

## THE ROLE OF THE COURTS IN ADDRESSING POVERTY, INEQUALITY AND UNEMPLOYMENT IN SOUTH AFRICA

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*South Africa's remarkable transition from a system based on minority rule and apartheid to a constitutionally supreme democracy is well-known. The founding of a "new" South Africa (based on values such as human dignity; the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the Constitution and the rule of law; universal adult suffrage; a national common voters roll; regular elections and a multi-party system of democratic government) was designed to revolutionise South African society. The intention, no doubt, was that this universally-acclaimed political transformation would be sufficient to propel the country towards the achievement of the Preamble's promise to improve the quality of life of all citizens and free the potential of each person. It appears increasingly likely, however, that the famed liberation struggle and constitutionally-based transition will be remembered only as a "first phase" achievement. The establishment of a constitutional democracy in South Africa may have been an outstanding building block for societal change and social protection. Perhaps through design, but more likely through implementation, this first phase transition has been unable to achieve significant gains in the country's battle against the so-called "triple challenge" of poverty, unemployment and inequality.*

*The author provides a snapshot of the achievements and failures of this "first phase" transition, briefly describing the key shortcomings in regard*

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*to poverty-, unemployment- and inequality reduction. This is followed by some discussion regarding the key elements of a so-called “second phase” transition, and a summary of key judgments of the Constitutional Court of South Africa involving socio-economic rights. The article focuses on the argument that the general understanding of the role of the separation of powers doctrine be fundamentally reconfigured, so as to enhance the ability of the judiciary, as well as other key stakeholders (such as the legislature, executive and civil society) to focus attention on (and reduce) the defects in the present scenario.*

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## I. INTRODUCTION

This article deals, firstly, with South Africa's "first phase" transition – a move which saw the establishment of a constitutional democracy in the country. This is followed by a brief description of the *shortcomings* of the first phase transition, as demonstrated by the various poverty, unemployment and inequality statistics available. Thirdly, the article sketches what may be considered to be selected key aspects of a "second phase" transition in South Africa, with particular emphasis on those matters which contain a legal slant. This is followed by a summary of select landmark cases adjudicated by the Constitutional Court of South Africa pertaining to socio-economic rights, in order to describe the key role of the courts in South Africa. Finally, it is argued that there exist a number of practical possibilities for a constitutionally inspired, legally driven second phase transition in South Africa, requiring modified approaches on the part of all of the key role-players in the country. It is specifically recommended that the general understanding of the role of the separation of powers doctrine be fundamentally reconfigured, so as to enhance the ability of the judiciary, as well as other key stakeholders (such as the legislature, executive and civil society) to focus attention on (and reduce) the defects in the present scenario.

## II. "FIRST PHASE" TRANSITION: THE ESTABLISHMENT OF A CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA<sup>1</sup>

The story of South Africa's struggle for liberation is indeed a remarkable one. It is perhaps best known for the combination of internal and external factors which ultimately compelled the National Party government to remove the ban on political parties such as the African National Congress, release leaders such as Nelson Mandela, and pave the way for fully democratic elections.

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1. The following three sections of this contribution are drawn from A. Govindjee, Professor of Law, Nelson Mandela Metropolitan University, Inaugural Address at Social Security Organization RTW Conference: Legal Strategies for "Second Phase" transition in South Africa (Jun. 21, 2012).

The system which emerged from this radical change of direction deliberately placed a Constitution as its pivot. The Constitution of the Republic of South Africa, 1996, was created to heal the divisions of the past and to establish South Africa as a democratic society founded upon universal values such as human dignity, equality, ubuntu,<sup>2</sup> freedom and social justice. It emerged as a symbol of hope for a peaceful transition away from a system based on disenfranchisement, minority rule, parliamentary sovereignty, racial autocracy, gender-bias, subjugation of the judiciary, intolerance and deprivation.

It was this decision which ensured that the country would not be an ordinary democracy, in terms of which an elected Parliament would govern the country (for example, in a Westminster-style approach). South Africa's democracy would be one in which the Constitution was the *supreme law* and any law or conduct inconsistent with its provisions would be invalid.

This fundamental paradigm shift was coupled with a range of supporting legal, political and societal innovations. This included, perhaps most importantly, the constitutionalization of a Bill of Rights which ordinary people could rely on to seek relief from the courts. Power was divided three ways: firstly, to those elected to represent the people in national and provincial legislatures and municipal councils, the power to make law; secondly, to those in government, the executive, the power and duty to implement the law and formulate policy; and finally, to the courts, headed by the Constitutional Court, the responsibility of interpreting the law. It is this, last-mentioned, power which forms the subject matter of the present contribution.

A system of co-operative government was also introduced, and spheres of government at national, provincial and local levels were expected to use the country's

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2 Ubuntu is a foundational value in traditional African society. It is a term which evades being defined with scientific precision, but nevertheless it has a particular relevance as a principle of legal interpretation. As a fundamental value of traditional African society, it connotes a world view and an approach to human relationships in which humaneness and the inherent humanity of the individual are central. Ubuntu has, as a result, been described by Justice JY Mokgoro as "a philosophy of life which in its most fundamental sense represents personhood, humanity, humanness and morality": Yvonne Mokgoro, *Ubuntu as a legal principle in an ever-changing world in* UBUNTU, GOOD FAITH AND EQUITY: FLEXIBLE LEGAL PRINCIPLES IN DEVELOPING A CONTEMPORARY JURISPRUDENCE 1, 1 (F Diedrich ed., 2011).

resources to improve the quality of life in South Africa. New institutions, such as the South African Human Rights Commission, the Public Protector, Commission for Gender Equality, the Auditor-General and the Independent Electoral Commission were created in order to compliment this constitutional democracy.

Cumulatively, these interventions marked a watershed in South Africa's history. The destruction of apartheid and minority rule and the establishment of a new society determined to fulfil the potential of the rainbow nation by infusing the constitutional values into the far reaches of South African society. The intention, no doubt, was that this universally-acclaimed political transformation would be sufficient to propel the country towards the achievement of the Preamble's promise to improve the quality of life of all citizens and free the potential of each person.

It appears increasingly likely, however, that the next generation of South Africans will recall the events of the famed liberation struggle and constitutionally-based transition as only a first phase, albeit a massive step, in the right direction. The establishment of a constitutional democracy in South Africa may have been an outstanding building block for societal change and social protection. Perhaps through design, but more likely through implementation, this first phase transition has been unable to achieve significant gains in the country's battle against the Triple Challenge of poverty, unemployment and inequality. As will be illustrated, it is this creeping tide of deprivation and desperation which poses the biggest obstacle in the path of tomorrow's generation. As reflected below, the response of the judiciary in South Africa, in particular, to this challenge has been of special interest and has warranted worldwide attention.

### **III. SHORTCOMINGS OF THE "FIRST PHASE" TRANSITION: A SNAPSHOT OF POVERTY IN SOUTH AFRICA**

#### **1. Poverty, Unemployment and Inequality in South Africa**

The "triple challenge" of unemployment, poverty and inequality is a lingering problem that continues to persist.<sup>3</sup>

3 Jacob G. Zuma, President, Republic of South Africa, State of the Nation Address at the

To establish the “poverty line”, Statistics South Africa (2007) proposes two indicators: the “lower-bound” poverty line, calculated at R384 per capita per month (the South African Rand to rupee conversion rate is presently in the region of R1,00 to Rs 6,70), which provides for absolute basic consumption, and the “upper-bound” poverty line, calculated at R1 597 per capita per month. In 2005 it was found that 33.2% of households in South Africa consumed below the “lower-bound” poverty line and 53.3% below the “upper-bound” poverty line. It is estimated that there are just over 50 million persons living in South Africa as of mid-2011.<sup>4</sup> The most accurate data available suggests that there are approximately 26.7 million people living below the “upper-bound” poverty line today – over half of the country’s population. This is reflected, to some extent, by the percentage and number of people receiving social grants: 29.6% of the country’s population in 2011, that is, roughly 16 million persons (mainly children, disabled persons and persons over the age of 60 without means), presently obtain state assistance in the form of the social grants system – an increase of around 300% over the past decade.

The extent of the challenge facing South Africans is also highlighted by the unemployment statistics available. South Africa’s unemployment rate is one of the highest in the world, and significantly higher than those of other middle income economies.<sup>5</sup> When using the narrow International Labour Organisation (ILO) definition (which is the official definition in South Africa), South Africa’s unemployment rate currently stands at around 25%. If the broad definition of unemployment is used (which includes discouraged work seekers), the unemployment rate swells to 36.2%.<sup>6</sup> While

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Joint Sitting of Parliament (Feb. 9, 2012) *available at* <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=24980&tid=55960>.

4 Survey, *Mid-year Population Estimates*, 2011 STATISTICS SOUTH AFRICA *available at* <http://www.statssa.gov.za/publications/P0302/P03022011.pdf>.

5 H. Bhorat, *Unemployment in South Africa: Descriptors and Determinants*, PRESENTATION TO THE COMMISSION ON GROWTH AND DEVELOPMENT AT THE WORLD BANK (Oct. 15, 2007) *available at* [http://www.commerce.uct.ac.za/Research\\_Units/DPRU/OtherPDFs/Unemployment\\_in\\_South\\_Africa4.pdf](http://www.commerce.uct.ac.za/Research_Units/DPRU/OtherPDFs/Unemployment_in_South_Africa4.pdf).

6 Survey, *Quarterly Labour Force Survey, Quarter 2*, 2012 STATISTICS SOUTH AFRICA *available at* <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2012.pdf>.

urban unemployment rates are already very high, particularly striking and unusual are the higher rural unemployment rates (particularly in the so-called former “homelands”) which are far higher than anywhere in the developing world. Also noteworthy is that these unemployment rates differ greatly by race, age and gender.<sup>7</sup> In 2011, Africans had much higher (official or narrow) unemployment rates, compared to Coloured persons, Indian persons and White persons.<sup>8</sup> Age is also a major determinant of unemployment. Unemployment disproportionately impacts on the youth, affecting about 51% of those between 15 and 24.<sup>9</sup> Of particular concern is the unemployment rate of African youth, which stands at around 60%. There is also a noticeable gender differential with females suffering from higher unemployment rates among each age and race group.<sup>10</sup>

The inability to create large-scale employment opportunities has also apparently been a major contributory factor in the rise of inequality. According to the World Bank (2009), the GINI Coefficient reflects that inequality in South Africa has increased since 1995. In 2009, the Coefficient reflected a score of 63.1, remembering that the most unequal distribution of income possible would result in a score of 100. Since 2008 the income of the ‘wealthy’ has increased while that of all other deciles of incomes have either declined or remained stagnant.<sup>11</sup> The top decile of earners account for 58% of the country’s income and the bottom decile only 0.5%.<sup>12</sup> This reflects the vast discrepancy in skills between various groups of persons in South Africa, which itself is a factor inherited from the system of apartheid.

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7 C. Cooper, *Women and the Right to Work* in WOMEN’S SOCIAL AND ECONOMIC RIGHTS DEVELOPMENTS IN SOUTH AFRICA 245, 245-276 (B. Goldblatt and K. McLean eds., 2011).

8 Statistics South Africa, *supra* note 6.

9 Press Release, South African Institute of Race Relations, *One in Two Youths Unemployed* (Jan. 31, 2011) (on file with author).

10 Statistics South Africa, *supra* note 6.

11 DEVELOPMENT BANK OF SOUTHERN AFRICA, DEVELOPMENT REPORT: PROSPECTS FOR SOUTH AFRICA’S FUTURE, 28 (2011) available at <http://www.dbsa.org/EJournal/Documents/DBSA%20Development%20Report%202011.pdf>.

12 THE WORLD BANK, SOUTH AFRICA ECONOMIC UPDATE: FOCUS ON INEQUALITY OF OPPORTUNITY, viii (2012) available at [http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1342195607215/SAEU-July\\_2012\\_Full\\_Report.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1342195607215/SAEU-July_2012_Full_Report.pdf).

#### IV. KEY ELEMENTS OF A “SECOND PHASE” TRANSITION

The notion of a “second phase” of transition, rather than a “second transition”, appears to have recently captured the minds of policy-makers in the country. Building upon the acute realisation of the bitter shortcomings of the present situation, as evidenced by the litter of public service delivery protests, government has started to sharpen the rhetoric of poverty alleviation as South Africa moves to another election. This second phase is characterised by the following:<sup>13</sup>

- A change in approach, but a change which must build on the successes of the first phase of the transition;
- Enhanced focus, and a changed approach, regarding poverty, unemployment and inequality, the so-called “triangle” of difficulty;
- A number of economic-oriented suggestions, including clever utilisation of mineral resources, land and coastline;
- The creation of a “social floor”, including the provision of the most basic form of services, with particular emphasis on education and health provision; and
- The quality provision of services.

Precisely *how* these laudable but lofty ambitions will be realised has received considerably less attention, even within academic circles. It is suggested that the time is ripe for a co-ordinated and consolidated “second phase” response from *all stakeholders* in the country, not only those in government.<sup>14</sup> True to the idea of a “*second phase*” transition (rather than a “second transition”), this approach must build upon the successes of the past. How should this be achieved and what modifications in design and approach are likely to be necessary? In particular, what is the role of the South African judiciary as part of this second phase transition and what innovative strategies may be suggested for a judicial approach which better addresses the challenges faced?

13 AFRICAN NATIONAL CONGRESS, THE SECOND TRANSITION? BUILDING A NATIONAL DEMOCRATIC SOCIETY AND THE BALANCE OF FORCES IN 2012, 40 (Feb. 27, 2012) *available at* <http://www.anc.org.za/docs/discus/2012/transition.pdf>.

14 *Id.* at 43.



Predictably, it is suggested that the next phase of transition must involve focused intervention on the part of all the *arms of government* (the legislature, the executive and the judiciary), and *spheres of government* at all levels (nationally, provincially and locally).<sup>15</sup> Business and labour too will need to put aside their differences, guided by context-specific policy direction. The Chapter 9 Institutions created by the Constitution, including the South Africa Human Rights Commission, the Public Protector and the Commission for Gender Equality, will need to interrogate their roles in promoting equality, development and protection for human rights. And, perhaps most importantly, NGOs and civil society, led by the very people who are the target group of this second phase transition, need to redouble their efforts and refine their tactics to stand any chance of success.

The *precise role of the law and the legal system* in this process is a core issue for discussion. In March, the Minister of Justice released a discussion document on the transformation of the judicial system.<sup>16</sup> The report accepts judicial review as a central element of the Constitution. Among other topics, it speaks about “evaluating and monitoring” court decisions to advance the rule of law. A central focus is an *assessment* of the Constitutional Court and the impact of its decisions on South African society.

As Professor Klaaren notes, there exists a perception, at least in terms of the ruling party’s policy, that the judiciary is not part of governance in the country.<sup>17</sup> The recently released policy documents view the judiciary as an *object* rather than an agent of transformation. To these somewhat cloaked remarks may be added the following: the notion of separation of powers is based on a system of checks and balances. The judicial review component of this system involves ordinary persons accessing courts in order to test government conduct against legal

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15 African National Congress, *supra* note 13, at 40.

16 Department of Justice and Constitutional Development, Republic of South Africa, Discussion Document on Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State (2012) available at <http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf>.

17 Jonathan Klaaren, *Gaps between Judiciary and Developmental State*, MAIL & GUARDIAN (Jun. 15, 2012), <http://mg.co.za/article/2012-06-15-gaps-between-judiciary-and-developmental-state> (last visited Aug. 21, 2012).

standards. This recourse to the courts often serves as an unnecessary handbrake (and headache) for those in power. There is, therefore, some mistrust, because it is felt that the courts are being used as a tool by the minority, in order to stunt the process of transformation.

It is argued that there exist a number of practical possibilities for a constitutionally inspired, legally driven second phase transition in South Africa, requiring modified approaches on the part of all of the key role-players in South Africa. As indicated above, this contribution pays particular attention to the contribution and role of the judiciary in South Africa.

## **V. KEY JUDGMENTS OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA INVOLVING SOCIO-ECONOMIC RIGHTS**

### **1. Soobramoney v. Minister of Health, KZN<sup>18</sup>**

Soobramoney was a diabetic suffering from various life-threatening conditions involving failure of the kidneys. He approached the Court for an order directing a public hospital to provide him with ongoing dialysis treatment. His condition was irreversible and his life could only be prolonged (not saved) by the regular renal dialysis treatment which he sought. Unfortunately, the hospital in question, because of a lack of resources, only had a limited number of dialysis machines available and could accordingly only treat a limited number of patients. As Soobramoney's condition made him ineligible for a kidney transplant, the hospital policy was to disallow him from accessing dialysis treatment (because the machines were better served assisting people who were eligible for the transplant). The Constitutional Court were asked to adjudicate whether Soobramoney was entitled to receive dialysis treatment in terms of everyone's constitutional right not to be refused emergency medical treatment and the right to health care.

The Constitutional Court acknowledged the reality of high poverty, levels of unemployment, inadequate social security and general lack of access to health services, some of which has been reflected above. The Court came to the conclusion that the realisation of the wide variety of socio-economic rights which had been

<sup>18</sup> Soobramoney v. Minister of Health, 1998 (1) SA 765 (CC). (S. Afr.)

promised by the Constitution was dependent upon the availability of resources. An unqualified obligation to meet the needs of everyone immediately was not possible. The Court held that the purpose of affording everyone the right not to be refused emergency medical treatment was to ensure that necessary and available treatment was provided immediately in order to avert harm. The type of long-lasting treatment sought by Soobramoney did not constitute an “emergency” in this context. The State had presented evidence demonstrating that additional funds and resources could not be allocated to the hospital. Allowing the applicant and others in a similar condition to receive the dialysis treatment would collapse the already over-extended resources of the State, and indeed the entire health care system itself. The difficult decisions regarding budgetary allocations were to be made by the State in a holistic fashion and the Court promised that it would be slow to interfere with *rational decisions taken in good faith* by authorities responsible for such matters. As in Soobramoney’s case, the consequence of this reality would be that the interests of particular individual’s in society would occasionally have to give way to the larger needs of society. The State, in the circumstances, was held not to have breached its constitutional obligations, and Soobramoney’s application was dismissed.

## **2. Government of the Republic of South Africa v. Grootboom<sup>19</sup>**

In this case, a group of poor residents had been rendered homeless as a result of their eviction from privately owned land. Prior to their occupation of the private land, they lived in Wallacedene, an informal squatter camp. About half the population were children, a quarter of households had no income and more than two thirds earned less than R500 per month; they all lived in shacks. Residents of Wallacedene lacked basic services such as water, sewage and refuse removal services. The intolerable conditions prompted their migration to the new area, the private property from which they were later evicted.

Following their eviction, the group applied to the High Court (a court of lower status than the Constitutional Court) for an order requiring government to provide them with adequate basic shelter or accommodation until they could obtain permanent accommodation. Evidence before the court showed that the

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<sup>19</sup> Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC). (S. Afr.)

people had nowhere else to go. The High Court ordered government to provide children, accompanied by their parents, with shelter. The government challenged the correctness of this decision.

The Constitutional Court confirmed that Sections 26(1) and 26(2) of the Constitution (providing for the right of access to housing and the state's obligations to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right) were related and must be read together. Though not expressly stipulated, there exists a negative obligation upon the state and other entities to refrain from preventing or impairing the right to access to adequate housing. Subsection 2 placed a positive obligation upon the state: the state was required to take reasonable legislative and other measures within its available resources to achieve progressive realization of the right.<sup>20</sup>

In the case of housing, this obligation was shared by all spheres of government. A reasonable programme must clearly allocate responsibilities to the different spheres of government and ensure that appropriate financial and human resources were available.<sup>21</sup> Legislative measures were, on their own, insufficient to comply with the constitutional mandate. The state must act to achieve the envisaged results.<sup>22</sup> For example, measures to establish a public housing programme must be directed towards progressive realization of the right. The state was, however, not obliged to immediately realize the right on demand. The government housing plan did not reasonably make provision to facilitate access to temporary relief for people who have no access to land, had no roof over their heads and who were living in intolerable conditions. The programme was held to be not flexible enough to respond to the needs of people in such situations.

The Constitutional Court concluded that all spheres of government were to cooperate and devise a coordinated public housing plan which properly took cognizance of the need to provide immediate relief and accommodation for persons in emergency situations. Access to immediate and temporary accommodation included the provision of water and other basic facilities. The

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20 *Id.* at para. 39.

21 *Grootboom*, *supra* note 19, at para. 40.

22 *Grootboom*, *supra* note 19, at para. 42.

State was ordered to revise their housing plan for the area concerned in order to ensure that the plan reasonably contemplated and provided for the various considerations raised.

### **3. Minister of Health v. Treatment Action Campaign<sup>23</sup>**

HIV / AIDS, has been acknowledged to be a major challenge facing South African society and qualifies as a government priority. As a result, the government implemented a programme which consisted of establishing a series of testing and research centres. The Treatment Action Campaign, (TAC) a non-government association, brought an application in the High court to force government to make the antiretroviral drug Nevirapine generally available (i.e. even outside the testing and research centres) and to develop a coherent programme to deal with HIV/ AIDS. The High Court found that the government programme to combating HIV/AIDS fell short of the constitutionally mandated standard in two material aspects:

1. The refusal to make Nevirapine generally available where attending doctors considered it medically indicated; and
2. Failure to set out a timeframe for a national programme to prevent mother-to-child transmissions through the administration of Nevirapine.

The government appealed to the Constitutional Court. The Court found the government's policy to be inflexible. Mothers and their new born children at public hospitals and clinics outside the research and training sites were denied the opportunity of receiving a single dose of Nevirapine which was potentially a lifesaving drug at the time of birth of the child. Whereas Nevirapine was available exclusively for research and training sites, the drug could be administered within the states available resources , with no known harm to the mother and child at public health institutions where testing and counselling was available.

The Constitutional Court accordingly confirmed the High Court's finding: the government's policy relating to the limited use of Nevirapine at research and

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23 Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC).

training sites constituted a breach of constitutional rights. Implicit in the courts finding was that the waiting period before taking a decision to make the drug generally available was not reasonable within the meaning of Section 27(2) of the Constitution.

The count also had to review governments programme to determine whether measures taken in respect of the prevention of mother to child HIV transmission were reasonable. Restricting the use of Nevirapine to research and training sites was held to unreasonable because hospitals and clinics with testing and counselling facilities could easily be equipped to prescribe Nevirapine where this was medically necessary.

With respect to the separation of powers divide, the Constitutional Court confirmed that policy-making remained the executive's prerogative (and not that of the courts). As a result, the courts would be slow to make orders that had the effect of requiring the executive to pursue a particular policy. The court emphasized the duty of each arm of government to respect and be sensitive to the separation of powers ideal. Significantly, however, this doctrine did not restrain the courts completely from making orders that impacted on policy. The courts' primary duty remained to the Constitution and law, which they were obliged to apply impartially and without fear, favour or prejudice. The Constitution required the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Where state policy was challenged as being inconsistent with the Constitution, courts had to consider whether the state, in formulating and implementing such policy, had given effect to its constitutional obligations. Crucially, in as so far as this constituted an intrusion into the executive domain, the Constitutional Court held that such an intrusion was constitutionally mandated.

In the circumstances, the government was ordered to devise and implement, within its available resources, a comprehensive and co-ordinate programme to progressively realize the rights of pregnant women and their new born children to have access to health care services and to combat mother to children HIV transmissions. This programme had to include reasonable measures for counselling

and testing and the state was ordered, without delay, to remove restrictions that prevented Nevirapine from being made available at public hospitals and clinics.

#### **4. Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development<sup>24</sup>**

The applicants in these cases were destitute permanent residents (not citizens) of South Africa who would have qualified for social assistance (in terms of the Social Assistance Act), but for the fact that this Act reserved social grants for “citizens”. The main contention before the Constitutional Court was that the citizenship requirement in Section 3 of the Social Assistance Act was inconsistent with Section 27(1)(c) of the Constitution, in terms of which the state was obliged to provide access to social assistance to *everyone*. It was argued that the limitation constituted an infringement of the right to equality and did not pass muster under the general limitations clause of the Constitution.

Although the state argued that it did not possess sufficient budgetary resources to extend social assistance benefits to permanent residents, the Court rejected this argument by looking at the available information, by considering the amount already spent on social assistance grants for citizens and by noting the adverse effect of the legislation on permanent residents (who contributed to the country’s fiscus through the payment of tax) who required state assistance in times of need. The exclusion of permanent residents from the social assistance system was, therefore, held to be unfairly discriminatory and the applicants were considered to be part of a vulnerable group who were worthy of protection.

Accordingly, the exclusion of permanent residents by Section 3 of the Social Assistance Act was found to be inconsistent with Section 27 of the Constitution. The court’s declaration of invalidity was coupled with reading in the words ‘or permanent residents’ into the relevant section so that permanent residents could apply for social assistance in future.

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24 Khosa v. Minister of Social Development 2004(6) SA 505 (CC). (S. Afr.)

## 5. Mazibuko for Others v. City of Johannesburg and Others<sup>25</sup>

Operation Gcin'amazi, a project of the city of Johannesburg, was implemented to address severe problems of water losses and non-payment for services in Soweto, a poor community situated in Johannesburg, South Africa. The project involved re-laying water pipes to improve water supply and installing pre-paid meters to charge for use of water in excess of the monthly free basic water allowance per household, which was fixed at six kiloliters. The applicants, who were residents of Phiri, Soweto, challenged the city's basic water supply together with the lawfulness of the installation of prepaid water meters in Phiri. The High Court held the installation of prepaid water meters was unlawful and unfair and that the city's free basic water policy was unreasonable. It ruled that the city should provide 50 litres of free basic water daily to Phiri residents and people in similar situations.

On appeal, the SCA held that 42 litres per day was 'sufficient water' in terms of the Constitution and directed the city to formulate policy in light of this finding. The installation of pre-paid water meters was held to be unconstitutional. The applicants appealed to the Constitutional Court and sought reinstatement of the more favourable High Court order.

The applicants, firstly, contended that the court should determine a quantified amount of water as 'sufficient water' within the meaning of Section 27 of the Constitution (which affords everyone the right to have access to sufficient food and water) and that this amount should be set at 50 litres of free water per person per day. The Constitutional Court refused the invitation to set a "minimum core" amount of free basic water, once again restricting its role to an assessment of the reasonableness of state conduct. The state, the Court held, was constitutionally obliged required to take reasonable legislative and other measures in order to progressively realize the achievement of the right of access to sufficient water, within its available resources.

The Court's judgment in *Mazibuko* reflects that, ordinarily, it is of the view that it would be institutionally inappropriate for a court to determine both

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25 Mazibuko v. City of Johannesburg 2010 (4) SA 1 (CC). (S. Afr.).



what the content of a particular social economic right entails and the precise steps that government should take to ensure progressive realization of the right. Courts should, in terms of this approach, only enforce the positive obligations imposed on government if government takes no steps or adopts measures that are unreasonable.<sup>26</sup> The Court concluded, in the circumstances, that the 6 kilolitres of free water per household per month (which amount could be progressively increased over time) was not unreasonable. The argument that the introduction of a prepaid water system in Soweto discriminated unfairly against poor black South Africans also failed. This was on the basis that government had the authority to decide how to provide essential services, so long as the mechanisms chosen were reasonable, lawful and not unfairly discriminatory.<sup>27</sup>

## **VI. THE ROLE OF THE COURTS IN A “COMBINATIVE GOVERNANCE” APPROACH TO SEPARATION OF POWERS**

The “pure form” of separation of powers requires strict adherence to the following three principles:

- The division of governmental power into Montesquieu’s three branches: legislative, executive and judicial, with no control or interference by one on the other;
- The separation of functions; and
- The separation of personnel.

The objective has always been to curtail the exercise of political power in order to prevent its abuse.<sup>28</sup> The idea is that by allocating different functions to different people, each of the branches will be a check on the others and no single group of people will be able to control the machinery of the state.

The separation of powers doctrine, as it has been applied in the first phase of South Africa’s transition, has been characterised by a number of successes. For

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26 *Id.* at para. 52.

27 *Masibuko*, *supra* note 25, at para. 157.

28 H. Strydom and K. Hopkins, *International Law in CONSTITUTIONAL LAW OF SOUTH AFRICA*, 30-1 (S. Woolman et al eds., 2008).

example, the achievement of the judiciary in the area of socio-economic rights adjudication, as reflected by the landmark judgments of the Constitutional Court in cases such as *Grootboom*, *Khosa* and *TAC* (as summarised above) is acknowledged worldwide.

The application of the doctrine has, however, also resulted in some challenges. In particular, and despite persistent attempts by the courts to prevent this, judicial review of governmental action (or inaction) has created a perception in the minds of some of the country's leaders. The most extreme form of this view would suggest that the courts are counter-revolutionary, untransformed and a tool for the protection of minority rights.

The second problem which has emerged is more subtle. It suggests that the Constitutional Court has been overly cautious with respect to socio-economic rights cases in South Africa, as demonstrated by its interpretation of the internationally accepted minimum core idea in *Mazibuko*.<sup>29</sup> This critique may be summarised as follows, and I quote:

*“The Court has developed a framework for dealing with socio-economic which seeks to maximise the autonomy of the other branches of the state, employing a concept of rationality sourced in international law, fashioned in domestic administrative law and packaged as reasonableness.”*<sup>30</sup>

As Judge Dennis Davis<sup>31</sup> argues, the Court will not intervene as long as government is shown to have put in place a plan which is rationally connected to dealing with the least privileged in society. This allows the state to raise a complete defence on the basis of limited availability of resources. The problem is that the scope and range of the rights themselves are left undefined and the Court is able to side-step the adjudication of an unqualified socio-economic right, even at the most minimum level.<sup>32</sup>

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29 D. Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards “deference lite”?* 22 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 301, 306 (2006).

30 *Id.*

31 Davis, *supra* note 29, at 305-306.

32 Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights* 69 (Centre for Human Rights and Global Justice, Working Paper No. 8, 2005).

This caution has bordered on unwarranted deference to the policy problems of the legislature and executive. Partly this is as a result of South Africa's knowledge of the experience of the Indian Supreme Court and its clashes with the Nehru government over property rights.<sup>33</sup> This deference is also discernible when one considers the cautious approaches adopted by the Constitutional Court to the idea of a supervisory order.

The argument, in other words, is that the judicial review role of the courts in the present system has created both a problem of perception on the part of government that the judiciary is too activist, and a reality which suggests that the courts are overly cautious, and even deferential, to the will of government, which has hampered socio-economic rights enforcement and realisation.

There may, however, be an alternative paradigm within which the arms of government can perform their core tasks, yet combine in a concentrated struggle against the poverty, unemployment and inequality challenges faced by the country. Certainly, the suggestion is not that the core domain of the arms of government be blurred. Courts, for example, must retain their independence and impartiality and must unhesitatingly strike down state law, conduct or inaction which is illegal and which causes untold suffering for so many people in the country. A good example of that is the recent judgment by Judge Clive Plasket of the Eastern Cape High Court in the matter of *Centre for Child Law v. Minister of Basic Education and others*.<sup>34</sup> The 13 parts of the issued order direct the Minister, the Director-General, the Member of the Executive Council and the Head of Department of Basic Education on a range of matters, coupled with strict timeframes for compliance. And there appears to be little doubt that such an approach was warranted in the circumstances. Nevertheless, focusing on this one aspect of the role of the courts in our constitutional democracy has created the types of problems I have just described. This is both in respect of the perception of the courts' function, and the reality which suggests that the Constitutional Court is deferential to government, perhaps because of the fear that going too far in their judgments will result in a constitutional crisis whereby government refuses to comply with the courts' pronouncements.

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33 Davis, *supra* note 29, at 305.

34 *Centre for Child Law v. Minister of Basic Education* [2012] ZAECGHC 60 (S. Afr.).

An alternative modality which sees the legislature, executive and judiciary more as collaborative partners in a broader societal project for addressing the “Triple Challenge” is not as radical a notion as might originally appear to be the case. One needs only to think back to the process followed for certifying the final Constitution, for a strong example of the judiciary being used in a joint sense to get something important right. It must be remembered that it was the Constitutional Court that had to decide whether the final Constitution of the Republic of South Africa complied with the agreed 34 Constitutional Principles during the negotiation process which took South Africa away from the system of apartheid. In fact, the first draft of the Constitution adopted by the Constitutional Assembly on 10 May 1996 was held, by the Constitutional Court, *not to comply* with the 34 Constitutional Principles in all respects. The document was accordingly sent back to the Constitutional Assembly for revision. The amended draft was adopted later in 1996 and this version was indeed certified by the Constitutional Court, coming into effect on 4 February 1997 as the final Constitution. Significantly, the other powers in the country at the time had no qualms with the fact that the Constitutional Court’s review of the final constitutional text was informed by the Court’s own views about its role as part of the new constitutional democracy.<sup>35</sup> In fact, many of the grounds upon which the Court initially declined to certify the text had institutional implications for the Court itself<sup>36</sup> and the Court’s approach, which was not subsequently challenged, indicated a major emphasis on guaranteeing *the power of the Court to decide who decides*. This is a matter of particular relevance to the socio-economic challenges facing the country.

An expanded role for the courts in South Africa is also reflected in the text of the Constitution itself. The Constitution already foresees that members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional (Section 80(1)-(3) of the Constitution). The President, in terms of Section 84 of the Constitution, is responsible for referring a Bill back to the National Assembly for reconsideration of the Bill’s constitutionality, and for referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality.

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35 *Overview of CONSTITUTIONAL LAW OF SOUTH AFRICA*, at xv (S. Woolman et al eds., 2008).

36 *Id.*

These types of interventions arguably foresee a combinative approach on the part of the three key role-players, playing to each of their strengths. Indeed, even the idea of “co-operative government” finds expression in a chapter of the Constitution devoted to explaining the notion.<sup>37</sup> This “co-operative government” refers, of course, to co-operation amongst the national, provincial and local spheres of government. But there is no reason why an expanded form of this idea, perhaps best phrased as “combinative governance”, should not explain a similar inter-relationship: This time not merely amongst the different tiers of the executive, but across the very arms of government themselves.

To re-iterate: the objective of conceptualising something along these lines is to change the perception of the transformative potential of the courts and to liberate the courts from the shackles of concern over the boundaries of their influence. The courts, as indeed is the case with the legislature and executive, must be seen to be and must in fact be an instrument aimed directly at the most pressing problems facing our society. This should, at the very least, enhance the likelihood of better enforcement of judicial decisions and reduce the chances of a constitutional crisis.

Such an evolution must be built upon the core dimensions of present judicial authority, including independence, impartiality and non-interference. Yet it needs to be spiced with modern variations. For example, allowing the court to deliver an advisory, non-binding judgment at an early stage of a matter related to a complex constitutional challenge could hold a number of advantages. It could expedite and direct debates of national importance, without at all destroying a core zone of power separation. Such an approach is, of course, more likely to succeed if there is political buy-in in terms of contemplating an expanded role for the courts in the fight against poverty, unemployment and inequality.

This type of “combinative governance” is not completely novel. Woolman and Botha, for example, have spoken of a doctrine of “shared constitutional interpretation”, by mediating between the doctrines of constitutional supremacy

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37 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Feb. 4, 1997, chap. 3.

and separation of powers.<sup>38</sup> Professor Sandra Liebenberg has also written that the Constitution values a “flexible and co-operative model of relations between the three branches of government, as well as between the three spheres of national, provincial and local government”<sup>39</sup>. This entails, in Martha Minow’s words, “a continual process of mutual action and interaction”<sup>40</sup> which context plays a crucial role. This is an approach based on “constitutional dialogue” amongst the different branches of government, in a way which appreciates the institutional strengths and weaknesses of each.

This “shared constitutional interpretation”, “constitutional dialogue” or what I’ve called “combinative governance” must include properly functioning institutions, communities, organisations and individuals (beyond the main three arms). This includes Chapter 9 institutions, such as the Public Protector and the Auditor-General, civil society bodies and proper public participation. All of this is necessary for a successful second phase transition in South Africa which turns the tide against poverty and deprivation.

## VII. CONCLUSION

In conclusion, the Constitution provides the legal basis for social change in South Africa and must lead the next phase of transition. Societies are dynamic and their needs change over time. The transformation that the Constitution envisions is an ongoing process which requires improvement of the daily lives of people through the provision of access to land, housing, water and food, education, social security and through job creation on the one hand, and through changing the prevalent legal culture in a more egalitarian direction to reflect the constitutional commitment, on the other. The courts in South Africa have already made a meaningful contribution in this regard. The challenge is to create the space for increased constructive interventions on the part of the judiciary

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38 S. Woolman and H. Botha, *Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices* in CONSTITUTIONAL CONVERSATIONS 149, 150-152 (M. Bishop et al eds., 2008).

39 Sandra Liebenberg, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, 68-69 (2010).

40 Martha Minow, MAKING ALL THE DIFFERENCE, 146-172 (1990).

when it comes to the most pressing challenges facing the country. A carefully constructed system of combinative governance, as described above, which builds upon the strengths of the past and links specifically to the lofty ambitions for the second-phase transition of the future, could have a particularly significant impact on the interpretive approach of the courts in socio-economic rights disputes. As importantly, it could revolutionise the perception of the role and function of the courts in South African society. Ultimately, respect for the role of the judiciary, the likelihood of proper enforcement of judgments and the judiciary's impact on social transformation could be enhanced in the process. It is hoped that these enhancements will dent the rapidly closing wall of deprivation in South Africa.