasoning of the *Brown* court as set out in this article is based.
has far reaching social implications of a controversial nature.\textsuperscript{72} But while the South African cases held important economic and social implications, they were hardly of a controversial nature. Neither the provision of shelter for the poor and homeless or anti-retroviral drugs to HIV-positive pregnant women placed the Constitutional Court at war with a significant body of public opinion, government opposition notwithstanding. In any event, the Constitutional Court, as custodian of the new constitutional enterprise, was obligated to build the basis for the long term legitimacy of the institution. These cases were not being heard by a court which had more than a century to construct the same project.

The argument in this paper is that, where the Court has employed administrative law principles to deal with socio-economic rights, its judgments have been based on a deep-seated concern about the limited role of a judiciary and the dangers of polycentricity. The tests of reasonableness, sometimes employed interchangeably with rationality,\textsuperscript{73} have enabled the Court to strike an uneasy balance between the existence of a right and its limited input upon the nature and extent of policy.

The issue then turned to the extent to which ‘the judiciary should allow the legislature and the executive the maximum feasible room to develop policy limited only by the requirement that it protects individual rights’.\textsuperscript{74} Even without a constitutionally entrenched system of separation of powers, the complexity of polycentricity should caution a judiciary against involving itself in the hurly burly of polycentric tasks. But the dichotomy should not be drawn between ‘individual’ rights and policy, as Lenta argues in an analysis which overeggs the American and Canadian jurisprudential pudding.\textsuperscript{75}

The debate about judicial activism in the United States is based on the manner in which judges either confine themselves to a skeletal text or seek to expand its scope. Likewise, the Canadian text makes no provision for socio-economic rights nor does it have an equivalent to s 7. Socio-economic rights and positive duties imposed on the state in terms of s 7 introduce a far more complex range of rights and hence a different set of challenges for a judiciary. This text necessitates an approach to the judicial role that cannot helpfully be analysed in terms of the binary opposites of activism versus restraint developed from a history of

\textsuperscript{72} The reluctance to approve of a structural interdict finds illustration in the Canadian case of \textit{Doucet-Bordeau v Nova Scotia Minister of Education} [2003] 3 SCR 3. In this case a majority of 5:4 of the Canadian Supreme Court held, seemingly on the basis of a measure of deference to the trial court, that the court could retain jurisdiction over the government by compelling it to report back to court on progress in complying with an order to build French language educational facilities. The majority appeared to be reluctant to endorse the principle but did accept that in certain cases it could be appropriate (see paras 58 61) while the minority were fierce in their condemnation of the remedy which they considered to be inappropriate in that it was a political step which breached the principle of separation of powers. See paras 106 112.

\textsuperscript{73} See for example \textit{Grootboom} (note 16 above). para 87.

\textsuperscript{74} P Lenta ‘Judicial Restraint & Overreach’ (2004) 2 \textit{SAJHR} 544, 575.

\textsuperscript{75} Ibid.
controversy about judicial rewriting of the text. Once the constitutional
text creates a dialogic model in which the formulation and implementa-
tion of policy concerns the implementation of rights, a partnership is
created between the judiciary and the other branches of state. The
judiciary is involved in the very manner in which these rights are
fashioned. In short, the argument of this paper favours courts being
viewed as a mechanism for a constitutional dialogue between the state
and the citizenry about the range and scope of a range of positive rights
and the corresponding fulfillment of positive obligations.

But as been noted already, the present debate about the nature of
socio-economic rights has become sterile in that it is based either on an
uncritical acceptance of an administrative law model or on the persuasive
but decontextualised influence of the International Covenant on Social,
Economic and Cultural Rights.76

The Constitutional Court needs a new methodology if it is consistently
to transcend its concerns about the limitations of the judicial role. The
judgments in Khoza, Modderklip and Metrorail point towards a
possibility of a transformed rights jurisprudence which gets beyond the
limitations inherent in ss 26 and 27. It has been a critical argument of this
article that reliance on ss 26 and 27 to achieve the goal articulated by
Albie Sachs a decade ago, being to safeguard the democratic interests of
the disempowered, will bear very little fruit. The ‘reasonableness’ test
coupled with qualifications about resources have proved to be fetters
upon the development of a distributional jurisprudence. Further the
claims raised in ss 26 and 27 appear to be grounded less on a rights and
more on a policy basis, which in turn triggers judicial deference. By
contrast, if the very material with which courts work each day, being
rights claims, can be seen to hold both positive and negative dimensions,
a greater boldness of outcome becomes evident, as for example in
Metrorail. As André van der Walt has noted about this case:

The most important aspect of this finding is the fact that the existence of a state duty to
protect (accountability) can be an indication of a duty of care and hence of private law
liability, so that private law could possibly be developed in the sense that state liability is
extended to give to a transformative, public law or constitutional notion of
accountability.77

Modderklip is indicative of transformative possibility. In its decision to

76 To be frank about the potential influence upon judicial approaches to the distributional
implications of second and third generation rights, it is doubtful whether the academic
arguments propagated by writers like Lenta and Liebenberg, which offer no conceptual or
methodological alternative to the jurisprudence adopted by the courts (that is the critique is
generally that the court has not followed the precedent of an international body or complied
sufficiently with a particular textual reading), will move the courts one inch closer to an
embrace of a rights analysis which begins to take seriously the social-democratic vision which
is promised within the text.

77 AJ van der Walt ‘Transformative Constitutionalism and the Development of South African
uphold the Supreme Court of Appeal, the Constitutional Court gave
substantive content to the principle of the rule of law, upon which finding
it fashioned a clear duty which it imposed upon the executive. The result
was to burden the state with financial obligations which were founded
upon the state's obligation to uphold the rule of law and prevent
aggrieved residents from 'taking the law into their own hands'. In
arriving at this conclusion, the absence of the mediating role of
administrative law was significant.

This form of litigation will in turn compel the state to justify its policy
choices and promote democratic accountability and participation. A
court will either acknowledge the existence of a positive right, then
seek to invoke s 36, if possible, or deny, on the facts of the case, that a
particular right holds more then a negative obligation for the state.
Whatever the result, the process of jurisprudential justification will be
unable to hide behind the plasticity of the reasonableness/ rationality test.
Unlike the present position relating to ss 26–28, a range of rights will be
given some definition which will permit litigants to claim that they have
rights. The state will then be compelled to justify its failure to perform in
terms of the general limitation clause, s 36. It may be that, in this
exercise, the nature of a positive right will be weighed less than the state's
purpose in so limiting the right. But in itself, this exercise will promote a
far clearer culture of accountability then is the case with the vague
principle of reasonableness which, at best, means dealing first with the
poorest of the poor!

(a) Do rights struggles subvert the possibility of distributional claims?
This approach to rights raises the broader role of rights and rights
litigation in a progressive political project. This article has sought to
examine the possibilities that are available from the rights contained in
the constitutional text. It is tempting to conclude that, whatever the
jurisprudence developed by the Constitutional Court, the outcome will,
in essence, not differ in that rights have little in the way of progressive
potential. Some commentators contend that in an age of social and
economic neo-liberalism, constitutional rights have limited capacity to
advance non-market notions of social justice into areas that require wider
state intervention and more public expenditure so that any form of

78 See para 85 of the Metrorail judgment (note 66 above). A comparative approach is to be found in
the minority judgment of Arbour J in Gosselin v Quebec (Attorney-General) (2002) SCC 84. In
dealing with a social assistance programme which discriminated against persons under the age of
30, Arbour J held that the right to life, liberty and security of the person as provided for in s 7 of
the Canadian Charter of Rights and Freedoms was not only a negative right. The clause, she said,
guaranteed 'rights of performance' and that 'they may be violable by mere inaction or failure by
the state to actively provide the conditions necessary for their fulfillment' (para 319). See also
paras 328 329. For a further contribution to this debate, see S Fredman 'Providing Equality:
redistribution lies beyond the courts’ reach or potential. Harry Arthurs, for example, contends that judges cannot reconstruct cultures, reallocate public resources, or alter the hegemony of those with access to the key resources of the nation. He argues further that a bill of rights can divert resources from social programmes to litigation and further empower corporations rather than de facto disenfranchised communities. 79 Similarly, it may well be contended that judicial insulation of policy choices is the least threatening means of intervention for dominant elites faced with the possibility of the majoritarian imperative or an avenue to replace the hegemonic role of the now discredited bureaucrat who was supposed to shape the nature of society during the period which lasted from before the Second World War until the 1970s when the interventionist state was so successfully assailed by Thatcher and then Reagan. With the neo-liberal model itself under pressure, the judge rather than the administrator emerges as the new Hercules.80

South African history reveals that this analysis signals the danger posed by a juristocracy, both in the manner in which the court develops the law, and in the lack of benefit for the poor. Too much deference to the executive, whether in the scope given to a socio-economic right or in the limited use of supervising relief, may result in the dissipation of huge energy by the disempowered in the ensuing litigation for no gain. Yet, when law is seen as part of a broader political strategy, the result may well be more progressive outcomes. In particular, the distinction in the outcome in the Grootboom and TAC cases can, in part, be attributed to the ability of the Treatment Action Campaign to organise politically and utilise legal strategy as but one tool in their kit, as opposed to squatters who have no political power. This suggests that those who have no emancipatory strategies available to them, other than the law, find that the law provides less protective covering than a fig leaf for the lack of any ability to protest outside of the court room.

But, this is not the only possibility that is open to these rights. While the rights movement may well be guilty on occasion of presenting constitutional rights as the new religion, an ontological claim on behalf of rights can be made far more modestly. Rights may serve the value of collective self-government of citizens who decide together on the essential terms of their common life, subject to the provision that the terms may be reviewed the light of collective experience. Rights do not necessarily have to be seen through the prism of litigation. Rights can be claimed politically by social movements and, as was the case with many key political struggles fought in South Africa during the 1980s, rights claims are a rallying cry for political activity.

80 For an exposition of periodisation of law, see D Kennedy ‘Two Globalizations of Law and Legal Thought’ (2003) 36 Suffolk Univ LR 631.
On this basis, law does not have to represent the instantiation of liberal values. The debate becomes a political one about the extent of the interplay in competing modalities between the citizens and the state. Viewed in this way rights hold the gloomy possibility for the reproduction of the status quo, or for the transformation to a more participatory form of society.

That the Constitutional Court has followed, albeit carefully, a reading of deference embraced by apartheid jurisprudence is but one interpretation. There is another possibility: while neo-liberalism may continue to hold some sway, the Court should engage with the very nature and implications for rights of the social-democratic model of society prefigured in the Constitution. A contest about readings is important, for in the second decade of constitutional rule in South Africa, the courts could become yet again an arena of struggle for those who feel that the state considers them to be ‘the Other’! The sooner clear principles of democratic accountability and participation are embraced by the courts, the greater the possibility exists for a strengthened civil society able to develop forms of carefully located political struggle as has been the case with the Treatment Action Campaign. In this manner, accountability by way of the Constitution and political activism from civil society can ensure the positive implementation of the rights contained in the Constitution which are so central to the participation in civic life by all who live in this country.