

POVERTY: GIVING MEANING TO THE RIGHT TO SOCIAL ASSISTANCE

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“Through our sunless lanes creeps Poverty with her hungry eyes,
And Sin with his sodden face follows close behind her.”
(O Wilde *The Happy Prince and other Fairy Tales* (2001) 46)

1 Poverty

It is eleven years since Sandra Liebenberg alerted us to the promising implications of *Government of the Republic of South Africa v Grootboom*¹ (“*Grootboom*”) for the enforcement of socio-economic rights. She also warned that “the deep structural problems of poverty and inequality in South Africa have created a crisis of immediate needs for large numbers of people”.² She called for improved implementation of and broader access to social assistance programmes.

The crisis has deepened. Inequality has increased and the number of people living in dire poverty remains unacceptably high.³ This paper seeks to reinforce Liebenberg’s warning and to press for acceptance of the view that the persistence of high levels of severe poverty coupled with unfairly restricted access to social assistance are unconstitutional.

Primary responsibility for correcting inequitable distributions of wealth lies with the Executive and the Legislature. But this undisputed truth

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¹ 2001 1 SA 46 (CC).

² S Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” (2001) 17 *SAJHR* 232-257. I acknowledge my substantial reliance on the extensive writings of this author in formulating the legal arguments made in this article.

³ M Leibbrandt, I Woolard, A Finn & J Argent *Trends in South African Income Distribution and Poverty since the Fall of Apartheid* OECD Social, Employment and Migration Working Papers No 101 (2010) ch 2 confirm that inequality increased between 1993 and 2008. The authors point out that the Gini coefficient for per capita income increased from 0.66 in 1993 to 0.68 in 2000, to 0.7 in 2008 (32-33). The relationship between poverty and inequality is complex. It is trite that inequality can increase even as poverty decreases. Poverty trends are more contentious, but the authors assert that there has been no marked improvement in money-metric poverty, that aggregate poverty has improved marginally, and that declines in poverty rates have been driven by social grants (18, 26, 36, 44, 45, 66). Race remains a dominant factor, with highest levels of poverty and inequality among black people. Resolving these issues is accepted by the National Planning Commission to be critical to South Africa’s future. The National Planning Commission *National Development Plan* (2011), released on 11 November 2011, is a comprehensive proposal submitted for public comment. Its guiding objective and overarching goal, repeated throughout the document, is to eliminate poverty and reduce inequality by 2030 (see, for example, 1, 2, 78, 326). The number of households living below R418 per month in 2009 Rands needs to fall from 39% to zero, and the Gini coefficient from 0.7 to 0.6. To achieve this ambitious goal, annual GDP growth must average 5.4% over the period (28, 90). Moreover, it is GDP per capita that must improve to alleviate the plight of the poor, not merely the national average. Is the growth required likely to occur when forecasts of higher inflation and slower growth signal a real risk of stagflation? See further nn 22, 23.

does not exonerate the courts. Karl Klare's formulation of transformative constitutionalism as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law"⁴ underpins the call made in this article for the Constitutional Court to move beyond its current (strategy of)⁵ deference to the other branches of government and to confirm, by giving content and enforceability to the socio-economic right to social assistance, that its mandate is not merely preservative, but transformational.⁶

Using a paltry poverty line of R524 per month, we find nearly half of roughly 50 million South Africans living below it.⁷ Poverty is heavily informed by intersecting disadvantage flowing from race, gender and socio-economic status resulting from racially discriminatory education. Black people constitute roughly 80% of the population and in 2010 earned 41.2% of total income while whites, who constitute only 9.2% of the population, earned 45.3% of total income. Furthermore, 93.2% of the income of the lowest decile was earned by blacks and only 3% by whites.⁸

⁴ K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150. S Liebenberg concludes her book, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 490, with the view that socio-economic rights litigation cannot bring about the far-reaching structural changes required to build a society based on social justice, and limits her plea to the courts to create a normative framework to stimulate and support initiatives by government and civil society to transform social and economic relationships. This article presses for a more robust role for the courts. The Executive and Legislative branches of government do not favour increased social assistance to alleviate poverty. It is arguable that they do not accept that it is their constitutional duty to effect structural change in respect of social assistance. In such circumstances the courts need to ensure both that these branches of government acknowledge the supremacy of the Constitution and that they formulate policy and legislation consonant with their constitutional and international-law obligations, regardless of their predilections about welfare. To do so, the courts must reassess their role in preserving the legitimacy of our constitutional democracy and must develop a normative vision for interpreting and enforcing socio-economic rights. See the discussion on the separation of powers in part 8 1 below.

⁵ D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 claims that the courts have sought to deal with institutional problems such as the separation of powers through a judicial strategy of deference.

⁶ The judgment of the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) does not augur well for future attempts to enforce socio-economic rights. Nor does the warning issued to judges by President Zuma at the *Access to Justice Conference* hosted by the Office of the Chief Justice at the Hilton Hotel, Sandton, 08-07-2011 <<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=19843&tid=36903>> that judges have no business altering or forming policy in the course of their work. This function, he claimed, is the sole prerogative of the Executive. His (inappropriate) conception of the import of the doctrine of separation of powers was repeated at a joint sitting of Parliament on 1 November 2011, where he is reported to have said:

"The Executive must be allowed to conduct its administration and policy-making work as freely as it possibly can... The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote". W Hartley "Executive Superior to Courts, Says Zuma" *Business Day* (02-11-2011) 1.

No mention was made of the Constitution of the Republic of South Africa, 1996 ("the Constitution") as the supreme law, or the role of the Constitutional Court in interpreting it, as its custodian, or the need for flexible dialogic interaction between the three branches of government to advance the transformative imperatives of the Constitution. Rather, the process of constitutional adjudication is characterised as an attempt by those opposed to the ANC to "co-govern through the courts" (Hartley *Business Day* (02-11-2011) 1) and has culminated in an impending review of the Court's performance. These, and the effect of them on at least some judges, are worrying developments.

⁷ National Planning Commission *Diagnostic Report* (2011) 9 based on The Presidency *Development Indicators 2010* (2010) 26. The National Planning Commission *National Development Plan* refers both to a poverty line of R515 per month with 54% of the population living below it (339), and to a poverty line of R418 per month per person in 2009 Rands with 39% of households living below it (28).

⁸ RSA *Millennium Development Goals Country Report 2010* (2010) 29-30.

This paper focuses on income poverty of the adult poor who are able-bodied but cannot find employment. Many of them work, but their work is unpaid work, disproportionately women's work, invisible work, the work of the caregiver. Some have intermittent, poorly paid, part-time work and no job security or conventional benefits. Some move in and out of such employment. Many have never had formal employment and have little prospect of finding any before they reach the age of 60 and qualify for the older persons grant. These "non-workers" are not eligible for unemployment insurance because it is premised on contributions and they do not meet the requirements of the Unemployment Insurance Fund ("UIF").⁹ During the financial crisis of 2008-2010 over 1 million jobs were lost, and another 395,000 jobs were lost in 2010.¹⁰ The official unemployment rate of 25% does not include those so discouraged that they have given up seeking employment. If they are included, the rate jumps to 37.4%, or 6.6 million people.¹¹

A consequence of this poverty not always articulated is that the able-bodied adult poor are forced to rely heavily on the working poor to sustain themselves. This situation impairs their dignity.¹² It also amounts to tacit approval by government of the privatisation of its constitutional obligations to the poor *via* a transfer of its burden to the working poor, for it is among them that the unemployed adult poor live. It is noteworthy that the Congress of South African Trade Unions ("COSATU"), fully supportive a decade ago of the recommendations of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa (the so-called "Taylor Report") for a Basic Income Grant¹³ ("BIG") but curiously quiet in recent times, has reiterated its call for expanded social assistance including a BIG.¹⁴ The privatisation of the State's duty has enormous, ongoing and deleterious consequences for union members.

⁹ These features of the group, and especially the plight of women within it, are cogently described and analysed by LA Williams "The Legal Construction of Poverty: Gender, 'Work' and the 'Social Contract'" (2011) 22 *Stell LR* 463-482. Unemployment insurance covers only about 10% of South Africa's unemployed: A Govindjee & O Dupper "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa" (2011) 22 *Stell LR* 775 783.

¹⁰ Statistics South Africa *Labour Market Dynamics in South Africa* (2010).

¹¹ Statistics South Africa *Quarterly Labour Force Survey: Quarter 3* (2011) vi. This is an improvement on the second quarter unemployment rate of 25.7% which, if discouraged work-seekers were included, was 38.2%. However, the figures are not considered, even by Statistics South Africa, to be reliable. (M Isa "Warning Casts Doubt on Employment Data" *Business Day* (02-11-2011) 2). The labour absorption rate hovers around 40%.

¹² *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) paras 41-52 and 80-85.

¹³ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa: Transforming the Present – Protecting the Future* (2002). Support for a BIG to eradicate destitution is offered by LA Williams "Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis" (2005) 21 *SAJHR* 436 459-463.

¹⁴ COSATU *A Growth Path towards Full Employment* Discussion Document (2010) para 16 calls for a basic income grant.

2 Current State responses to poverty and inequality

2.1 State policy

The political economy of the country has been and remains volatile. In tandem with global developments, it has fluctuated substantially in the years since *Grootboom* and is considerably less amenable now to expanded social assistance than it has been at times over the last decade. In policy terms, we have come through the Reconstruction and Development Programme (“RDP”),¹⁵ Growth, Employment and Redistribution (“GEAR”),¹⁶ and Accelerated and Shared Growth Initiative for South Africa (“ASGISA”)¹⁷ and the Millennium Development Goal¹⁸ of halving poverty and unemployment by 2014, which is clearly not attainable.¹⁹ Now we have the New Growth Path²⁰ to create 5 million more jobs by 2020, a goal which Minister Pravin Gordhan has admitted (in 2011) we are not on track to achieve²¹ and the proposed National Development Plan aiming at eradicating poverty and reducing inequality, and securing nearly full employment by creating 11 million new jobs, by 2030.²²

A commendable intervention that provides temporary relief to a growing number of the poor, is the Expanded Public Works Programme (“EPWP”). But it affords only short-term work.²³ It is worrying that the National Development Plan relies so heavily on public works programmes for meeting

¹⁵ ANC “Policy Documents: A basic guide to the Reconstruction and Development Programme” ANC <<http://www.anc.org.za/show.php?id=234>> (accessed 16-07-2012).

¹⁶ National Treasury *Growth, Employment and Redistribution: A Macroeconomic Strategy* (1996) <<http://www.treasury.gov.za/publications/other/gear/all.pdf>> (accessed 16-07-2012).

¹⁷ Presidency *Accelerated and Shared Growth Initiative for South Africa (AsgISA)* (2006) <<http://www.info.gov.za/asgisa/>> (accessed 16-07-2012).

¹⁸ See Index mundi “Millennium Development Goals: South Africa” *Index mundi* <http://www.indexmundi.com/south_africa/millennium-development-goals.html> (accessed 16-07-2012).

¹⁹ C Meth *Unemployment and Poverty Halved by 2014?* Working Paper 56, South African Labour and Development Research Unit, University of Cape Town (2009). Meth also makes a cogent claim for the introduction of a universal basic income grant. See further C Meth *Basic Income Grant: There Is No Alternative! (BIG: TINA)* Working Paper 54, School of Development Studies, University of KwaZulu-Natal (2008).

²⁰ Economic Development Department *The New Growth Path: The Framework* (2010) 1-34.

²¹ National Treasury *Medium Term Budget Policy Statement 25-10-2011* (2011). The Minister has also called for a relaxation of labour laws because we are likely to create no more than 4 million jobs by 2020. At the same time, curiously, at an internal audit conference on 16 August 2011, he urged that we need to switch from welfare to a situation where most South Africans of working age work for their income (M Isa “SA’s Job-Creation Stalled by Reality” *Business Day* (16-08-2011) 2), a clear signal that social grants are not favoured as a response to dire poverty.

²² National Planning Commission *National Development Plan 10*. It reflects that 65% of black youths are unemployed. The most vulnerable group is aged 15-24 years. Black youths who fail to get a job by age 24 are, it states, unlikely ever to get formal employment (85).

²³ The mean period of employment under the EPWP is around 100 days. It costs approximately R100,000 per job (S Blaine & P Vecchaitto “Ackerman Joins Call to Relax ‘Rigid’ Labour Laws” *Business Day* (18-08-2011) 1). For the disadvantages of these programmes and their inadequacy see further Williams (2005) *SAJHR* 461-462. The Community Works Programme (“CWP”) is susceptible of similar comments. This is not to say that such programmes are not commendable. They are absolutely necessary, but insufficient. The National Planning Commission *National Development Plan* envisages expansion of these jobs as critical to its solution of creating 11 million jobs and reducing unemployment to 6% by 2030 (91-93). The target translates to 2 million full-time equivalent jobs by 2030 (29). Various scenarios are offered to demonstrate how many more such jobs will be required if targets for a diversified dynamic economy are not met (95-96). In scenario one, the worst case, EPWP jobs will have to make up 23.1% of all jobs, a proportion much higher than for any other sector. The employment guarantee target is to achieve 100 days of work opportunities for 50% of the unemployed each year, using the expanded definition of unemployment (343).

its very ambitious targets. There is broad agreement that Treasury's wage subsidy proposal would alleviate the situation. This intervention would entail (tax) incentives for employers to take on unskilled and untrained youths. But it is regarded by some as too timid and remains hotly contested within the trade union movement.²⁴

Social justice is an elusive concept. Setting goals that are not achieved and arguing about what we do not want and what will not work, without putting into place concrete measures founded in law to eradicate destitution and substantially alleviate poverty in the near future, put social stability at risk. The truth is that, despite efforts since the end of apartheid, we have not achieved a redistribution of wealth conducive to a peaceful future and the entrenchment of democracy. The expectations of the poor and the working poor remain unmet. Unfulfilled promises of a better life for all that has not materialised seventeen years after the ANC came to power provoke growing anger. The poor have taken to the streets over poor service delivery and low wages but it is obvious that their grievances run much deeper and are essentially about too many people being too poor to enjoy the fruits of "political freedom".²⁵ The ANC Youth League slogan "*economic freedom in our lifetime*"²⁶ (accompanied by calls for nationalisation of mines and banks, and land grabs) is a powerful rallying message that requires only a spark to set off widespread civil unrest. At the point when desperate youths throw caution to the wind, overcome their fear of increasingly repressive police responses and take to rioting and looting, democracy and the rule of law will be compromised.²⁷ We will have lost the chance to hear and respond appropriately to messages of desperation and to correct untenable economic distortions in our society. Concrete measures that will demonstrably alleviate poverty and inequality are required as a matter of urgency. Comprehensive social assistance is one such measure argued for in this article.

²⁴ At R5 billion over three years it could subsidise 423,000 jobs. Ann Bernstein, of the Centre for Development and Enterprise, considers an appropriate three-year budget to be R15 billion (Centre for Development and Enterprise *Jobs for Young People: Is a Wage Subsidy a Good Idea* (2011) 4). Unions point to the risk of "substitution" – employers using the scheme to reduce their wage bill by restructuring in order to retrench older, unskilled workers and employ in their place youths whose wages are subsidised by the State. The National Union of Metalworkers of SA ("NUMSA") has described Minister Gordhan as an enemy who will be confronted in the streets and asks for him to be fired if he proceeds with the proposal (Ncncana "Gordhan 'Is the New Enemy'" *Sunday Times Business Times* (21-08-2011) 1). Despite the controversy, wage subsidies form part of the *National Development Plan's* "proposed active labour market policies" (National Planning Commission *National Development Plan 29*).

²⁵ Political freedom properly understood entails the ability to exercise it fully as a citizen. Abject poverty curtails political freedom.

²⁶ See ANC Youth League "ANC Youth League 24th National Congress Resolutions – Consolidated: Foreword by ANC Youth League Secretary General- cde Sindiso Magaqa" *ANCYL* <<http://www.ancyl.org.za/docs/res/2011/24resolutions.pdf>> (accessed 16-07-2012) (emphasis added).

²⁷ M Castells *Socio-Political Movements in the Internet Age: From Cairo to Barcelona* paper presented at 2011 STIAS Lecture Series hosted by Stellenbosch University, Stellenbosch, 16-08-2011, explained the genesis and the significance in several recent international uprisings of the use of internet and mobile phone technology. Regime change would not be an issue here, but ongoing political upheaval and the attendant economic consequences that would make poverty alleviation even more difficult certainly would be.

2.2 A developmental *versus* a welfare state

The policy shift away from welfare, despite the content of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”, which South Africa has signed but not ratified), is evident in declarations that South Africa is a developmental state, should not be a welfare state, and is committed to strong economic growth and job creation.²⁸ As a matter of law, this stance ignores the fact that arguments about the desirability or otherwise of a comprehensive social security system are not the primary issue. International law and the Constitution specifically commit the country to providing welfare, including social assistance, to those in need. Interpreting that commitment in the spirit of the Constitution is the primary issue and it is argued here that any legislative scheme regulating access and/or entitlement to social security must not exclude the able-bodied adult poor. Those negatively disposed towards welfare cannot deny that it is a constitutionally entrenched imperative (the precise nature of which falls to be interpreted). At the political level, the negative disposition results in the realities of poverty being hidden. Poverty is attributed to “forces over which we have no control”,²⁹ to “the economy”, to “global forces”, which we cannot change. Distributive measures are labelled “unsustainable” and removed from arenas where they deserve much more searching and transparent discussion. This paper accepts as incontrovertible that the persistence of poverty under modern economic conditions is, at least in part, a product of legal and political choices designed to serve preferred social policies.

²⁸ The ICESCR recognises the right of everyone to social security. United Nations Committee on Economic Social and Cultural Rights (“UN CESCR”) *General Comment No 19: The Right to Social Security (art 9)* (2008) E/C.12/GC/19 para 23(i) states that in order to achieve coverage for disadvantaged and marginalised groups, that is, “everyone”, non-contributory welfare schemes will be necessary. The effect of government’s growing insistence on South Africa’s being a developmental state is that progress towards comprehensive social security in the form of more welfare is impeded. President Zuma’s state of the nation address and Finance Minister Gordhan’s budget speech in 2011 both focus heavily on development, economic growth and the creation of jobs. They declare that the country’s aim is to put development first and not dependence on welfare (P Gordhan *2011 Budget Speech* (2011) 16). The National Development Plan echoes this approach (see nn 22, 23, 24). See further Centre for Development Enterprise *Roundtable Report on Poverty and Inequality* (2010), which comes out strongly in favour of job creation and against welfare as South Africa’s solution. It fails to address what should be done to sustain the poor if the economic growth upon which its conclusions depend is neither achieved nor, in the foreseeable global financial climate, achievable. No one is arguing for welfare first and economic growth later. Both are immediate and critical elements of an improved situation for those who seem to be being told to “eat cake”. A stark truth is that our developmental aspirations are laudable but cannot be achieved quickly enough to palliate the immediate plight of the poor. Nor should these aspirations be permitted to diminish the import of the international-law and constitutionally enshrined right to comprehensive social security. The right to social assistance is elucidated below.

²⁹ D Brand “The ‘Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights Claims in South Africa” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17 19. Depoliticisation and domestication of poverty ensue.

Such policies, as Lucy Williams so cogently points out, are susceptible of change.³⁰

Faster economic growth, currently seen to be the panacea for global economic woes, does not necessarily correct rising inequality. Where growth has accelerated in some parts of the world, inequality has also risen. Growth is not necessarily evenly distributed. Indeed, steady economic growth combined with high levels of youth unemployment and conspicuous consumption on the part of (corrupt) ruling elites contribute greatly to triggering political instability. These features were central in the Arab uprisings in Tunisia and Egypt and are prevalent in countries like Kenya and Uganda. Telling the youth of Africa about GDP growth will provoke visceral responses. “For whom is the economy growing?”, they will ask. Mitigating inequality within countries rather than among them is now acknowledged to be the crucially important international development challenge.³¹

The focus of our welfare system mimics that of the apartheid state and welfare systems in the United Kingdom and the United States³² where full or nearly full employment was (but is no longer) assumed to be achievable and where residual state intervention was thought to be needed only to palliate cyclical unemployment and poverty ensuing from temporary economic downswings and market imperfections. Minimal, temporary state intervention, in accordance with the thrust of so-called Washington Consensus thinking, remains the underpinning rationale for targeting vulnerable groups in those

³⁰ Williams (2005) *SAJHR* 446-447, discussing welfare as a right, an entitlement, points out that all property rights are human artefacts with content capable of determination through chosen social policies. See also LA Williams “Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 239 241-245. There was for a time a glimmer of hope that social assistance would be expanded. The Department of Social Development’s (“DSD”) discussion paper *Creating our Future: Strategic Considerations for a Comprehensive System of Social Security* (2008) envisaged not only expanded UIF, but also creating special grants for unemployed youth under 25 and caregivers of children, recognising the extreme vulnerability of these groups. The proposals have not gained support from Treasury and this is reflected in the most recent strategic plans/ annual reports of the DSD. *DSD Strategic Plan 2009-2012* (2009) paras 3.4.3-3.3.4 make reference to developing options for unemployed adults and caregivers of children who are child support grant (“CSG”) beneficiaries, while the 2010-2015 plan contains no such reference. *DSD Annual Report to 2009/2010* (2009) 50 explains that developing policy options for a basic income grant for unemployed adults, youth benefits and assistance for caregivers has been put on hold and the *DSD Annual Performance Plan 2011/2012* (2011) is silent on any such developments. The *National Development Plan of 2011* speaks of a “social floor” below which no one should have to live (National Planning Commission *National Development Plan* 21, 37, 342). It also speaks of a stronger social security net and inclusive economic growth (101, 10, 103). But the focus is on jobs, the social wage (housing, education, health *et cetera*) and contributory social security schemes (5, 25, 37). There is no hint of expanding non-contributory social assistance to close the acknowledged glaring gap in the current grant system, which excludes the able-bodied poor aged 18-59. (See, for example, 327, 333-334, 340, 342.) Lofty goals and objectives for comprehensive social protection abound, but nothing is being planned to relieve income poverty for the millions of adults who will not get jobs because of structural unemployment and do not qualify for any social grant. This omission runs counter to the imperatives of the Constitution and of the ICESCR.

³¹ See the insightful contribution about growth and inequality and the possibility of the Arab Spring spreading south by J Githongo “The Poverty of Growth may Feed an African Spring” *International Herald Tribune* (24-07-2011) 23. Chief Executive of the Inuka Kenya Trust and chairman of the Africa Institute for Governing with Integrity, Githongo’s views have great resonance in South Africa. The *National Development Plan* recognises the threat of social disorder, widespread political unrest and increased crime if poverty and unemployment are not addressed (National Planning Commission *National Development Plan* 85-86). But its solutions are steadfastly premised on faster economic growth (10).

³² For a comparison of welfare in South Africa and the United States, see Williams (2005) *SAJHR* 436.

jurisdictions.³³ With the advent of democracy in South Africa, exclusion from welfare benefits based on race was eliminated. But assumptions underpinning the system, assumptions about the ability of the economy to absorb all adults and for full or nearly full employment to be achieved by the market were not reconsidered. The 2011 National Development Plan discloses how vital public works programmes will be to creating nearly full employment, but it does not challenge traditional criteria for identifying target groups for social grants, criteria inherited from other jurisdictions and applied to whites during the apartheid era, such as age (being a child, or being old), disability, participation in war.³⁴ Pervasively in government and broader society these groups are regarded as the “worthy” poor, while able-bodied adults are not.

Rhetoric, often attributable to government officials, that the poor need and would prefer the dignity of a job to handouts that allegedly encourage a culture of dependence is misplaced,³⁵ based on misconceptions about the difference between structural and cyclical poverty and evocative of an obdurate commitment to developmental social welfare that limits the transfer of resources from the productive economy to social services. Advocates of this model assume that participation in formal-sector waged work is *the* solution to poverty.³⁶

Lucy Williams points out that the rhetoric also suggests, not always subtly, blameworthiness on the part of the adult able-bodied poor.³⁷ They are stigmatised as failures, as lacking family values, as unproductive consumers of

³³ This is not to say that social-rights thinking has not changed. See W Forbath “A Not so Simple Justice: Frank Michelman on Social Justice” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 72-107.

³⁴ It makes no suggestion for expanding the social grant system to cover the able-bodied unemployed poor. Reliance on assumptions inherited from the days of apartheid, when job reservation, privileged education and other racially discriminatory policies protecting whites made the economy for whites more similar to that of developed countries is wholly inappropriate in South Africa, where poverty and inequality are structural, systemic and pervasive, and (exacerbated but) not derived from cyclical fluctuations in the market. The *National Development Plan* takes cognisance of this, but considers it possible to eradicate poverty, achieve nearly full employment and have everyone enjoying “a high standard of living” by 2030, without expanding social grants (National Planning Commission *National Development Plan* 328, 330-331).

³⁵ Misplaced, not the least because the ICESCR recognises unemployment as a social circumstance warranting its own category, alongside age, disability *et cetera*, for eligibility for social assistance (UN CESCR *General Comment No 19* para 16). There is no evidence that small grants, of the order of the R280 per month currently payable as a child support grant would cause dependence. Who would prefer such a grant to a job? On the contrary, the importance of small grants in alleviating destitution was recently adduced by UNICEF and the Department of Social Development, in the knowledge that the CSG is used as a household grant, and is not confined to children (K Gernetzky “Social Grant ‘Weakened Effect of Recession on the Poor’” *Business Day* (16-08-2011) 2). See further Leibbrandt et al *Trends in South African Income Distribution and Poverty since the Fall of Apartheid*. The ILO considers income support for the unemployed to be an essential element in creating a social protection floor (ILO *World Social Security Report 2010-2011: Providing Coverage in Times of Crisis and Beyond* (2010) 63, cited by Govindjee & Dupper (2011) *Stell LR* 787 n 80). The *National Development Plan* acknowledges market failure and the need for a “social floor” and greater social justice (National Planning Commission *National Development Plan* 54-55), but it remains obdurate about employment as the solution and proposes that the EPWP be regarded as part of social protection: “Work provides people with an earnings floor and the dignity of being productive rather than dependent” (334). Being dependent on social grants is clearly frowned upon, while having to depend on the working poor and recipients of grants intended for others is apparently preferable.

³⁶ Williams (2011) *Stell LR* 463, 466, 468, 473, 476 stresses that this understanding of waged work ignores that labour markets are fragmented and is highly prejudicial to caregivers.

³⁷ Williams (2005) *SAJHR* 462.

the fruits of the labour of others. An adult who is unable to support himself or herself and his or her dependants is deficient, lazy, not worthy of the protection expressly provided for in section 27 of the Constitution. These attitudes impair the dignity of the poor and ignore historical, political and economic forces that are the constructs of poverty and need. They flow from an acceptance of the flawed assumption of neo-liberal policies for poverty reduction that formal-sector waged work (complemented by public works programmes) can and will provide adequate family support.³⁸ The assumption entails that waged labour properly makes the family the site primarily responsible for support of its members and properly renders the State's responsibility residual, to be invoked only in crises and only temporarily.³⁹ Williams, calling for inclusive social assistance, powerfully claims that South Africa's reliance on markets, public works and the family economy as paramount in reducing poverty disables it from addressing profound structural inequality. "Privatising poverty solutions transfers many welfare functions to a domestic economy that cannot accommodate this responsibility" and demonises parents who cannot provide for their families.⁴⁰

Arguments for expanded access to social assistance grants should not be taken in any way to diminish the laudable goals for expanding the economy and increasing the number of jobs. But growth on its own leaves intact unacceptable degrees of inequality and cannot quickly enough palliate dire poverty. Worthy job-creation strategies ignore suffering in the present for an uncertain claim in the future. Even public works programmes, akin to employment guarantee schemes that have been adopted elsewhere, such as in India,⁴¹ are laudable but on their own inadequate. There is a time-bomb ticking and there are moral and constitutional issues that must be aired and acted upon. Content must be given to the commitment to the founding values of freedom, dignity and equality, to the fundamental rights to equality and dignity, and to the socio-economic right to social assistance. In this quest the courts have a central role to play.

³⁸ Williams (2011) *Stell LR* 463, 464.

³⁹ Brand addresses this "domestication" of poverty (Brand "Politics of Need Interpretation" in *Theories of Social Justice* 19). Williams (2005) *SAJHR* 462 points out that the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) accepted that primary responsibility for family subsistence rests with the family. She also emphasises that reaffirmation of the free market and the family as the correct framework for dealing with income disparities perpetuates class, racial and gender inequality (Williams "Beyond Labour Law's Parochialism" in *Theories of Social Justice* 254).

⁴⁰ Williams (2005) *SAJHR* 463. She supports the introduction of a basic income grant (459). Economic Development Department *New Growth Path* 1-34 acknowledges that the economy has not been able to create nearly enough jobs. It remains to be seen whether the highly ambitious targets in the *National Development Plan* can be achieved. Risk of failure is high, and the impact of failure will be very serious. So, can we afford not to have a "Plan B"?

⁴¹ See generally 12th Regional Seminar for Labour-intensive Construction *Prioritising Employment Creation in Government Policies, Programmes and Investments* (12-10-2007) <http://www.economistsforfullemployment.org/news/Durban_panel.doc> (accessed 16-07-2012).

3 The legislative problem

The Preamble to the Social Assistance Act 13 of 2004 affirms that the Constitution⁴² confers on “everyone” the right to have access to social security,⁴³ including, if they are unable to support themselves and their dependants, appropriate social assistance.⁴⁴ An interpretation of these words faithful to the spirit of the Constitution is that they contain a promise that the structure of the legislative system of social assistance contained in the Social Assistance Act will be comprehensive, formulated to cover all persons in need, in accordance with their constitutional rights.⁴⁵ But this is not the position.

Section 1 of the Social Assistance Act defines “social assistance” in narrow and specific terms, as “a social grant in terms of the Social Assistance Act”. Section 1 goes on to define “social grant” as a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person’s grant, a war veterans’ grant and a grant in aid. There is also a specific section dedicated to eligibility for social assistance.⁴⁶

Instead of defining social grant in general terms, such as “a cash transfer paid by the state to persons who demonstrate that they do not have enough income to support themselves and their dependants”, the legislation lists the specific grants that are available in terms of the Act. In other words, the categories of grants determine who is in and who is out.⁴⁷

The argument made in this article is that this definitional modus conflicts with the constitutional provision, which bases the eligibility of “everyone” to have access to social assistance solely on need. “Being unable to support

⁴² S 27(1)(c) read with s 27(2) of the Constitution.

⁴³ The broader term “social security” covers the whole gamut of welfare instruments, including non-contributory social assistance in the form of social grants and contributory forms of welfare such as unemployment insurance and compulsory retirement funding schemes. It would seem not to cover elements of what is sometimes called the social wage – housing, health care, food, water – because these are separately itemised in other provisions of the Constitution. Social assistance is thus a component of social security. Access to it is based solely on the ground that claimants are “unable to support themselves and their dependants” (s 27 of the Constitution). The type of assistance envisaged in the term “social assistance” suggests the payment of money by the State to an individual, in the form of a grant. Expanded Public Works Programmes and wage subsidies do not, on the basis of the legislative definition, fall into the category of “social assistance”. (The inclusion in other jurisdictions of aspects of the social wage, guaranteed income schemes and public works programmes as part of “social assistance” cannot change the import of the way social assistance is defined in South Africa.)

⁴⁴ Note that the adjective here is not the same as that used to qualify housing in s 26 (“adequate”) or food and water in s 27(1)(b) (“sufficient”). See further part 6 below.

⁴⁵ DSD *Strategic Plan 2010-2015* (2010) 2 declares:

“At the heart of the creation of a caring and inclusive society has been the creation and implementation of a comprehensive social security system.”

But the able-bodied adult poor remain excluded.

⁴⁶ S 5(1)(a) of the Social Assistance Act requires eligibility in terms of ss 6-13, which contain the specified categories of grants.

⁴⁷ The Minister of Social Development determines the amount payable in terms of the various grants and the scope of their reach, within the defined categories, by means of Regulation. So, for example, eligibility for the CSG has been extended to cover children aged under the age of sixteen (as from 2010), seventeen (as from 2011) and eighteen (as from 2012) – GN R 1116 in GG 32747 of 27-11-2009. Upon reaching eighteen, majority is attained and the individual is no longer a child in terms of the law. A new category of grants would be required to cater for the able-bodied adult poor aged 18-59 years.

themselves and their dependants”, the Constitution declares, suffices to entitle any person to have access to social assistance.

The definition and eligibility sections in the Social Assistance Act have the effect of excluding absolutely, and until their amendment, all poor adults aged eighteen to 59 years. Some of these persons are able-bodied but simply poor; others may also be ill, even chronically ill, mentally or physically, but not disabled and thus not eligible for any social grant.⁴⁸ The group is not small. The lived experience of the individuals who make up this group is something we cannot afford to ignore. They experience the effects of gross income inequality and poverty that prevails in South Africa.⁴⁹

This article argues for the restructuring of the legislative scheme for social assistance to provide access to social grants for the excluded group and an interpretation of the content of the right to social assistance that is meaningful and in line with the founding moral values and transformational demands of the Constitution. Anything less would betray a true commitment to social justice.

4 The constitutional challenge

The argument made here is, first, that the legislative scheme excluding able-bodied persons aged between eighteen and 59 from access to social grants in the Social Assistance Act is constitutionally invalid. It is more than a disregard for the foundational values underpinning the Constitution; it is a violation of the group’s fundamental rights to equality and dignity⁵⁰ and it runs counter to the principles of the ICESCR, to which South Africa is a signatory.⁵¹ The definition of social grant and the section determining eligibility for a social grant require amendment.⁵²

Secondly, the failure of the State to take reasonable legislative and other measures to provide access to the socio-economic right of access to social

⁴⁸ The scope for manipulating, even distorting the definition of disability, in order to qualify/disqualify or permit/refuse someone entitlement to the disability grant is disturbing. There is evidence that HIV positive persons deliberately stop taking their medication in order to retain disability benefits (N Natrass “Disability and Welfare in South Africa’s Era of Unemployment and AIDS” in S Buhlungu, J Daniel, R Southhall & J Lutchman (eds) *State of the Nation: South Africa 2007* (2007) 179-200.

⁴⁹ Sketched in the first two parts of this article.

⁵⁰ Contained in ss 9 and 10 of the Constitution.

⁵¹ South Africa has not ratified the ICESCR but s 39(1)(b) of the Constitution requires the courts to consider international law. Art 9 of the Covenant recognises the right of “everyone” to social security and emphasises the importance of this right in guaranteeing dignity for all persons. Art 2(2) guarantees non-discrimination in the exercise of each of the economic and social rights enshrined. (See also UN CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* (2009) UN Doc E/C.12/GC/20 para 2 on the guarantees of equality and non-discrimination in relation to rights to social security and an adequate standard of living.) UN CESCR *General Comment No 19* para 2 points out that the right to social security encompasses the right to access and to maintain benefits without discrimination in order to secure protection from, *inter alia*, a lack of work-related income caused by unemployment, age, disability *et cetera*. Para 16 of this General Comment requires States parties to endeavour to provide benefits, including social assistance, to cover unemployment, and *General Comment No 20* para 29 expressly lists age as a prohibited ground for discrimination.

⁵² Ss 1 and 5 respectively.

assistance for this group is a breach of the ICESCR and of its constitutional obligations in respect of a protected socio-economic right.⁵³

That the total exclusion of poor, able-bodied adults from access to social assistance is unconstitutional is a central argument of this article. It is a point that has also been raised by others.⁵⁴ The cash needs of the able-bodied adult poor have not been given adequate attention, in spite of the recommendations in the government-commissioned Taylor Report⁵⁵ for the introduction of a universal basic income grant.

The denial of access to social assistance was the direct subject of litigation in *Khosa v Minister of Social Development*⁵⁶ (“*Khosa*”). The case concerned the exclusion of permanent residents from the Older Persons Grant, the Child Support Grant and the Care Dependency Grant. The legislation in question expressly required applicants for these grants to be South African citizens. Mokgoro J stressed the importance of the intersection of the right to dignity and the breach of the specific right to social assistance.⁵⁷ Sandra Liebenberg and Beth Goldblatt have also cogently advanced the imperative of an interpretive approach that acknowledges and reinforces the interconnectedness of rights, accords with the mandate to our courts to promote the foundational values of human dignity, equality and freedom, and advances the transformative goals of the Constitution.⁵⁸ The mutually reinforcing potential of this approach is confirmed in *Grootboom*:⁵⁹

“All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”⁶⁰

⁵³ The right is contained in s 27(1)(c) of the Constitution. It must be read with s 27(2), which requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Art 9 of the ICESCR and the provisions in UN CESCR *General Comment No 19* and UN CESCR *General Comment No 20* (n 51) are pertinent again here. UN CESCR *General Comment No 19* para 65 expressly refers to a failure to reform or repeal legislation inconsistent with the right to social security as a violation occurring through an act of omission, and see also para 67.

⁵⁴ See, for example, S Liebenberg & B Goldblatt “The Interrelationship between Equality and Socio-Economic Rights” (2007) 23 *SAJHR* 335 360-361; D Brand “Between Availability and Entitlement: The Constitution and the Right to Food” (2003) 7 *LDD* 1-21; D Brand “The Right to Food” in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 153 181-187; Govindjee & Dupper (2011) *Stell LR* 775 798.

⁵⁵ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa*.

⁵⁶ 2004 6 SA 505 (CC).

⁵⁷ Paras 40-42.

⁵⁸ Liebenberg & Goldblatt (2007) *SAJHR* 335 337.

⁵⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 23-24.

⁶⁰ As to whether the action has to be pursued in the Equality Court, the principle of subsidiarity is relevant. It dictates that, once legislation has been enacted to give effect to a right in the Constitution, litigants must rely on the legislation rather than the Constitution when seeking to protect the right against infringement. It is not necessary to explore an action in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”) where the challenge is the constitutional validity of legislation. See *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 437 and AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77 100-101. Worth noting, though, is that, unlike the Constitution, s 34(1) of the PEPUDA

5 The challenge based on equality and dignity

Equality and dignity are separately guaranteed, fundamental and interconnected rights.⁶¹ Much of the Constitutional Court's equality jurisprudence is informed by the right to dignity. In *Hoffmann v South African Airways*⁶² the Court held that "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity".⁶³ Equality is adduced here in a substantive not a formal sense. And it entails not just what might be called equal protection, but encompasses Frank Michelman's insistence on putting welfare rights within a distributive principle of "minimum protection".⁶⁴

In challenges based on these fundamental rights the first question that arises is whether there has been discrimination. The discrimination here clearly renders the excluded group unequal. It derives from the use of a definitional modus for the provision of access to social assistance that excludes able-bodied adults aged eighteen to 59 even if it is clear that they cannot support themselves and their dependants. But it remains to consider whether the discrimination is unfair.

If the discrimination is based on a ground listed in section 9(3) of the Constitution, such as age, a rebuttable presumption of unfairness arises.⁶⁵ If the discrimination is not based on a ground listed in section 9(3), unfairness falls to be established by the claimant. The discrimination complained of here is based on age. The excluded group falls between the age limits for the two most prevalent and effective measures in the State's poverty-relief

contains a directive principle that includes socio-economic status as a possible ground of prohibited discrimination. Socio-economic status, in turn, is defined to include "a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications" (s 1(xxvi)). For a formalistic and undesirable outcome pertaining to the formulation of claims in terms of legislation and/or the Constitution see *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) and the criticism of the judgment by D Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *SALJ* 591-605.

⁶¹ Equality is guaranteed in s 9 and dignity in s 10 of the Constitution. One must be mindful however of Sandra Fredman's injunction that distributive inequality is largely an economic debate rather than a human rights, legal issue: S Fredman "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 22 *Stell LR* 566-590.

⁶² *Hoffmann v South African Airways* 2001 1 SA 1 (CC) and cited by Mokgoro J in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 70. See also *Harksen v Lane NO* 1998 1 SA 300 (CC).

⁶³ *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 27.

⁶⁴ FI Michelman "Foreword: On Protecting the Poor through the Fourteenth Amendment" (1969) 83 *Harv L Rev* 7 11-59, expounded upon by WE Forbath "A Not so Simple Justice" in *Theories of Social and Economic Justice* 72-107. Michelman regards equality discourse as inadequate rhetoric. My article is grounded within the context of a rich understanding of substantive equality in pursuance of advancing our current rights jurisprudence, but it is not unmindful of the limitations of equality analysis.

⁶⁵ In terms of s 9(5) of the Constitution.

arsenal.⁶⁶ The onus would be on the State to prove that this discrimination is not unfair.

In *Khosa*, the exclusion of permanent residents from the Child Support Grant, the Older Persons Grant and the Care Dependency Grant⁶⁷ was found to be unfairly discriminatory. It was held to be implicit in the word “everyone” in section 27 of the Constitution that State provision of social assistance cannot fairly result in the exclusion of any group in need. The Court said that “[t]hose who are unable to survive without social assistance are equally desperate and equally in need of such assistance”.⁶⁸ The exclusion complained of in *Khosa*, as here, is absolute. It is permanent until the offending legislative provisions are changed.⁶⁹ Mokgoro J stated that the exclusion limited the rights of the applicants “in a manner that affects their dignity and equality in material respects” and was thus unfair.⁷⁰ The denial was, the Court pointed out, total, and the consequences of denial were “grave”.⁷¹

Context and impact⁷² on the person or persons affected by the discrimination are determining factors in establishing whether discrimination is unfair. And relevant considerations in this regard are the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage. In this regard, race, too, may be a ground for claiming unfair discrimination against 18-59 year olds.

An absence of a basic subsistence need, such as cash, impedes the ability to fulfil life plans and to participate effectively in political, economic and social life.⁷³ It is clear that, in a society heavily reliant on cash, income poverty is a critical issue. The absence of cash on a regular basis entails no transport to seek employment, to attend a training or other educational programme, to go to a government office to collect a grant, to go to a health clinic to be immunised or receive medical attention, to purchase a necessity of life, such as food. Income poverty diminishes the ability to live with dignity and to access and benefit from what other welfare assistance there is.

For able-bodied adults it deprives them of the opportunity to participate in civil society as full citizens. It may even effectively deny them the chance to

⁶⁶ These are the CSG and the Older Persons Grant. The former accounts for 35% of the cost of all grants and the latter for 38%. The total number of grant recipients is close to 15 million and will cost R147 billion for 2011/2012 (National Treasury *2011 Budget Speech* (2011) 25). According to the findings of two collaborative studies of UNICEF and the DSD, launched in August 2011, South Africa’s welfare net, dominated by the CSG, has dramatically reduced the effect of child poverty. (The grant is paid to the child’s caregiver. As from April 2012, it stands at R280 per month.) DSD, SASSA & UNICEF *The South African Child Support Grant Impact Assessment: Evidence from a survey of children, adolescents and their households* (2012) 2.

⁶⁷ The challenge related to the Social Assistance Act 59 of 1992, as amended by the Welfare Laws Amendment Act 106 of 1997. The definitional modus adopted in the Social Assistance Act 13 of 2004 has not changed, although there are some differences in wording. They are not material to this argument.

⁶⁸ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 42.

⁶⁹ Inclusion could be achieved only by adding further categories of grants or introducing a (universal) basic income grant.

⁷⁰ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 85.

⁷¹ Para 77.

⁷² See parts 1 and 2 of this article.

⁷³ S Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 140 141.

vote. Exclusion from participatory democracy impoverishes democracy itself. It threatens the rule of law.

A notable consequence of income poverty is the reliance by poor adults not merely on the working poor but on grants targeted at and intended for children, the elderly and the disabled. Poor households with members that fall into the categories of persons eligible for grants are better off than those without them. It would be naïve to imagine that the grants are used exclusively for the benefit of the eligible beneficiaries. Government is aware that the targeted grants are pooled, for use by entire families. They are manifestly being used as household grants, a fact which supports the introduction of a comprehensive basic income grant.⁷⁴

The unavailability of jobs to absorb the able-bodied unemployed for the foreseeable future raises the terrible prospect for large numbers of young people, overwhelmingly black, of becoming ineligible for the child support grant at eighteen, eking out a miserable existence without being employed, and somehow reaching the age of 60 and qualifying for the old age grant. In large measure, these are the people who live the consequences of apartheid discrimination. They are a vulnerable, disadvantaged group.⁷⁵

The Court in *Khosa* found that exclusion of permanent residents in need of social security programmes forces them into relationships of dependency upon families, friends and the community in which they live, casts them in the role of supplicants, relegated to the margins of society.⁷⁶ This seminal case clearly confirms that the legislative denial of access to social assistance compels poor people to become dependent on their family members who are also poor; it impairs their dignity and it amounts to unfair discrimination. The ensuing question, whether the limitation of the rights to dignity and equality for the able-bodied adult poor is justifiable, is reserved for the section below on reasonableness review and the limitation of rights.

⁷⁴ Pertinently, Finance Minister Gordhan *2011 Budget Speech* 25 made the point that income support to poor households has been extended over the past decade, mainly through the phased extension of the *child support grant* to older children. No proposal is being made by me for household grants. The size and situation of households vary too much for the unit to be used as the basis for a household grant. Moreover, the Constitution confers fundamental and socio-economic rights on individuals. A basic income grant for individuals would be the preferred proposal.

⁷⁵ The poor are overwhelmingly black. John Kane Berman, of the Institute of Race Relations, alerts us to the fact that there are currently 11 million people between the age of seven and seventeen, of whom a third will never be employed and will remain illiterate and innumerate (R Mayer "Relax Law to Create Employment" *Business Day* (15-08-2011) 8). Minister Gordhan in his *2011 Budget Speech* also observed that 42% of 18-29 year olds are unemployed.

⁷⁶ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) paras 76, 80, 81. It is noteworthy that the Court is saying that it is the *absence* of welfare in the form of social grants that makes the excluded group dependent and that, by implication, their inclusion as recipients of welfare would help to make them independent of family members, recipients of grants and the working poor. This is a powerful counter to the prevailing and false view about dependency induced by small subsistence grants such as those that would be encompassed in a proposal for a basic income grant. No one would prefer such a grant to a job. On this point see Williams (2005) *SAJHR* 462-463. Govindjee & Dupper (2011) *Stell LR* 780 point to evidence showing the positive impact of social grants on alleviating poverty and on employment-seeking behaviour.

6 The challenge based on the right of access to social assistance

The purpose of social security is clearly to relieve poverty and is part of the State's strategy to give effect to the objectives of the Constitution. As Mokgoro J stated in *Khosa*:

“The right of access to social security, including social assistance, for those unable to support themselves and their dependants, is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.”⁷⁷

The Constitution declares that “everyone” has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.⁷⁸ Need is the only criterion for eligibility.⁷⁹ Two matters fall to be investigated: What is the content of this right, and has there been an infringement.

The right to have access to social assistance is one of a clutch of socio-economic rights. Access to health care, housing, food and water are others. The State is required to take reasonable steps to achieve the progressive realisation of *each* of these rights.⁸⁰ Thus the fact that the State's obligation in respect of one or more of the other rights is discharged may justify slower progress but is not determinative in a challenge in respect of denial of access to social assistance. The existence of what is known as the social wage, or the social welfare package, made up of elements such as health care, water, housing, does not obviate the need for access to money. The EPWP, the CWP and wage subsidies would alleviate unemployment, generate some income and hence reduce need, to some extent. But they do not fall within the definition of social assistance and cannot be invoked by the State to justify denial of access to social assistance.⁸¹

The content and meaning of the socio-economic rights in the Bill of Rights fall to be established *via* interpretation by the courts, which must, in order to fulfil their transformative mandate, promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁸²

“Whenever a court is faced with a claim by a disadvantaged group for equal access to a state benefit or resource, the court must be mindful of the socio-economic rights that entitle all people to have access to the relevant social goods.”⁸³

⁷⁷ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 52. For the position in terms of the ICESCR see n 51.

⁷⁸ S 27(1) of the Constitution.

⁷⁹ What is the significance of the conjunctive “and”? Must it be established that the person cannot support herself and also cannot support her dependants? Or would it be enough to establish that she can support herself but not her dependants (who may or may not qualify for one of the existing grants), or her dependants but not also herself? And is “dependants” to be given a broad meaning encompassing not only persons in respect of whom the claimant owes an enforceable duty of support, but others who rely on the claimant, such as a life partner or a *de facto* dependant?

⁸⁰ Ss 26(2) and 27(2). See the discussion on limitation below.

⁸¹ Govindjee & Dupper (2011) *Stell LR* 797-798. Nor are these programmes able on their own quickly enough to eradicate severe poverty – Meth *Unemployment and Poverty Halved by 2014?* 28-32.

⁸² S 39(1)(a) of the Constitution.

⁸³ Liebenberg & Goldblatt (2007) *SAJHR* 342.

The adjective used for social assistance is “appropriate”, while there is no qualifier for health care,⁸⁴ that qualifying housing is “adequate”⁸⁵ and that qualifying food and water is “sufficient”.⁸⁶ It is not clear why different adjectives were chosen for the various rights, whether the differentiation was deliberate, and what it is intended to achieve in the interpretation of the rights. All the adjectives signify a qualitative dimension. But the question arises whether they entail also a quantitative dimension. Put another way, and for the purposes of this discussion, is the State obliged, subject to the internal limitation of the right, that is, reasonableness review, to provide any social assistance to able-bodied adults in need? How much social assistance is appropriate? Is zero appropriate? If so, the right is empty.

This issue is fundamental to a substantive analysis of the normative purposes and values underpinning socio-economic rights and, on the facts in the present enquiry, to establishing the content of the right enshrined in section 27(1). It demands more of the courts than the setting of normative guidelines to bolster socio-economic rights adjudication.⁸⁷ It precedes, and is discrete from the examination of the internal limitation of the right contained in section 27(2). It calls for consideration of the current standing of arguments for a minimum core. Although widely thought to have been laid to rest in *Grootboom*,⁸⁸ *Minister of Health v Treatment Action Campaign (2)*⁸⁹ (“TAC”) and *Mazibuko v City of Johannesburg*,⁹⁰ (“Mazibuko”) the minimum core, an accepted concept in international law, may yet prove to be a fertile concept, the more so if one avoids using the term.⁹¹

⁸⁴ S 27(1)(a) of the Constitution.

⁸⁵ S 26.

⁸⁶ S 27(1)(b).

⁸⁷ Surely the socio-economic rights in the Constitution are more than guiding principles, or what Lucy Williams calls “soft law”? See Williams (2005) *SAJHR* 439.

⁸⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) where the Court said it did not have enough information before it to determine a minimum core obligation (para 33). But something has to be made of its finding that a programme that excludes a significant segment of society cannot be said to be reasonable. In this regard see D Bilchitz “Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance” (2002) 119 *SALJ* 484 501 and D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) ch 5. He argues that the courts implicitly use a minimum core.

⁸⁹ 2002 5 SA 721 (CC), which appears more clearly to have rejected the possibility of individual entitlements. See also Williams (2005) *SAJHR* 448.

⁹⁰ 2010 4 SA 1 (CC) which, contrary to the findings of the SCA, held that the City was under no obligation to provide any particular amount of free water to citizens on a monthly basis (para 85).

⁹¹ See Williams (2005) *SAJHR* 449-451, whose view is that the Constitutional Court has not closed the door on minimum core. The concept has been endorsed by the UN CESCR in interpreting the ICESCR (see Liebenberg *Socio-Economic Rights* 148 n 85). And the Constitution does demand that courts consider international law: s 39(1)(b). Liebenberg *Socio-Economic Rights* 163-173 traverses the arguments for and against the minimum core. Critics of it put forward important, but not insurmountable, difficulties. None calls for its abandonment. Rather than basing it on problematic determinants such as survival (see also Bilchitz *Poverty and Fundamental Rights* ch 5), Liebenberg urges that one could use notions of participatory democracy, dignity, equality and freedom to determine its import. Her view is powerful. Predominant among the arguments against the minimum core are those from judicial deference. But fears that the courts will transgress the proper boundaries of institutional legitimacy and usurp government’s function are trapped within a conception of bounded separate spheres regarding the appropriate roles of the various branches of government in a constitutional democracy. The arguments are adduced to justify the withdrawal by the courts from the arena of ensuring that socio-economic rights have content. That withdrawal is not the right response is a central premise of this article. This issue and proposals for a better response are canvassed in the discussion on reasonableness, below.

Lucy Williams⁹² highlights the fact that *Khosa* differs significantly from *Grootboom* and *TAC*. First, *Khosa* dealt with the constitutionality of a statute, rather than merely a programme of the Executive; secondly, there was no question in *Khosa* of progressive realisation of the right to social assistance for the excluded group – it had been entirely excluded by the Social Assistance Act. The exclusion of able-bodied poor adults aged eighteen to 59 years, in issue here, is in *pari materia* with the facts in *Khosa*. The distinctiveness of *Khosa* is that it shifts the enquiry from whether the State has a reasonable plan to the prior question whether there is an individual, enforceable right to the benefit in question. The effect of the Constitutional Court's finding was that the socio-economic right to social assistance effectively granted a group of individuals (permanent residents) a legally enforceable entitlement. But, to what? In *Khosa*, it was to the specific grants in the Social Assistance Act, from which non-citizens had been excluded. On the facts under discussion the route to the solution is more elusive, but not, it is submitted, out of reach.⁹³ The argument made here is that the courts declare the legislative scheme to be reconfigured to provide access to social grants for able-bodied adults who satisfy the requirements for eligibility set forth in section 27(1), and in an amount that would satisfy the requirement of appropriateness (to be determined by the relevant government organ), subject to the limitation enquiry contained in section 27(2). Earlier sections of this article elucidate the need of this group, their position in society and their vulnerability.

Sandra Liebenberg, in a critical analysis of *Mazibuko*, explains that developing the normative content of socio-economic rights need not imply that the courts set fixed, quantitative standards in a rigid and counter-productive manner. Neither does the enterprise admit of a finding that the State is under no obligation to provide any particular quantity of the benefit envisaged.⁹⁴ Such a finding denudes the right and impoverishes our conception of what socio-economic rights are intended to achieve – the alleviation of poverty and ensuring that the poor have access to a measure of the guaranteed service or benefit that will permit them to live with dignity, as full citizens. This understanding of the normative content of socio-economic rights would place a duty on the courts to oversee a process requiring the State to determine, in a context sensitive way, entailing engagement with the elected branches of government and the broader community, what an appropriate, minimum level of the benefit entails, and to present its determination to the courts for reasonableness testing in terms of the limitation of the right. Flexibility,

⁹² Williams (2005) *SAJHR* 450.

⁹³ New grants would have to be legislatively created. These could target caregivers and the youth, widely accepted to be the most vulnerable within the broader group of able-bodied adult poor. See, for example, DSD *Creating our Future*. Or, and much better, a basic income grant could be introduced, on a means tested basis or, better, universally, and coupled to claw-back mechanisms *via* the tax system to reduce the cost. It is the distributive potential of these sorts of possibilities that the courts should require the elected branches of government to investigate.

⁹⁴ Liebenberg *Socio-Economic Rights* 471. The binary choice between doing nothing and determining in perpetuity a fixed amount is a false one, as Lucy Williams points out in her criticism of the approach of the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (L Williams "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 141 189-197).

allowing for movement, is implicit. Lack of information and institutional competence could be addressed without abandoning the enterprise, and would advance our understanding of the legitimate role of the courts. And such an approach would comply with international law.⁹⁵

Had the Court in *Mazibuko* confirmed that the residents of Phiri, in their circumstances, were entitled to some amount (to be determined) of free water to guarantee a life with dignity, the level of scrutiny of the City of Johannesburg's programme, including the rigour of the research that underpinned it, would have been elevated. The Court would have paid careful attention to how and by whom and by what process the right might be actualised. As it was, in terse, conclusory language, and without providing in the judgment any probing analysis of the evidence, the Court in effect gave presumptive validity to the City's assertions about its data and methods of determining the sufficiency of its free water supply.⁹⁶ It adopted an unnecessarily narrow and restrictive view of a reviewing court's role, thereby diminishing the right in question and producing a result inconsistent with the project of transformative constitutionalism.⁹⁷

Notably, in *Khosa*, where fundamental and socio-economic rights were at play, Mokgoro J did not maintain a clear separation of the two stages entailed in constitutional adjudication of breaches of fundamental rights.⁹⁸ Nor is any separation of the enquiries under section 27(1) and 27(2) evident. Rather, in acknowledging that the rights of equality and dignity were implicated in the claim for access to social assistance, she adopted a broad approach to reasonableness review in relation to social assistance. She found it unnecessary to pronounce on whether reasonableness in section 27(2) means something different (less stringent) from reasonableness in the general limitation clause, section 36. Since the State's conduct in relation to the fundamental rights was unreasonable, it was unreasonable also in relation to the socio-economic right. This broad approach led to a positive outcome and an advance for transformative constitutionalism that is to be commended. However, as Sandra Liebenberg has pointed out,⁹⁹ it does carry with it the danger of blurring the need to determine the substantive, normative content of the socio-economic right protected in section 27(1) before proceeding to deal with the limitation of the right contained in section 27(2). To allow this blurring to go unnoticed, Liebenberg warns, could weaken the standard of reasonableness applied in cases involving socio-economic rights.

The arguments made above commend a separation of the enquiry required under the first subsection of section 27 from the limitation analysis entailed in the second.¹⁰⁰ A finding that the State's current programme is insufficient and

⁹⁵ For the imperatives of international law as set out in the ICESCR, which South Africa has signed but not ratified, see nn 51 and 91.

⁹⁶ Williams (2010) *CCR* 189.

⁹⁷ 147.

⁹⁸ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). The stages are to determine first whether there has been unfair discrimination and then to enquire whether the limitation of the right in question is justified in terms of the general limitation clause, s 36 of the Constitution.

⁹⁹ Liebenberg *Socio-Economic Rights* 175-176.

¹⁰⁰ They apply equally of course to enquiries under s 26 of the Constitution.

that the State is under an obligation to provide access to social assistance to the able-bodied adult poor, that is, a declaration that claimants who establish the requisite need have a substantive right, would, on its own, be insufficient and susceptible of the kind of criticisms of the outcome of *Grootboom*. (The homeless individuals were given no relief other than a declaration that the government's housing plan was unreasonable. And the Court's order did not include ongoing scrutiny by it of any remedial action taken by government.)¹⁰¹ For the substantive right to be an individual legally enforceable entitlement, the content of it must be determined and it must be procedurally enforceable, that is, there must be a process to enforce the entitlement.¹⁰² In this context a process is called for that, if it cannot be completed during the court's determination of the challenge, would keep the matter under the jurisdiction of the court. This issue is given further attention in the section on reasonableness review, and remedies, below.

7 The positive/negative divide and its significance in testing for reasonableness

Formulating the nature of the complaint about the definitional modus regulating access to social assistance in the 2004 Social Assistance Act is complex. As in *Khosa*, the facts in issue here disclose a challenge to the validity of the legislation – the Social Assistance Act – based on equality (and dignity) and also a complaint that the State has not fulfilled its section 27 duty in respect of the progressive realisation of the right to social assistance.¹⁰³

First, for the purposes of both the enquiry about infringement of the right to equality and for the enquiry about the socio-economic right to social assistance, the State has a duty not to impair the right or access to it. By choosing in 2004 to adopt a definitional modus inherited from the Social Assistance Act 59 of 1992, which had the effect of excluding the group of 18-59 year olds (and certain minor children), the State has done something, acted to impair the right to equality and simultaneously to deny the group access to the right to social assistance. This could be classified as a breach of its negative duties under both rights. In *Grootboom* the Court held that the right to housing incorporates “at the very least” a negative obligation upon the State to desist from preventing or impairing the right of access to adequate housing.¹⁰⁴ Viewed differently, the facts could disclose that the State in 2004 failed to remove the obstacle to access for the group under discussion. Sandra Liebenberg has pointed out that the terminology used in *Grootboom* is wide

¹⁰¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 96.

¹⁰² On the Court's unwillingness in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) to affirm a direct right see Liebenberg *Socio-Economic Rights* 203-204. She correctly asserts that the circumstances of a particular case may reveal that justice will not be served by simply ordering formulation and implementation of a reasonable programme (205). Williams (2005) *SAJHR* 439 articulates three prongs for actualisation – articulation of the substantive right, the process for enforcement, and practical implementation. To these she adds a fourth – that constitutional entitlements cannot be eliminated by legislative action.

¹⁰³ On the issue of subsidiarity, see n 60.

¹⁰⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34.

enough to cover not only a positive act but also a lack of positive action to sustain a claim of a breach of the negative duty.¹⁰⁵

It may be that the State's failure to alter the definition it inherited from the 1992 Act, puts it in breach of its positive duty under section 27. It is guilty of an omission. This is a breach of its positive duty to facilitate access.

The State has not deprived the group of existing access – the able-bodied adult poor have never had access, but its act/omission, as described above, certainly impairs, indeed prevents, access to the right for the group in question.

What is the significance of trying to determine whether the State's act is a positive one and a breach of a negative duty, or an omission constituting either a breach of a negative duty or a breach of a positive duty? The classification is more than a semantic exercise, and one that should not, if we wish to advance the transformative potential of the Constitution, be pursued purely as a matter of logic. As Liebenberg points out, a breach of a negative duty requires the invocation of section 36 at the stage when limitation of a socio-economic right is examined for reasonableness. The enquiry would mimic that required to justify a breach of the fundamental right to equality. By contrast, a breach of a positive duty calls into play the internal limitations of the socio-economic rights in section 27. It is not clear that this is a distinction with a difference. But it would be if the reasonableness requirement in section 27 is different from that in terms of a section 36 enquiry.¹⁰⁶ The point was raised in *Khosa*, but not decided.¹⁰⁷

The positive/negative divide is fully traversed by Liebenberg and her arguments will not be recited here. The nub of the issue is whether a potentially less stringent standard of scrutiny flowing from the internal limitation in section 27 than the stricter standard flowing from section 36 is inevitable and should be allowed potentially to alter the outcome of socio-economic rights litigation. Liebenberg powerfully calls for an approach by the courts that will not allow the classification of the breach as one of a negative or a positive duty to affect the outcome of the case and hence the rights of persons in need of socio-economic assistance. She calls rather for an approach that is faithful to the transformative imperatives of the Constitution and its underlying values, one that transcends the positive/negative divide, espouses the purpose of the rights involved and gives to them substantive, normative content. In calling for strong reasonableness she is also promoting a needs-based interpretation over one that is rigidly rights based.¹⁰⁸

The basis for the following section of this paper, dealing with the limitation provisions and reasonableness review, is that the approach advocated by Liebenberg is compelling and that it would be counterproductive for

¹⁰⁵ Liebenberg *Socio-Economic Rights* 214. UN CESCR *General Comment No 19* to the ICESCR classifies as a violation an omission to take steps to reform/repeal legislation inconsistent with a guaranteed right (para 65).

¹⁰⁶ Liebenberg *Socio-Economic Rights* ch 4, especially parts 4.6-4.7.

¹⁰⁷ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 83.

¹⁰⁸ See S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5 15-19.

courts to seek to establish different meanings and standards of scrutiny for determining reasonableness, depending on whether the limitation enquiry is one about fundamental rights as opposed to socio-economic rights. The interconnectedness of all the rights is incontrovertible. Moreover, in many cases, including the one under discussion here, there are two challenges in issue, implicating both kinds of rights. The definitional denial of access to social assistance is, it is argued, an infringement of the rights to equality and dignity, and the State's failure to provide social assistance is, it is argued, a violation of the socio-economic right of everyone in need to have access to appropriate social assistance.

8 Limitation of rights and reasonableness review

The rights of equality and dignity are not absolute and may be limited in terms of section 36, the general limitations clause in the Constitution. The limitation, in a law of general application, must be reasonable and justifiable in an open and democratic society based on dignity, equality and freedom, taking into account the nature of the right, the importance of the purpose of the limitation, the extent of the limitation, the relationship between the limitation and its purpose, and less restrictive means to achieve the purpose of the limitation.¹⁰⁹ The cases reveal that the courts do not go through the list sequentially. Rather, the approach is a broad one that uses the criteria to guide an overall exploration of the reasonableness of the limitation.

The socio-economic rights to housing, health care, food, water and social security are subject to limitation internal to the sections that confer them. The State is required to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".¹¹⁰ The means chosen by the State to limit the right of the adult poor to access, the extent of the limitation, and less restrictive means of achieving the purpose of the limitation are at issue, as are the resources available to the State to fulfil its obligation. Policies adopted by the State that increase socio-economic vulnerability of disadvantaged groups should trigger stringent scrutiny of the State's claims of justification.¹¹¹ And where the State has omitted to take any steps to ensure that a disadvantaged group has access to basic social resources and services, a high standard of scrutiny of any justificatory defence is also called for. Akin to the analysis required in terms of the general limitations clause, this scrutiny incorporates a proportionality analysis requiring the State to show that it has exhausted all reasonable alternatives to ensure that disadvantaged groups do not experience a denial of access.

The concept of reasonableness review was developed in *Grootboom*¹¹² (housing), *Soobramoney*¹¹³ (health care), *TAC*¹¹⁴ (health care) and *Khosa*¹¹⁵

¹⁰⁹ Termed proportionality. See s 36(1)(a)-(e) of the Constitution.

¹¹⁰ Ss 26(2), 27(2).

¹¹¹ Liebenberg *Socio-Economic Rights* 226.

¹¹² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹¹³ *Soobramoney v Minister of Health, (KwaZulu-Natal)* 1998 1 SA 765 (CC).

¹¹⁴ *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC).

¹¹⁵ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

(social assistance). *Mazibuko*¹¹⁶ (water) is the latest case and has attracted criticism¹¹⁷ for its retreat from the promising approaches of its predecessors, especially that of *Grootboom* and *Khosa*.

Reasonableness review undertaken without an *a priori* determination of the content of the right in question can, as adverted to above,¹¹⁸ degenerate into a weak, normatively thin concept of reasonableness that puts at risk the transformative values of the Constitution.¹¹⁹ The exercise, unmoored from a substantive analysis of the normative purposes and values underpinning the right¹²⁰ becomes vulnerable to criticisms apposite in respect of the finding of the Constitutional Court in *Mazibuko*: process-oriented, formalistic and cursory.

8 1 Separation of powers

Doctrinally, the separation of powers, judicial deference, judicial prudence, call it what one will, takes centre stage in reasonableness enquiries, as it did in *Mazibuko*. Acceptance of the need to separate the enquiry to determine the content of the right from the subsequent enquiry about justification for the limitation of the right would bring into question in both stages the proper limits of the court's role. But the doctrine tells us no more than that, broadly speaking, matters of policy are the domain of the elected branches of government. Lucy Williams points out that the concept is too abstract to provide much practical guidance to courts adjudicating socio-economic rights on how to attain an outcome that goes beyond mere aspiration and gives enforceable content to the justiciable rights enshrined. Asserting that current notions of supremacy of the representative branches of government and unquestioning acceptance of the latter's superior institutional capacity are simplistic and outdated,¹²¹ she points out that the inclusion of enforceable social rights in constitutions throws up challenging questions and interrogates our prevailing conceptions of democracy.¹²² And Sandra Liebenberg adds that placing an obligation on the State to ensure that everyone has access to socio-economic rights will require a degree of intervention which has significant implications for pre-existing policy and resource allocations.¹²³

Williams shows how two courts, both functioning within the doctrinal constraint of the separation of powers, produced very different outcomes in their exercise of judicial oversight in socio-economic rights cases. The

¹¹⁶ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

¹¹⁷ See Williams (2010) *CCR* 189-197; Liebenberg *Socio-Economic Rights* 466-480, especially 478.

¹¹⁸ See part 6.

¹¹⁹ Liebenberg *Socio-Economic Rights* 223.

¹²⁰ 467.

¹²¹ Williams (2010) *CCR* 141 n 1. Liebenberg *Socio-economic Rights* 71-75 revisits the issue of institutional competence and urges that the complexity and expertise required in socio-economic rights cases are present also in complex commercial litigation and other specialised fields. She makes the same point in relation to overstating the polycentric nature of some matters, and warns that courts should not too readily abdicate their duty to adjudicate in such cases.

¹²² On the conception of democracy that South Africa has opted for, see D Brand "Writing the Law Democratically: A Reply to Theunis Roux" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 97 98-107.

¹²³ Liebenberg *Socio-Economic Rights* 191.

judgment of the German Federal Constitutional Court (“FCC”) in the *Hartz IV* case¹²⁴ and the South African Constitutional Court judgment in *Mazibuko*, are compared in order to highlight that it was not the concepts and philosophy underlying separation of powers that disclosed what the courts did. In practice, what judges do is a function of their values, assumptions, sensitivities and commitment to transformative constitutionalism, sometimes collectively as “the judiciary” (or some members of it), and sometimes individually. Their work product in determining proper standards of judicial review reflects their understanding of the constraint of the doctrine and their own conception of whether and how to call the elected branches of government to account. This understanding, Williams concludes, is linked to controversial political and philosophical values, moderated to a lesser or greater extent by the judge’s commitment to social justice.¹²⁵

These assertions acquire powerful resonance when the outcomes of the two cases are compared. Both courts accepted that they cannot substitute their policy preferences for those of government. Both courts accepted that it is not their function to determine quantitative minima for a guaranteed social service.¹²⁶ But whereas the German court played a central role in exercising ongoing judicial oversight of the government’s programmes, the South African Constitutional Court took a hands-off approach that left the applicants bereft of any legally enforceable entitlement and gave minimal direction to the elected branches of government for setting acceptable standards for the service in question.¹²⁷ The lofty rhetoric proffered by the Court about water being essential to life was undercut by its finding that the State was under no obligation to provide a specific amount of free water to the applicants. Fearful that any other finding would give to everyone in need an immediately enforceable right, it retreated unimaginatively behind a veil of institutional incapacity and accepted the evidence of the government authority about its programme as seemingly “indisputable”.¹²⁸ Williams compellingly demonstrates how courts confronted with issues of enforceability of socio-economic rights in the future can work with the doctrine to achieve much more meaningful and acceptable outcomes than the Constitutional Court achieved in *Mazibuko*. It is the clutch of real possibilities she proposes for our courts, without requiring them to eschew doctrinal constraints, which constitutes the

¹²⁴ *Hartz IV* BVerfGE 125, 175, referred to by Williams (2010) *CCR* 143 n 3 and discussed by her 148-162. The case concerned the reduction by the State of the amounts of certain basic subsistence social grants and was challenged by unemployed individuals and their dependants on the basis of a breach of the right to dignity, contained in the German Basic Law.

¹²⁵ Williams (2010) *CCR* 199.

¹²⁶ It should be noted that both the High Court and the Supreme Court of Appeal in the *Mazibuko* case were prepared to order (but did not agree on) precise quantities of free water. See *Mazibuko v City of Johannesburg* 2008 4 SA 471 (W) and *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA). Both judgments were set aside by the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

¹²⁷ A detailed critique of the approach taken in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) is offered by Williams (2010) *CCR* 189-197. The points are cogent and entirely pertinent for the present enquiry, although not recited here. Further trenchant criticism of the judgment is offered by Liebenberg *Socio-Economic Rights* 466-480.

¹²⁸ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 84.

key value of her comparison. Williams is not in any sense urging the courts to compete with or attempt to claim ascendancy over the elected branches of government. Rather she joins the call of others for the Constitutional Court to fashion a proper role for itself as custodian of the Constitution and to foster dialogue between the three branches of government and civil society.¹²⁹

Sandra Liebenberg decries a construction of strict boundaries between the three branches of government that has the potential to frustrate transformative adjudication of socio-economic rights:

“In its idealized, static form, the separation of powers doctrine may be ritually invoked by the courts as a way of avoiding their constitutional mandate to interpret and enforce constitutionally guaranteed rights.”¹³⁰

She stresses what is envisaged by the Constitution – a flexible, dialogic model of the doctrine which does not focus on transgression by any one branch, but rather on whether the branches remain able to participate in an ongoing interactive process of mutually defining and redefining their boundaries.¹³¹

It remains to be seen whether South Africa’s current Executive can be persuaded to adopt this model, but the signs are not auspicious.¹³² If the Executive does not mollify its current view that it alone has the prerogative to make policy, and if the courts fail to ensure that the political branches of government fulfil their constitutional obligations¹³³ poor claimants in socio-economic rights cases will justifiably regard the Constitution as mere paper. It is often the failure of the political branches to fulfil their obligations, whether because of oversight, bureaucratic inertia or capture by powerful interest groups, that forces the poor to resort to litigation. The courts stand between them, final frustration and political upheaval.

Mazibuko was a missed opportunity for our highest court to advance the fundamental values that underpin the Bill of Rights. Passing so readily responsibility for the matter to other branches of government is also problematic, for they are the opponents in the litigation. Although the approach of the Court to its role in this case implies that future challenges are destined to fail, an alternative to this bleak outcome, an examination of what judicial imagination to fashion a remedy might yield, is put forward below.

¹²⁹ Williams (2010) *CCR* 190-199. S Woolman & H Botha “Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices” in S Woolman & M Bishop *Constitutional Conversations* (2008) 149 163-168 favour a shared project of constitutional interpretation involving all three branches of government; and Brand (2011) *Stell LR* 614 explores a shift in perspective from a binary to a triangular view of constitutional review that would enable the courts to engage not only the other branches of government, but also the “sovereign people”. He advocates a shift away from adversarial adjudication to a more inquisitorial model (630-637).

¹³⁰ Liebenberg *Socio-Economic Rights* 67.

¹³¹ 69-71.

¹³² See n 6.

¹³³ Which the Constitutional Court has said they are obliged to do – *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 108, 112-117, cited by Liebenberg *Socio-Economic Rights* 70.

8.2 Pursuing the social assistance claim

On the facts under discussion, the court would be approached by, say, a group of persons aged between eighteen and 59¹³⁴ who are desperately poor, claiming access to their right to appropriate social assistance. The Social Assistance Act, as claimed earlier in this article, unfairly excludes them. There has been a violation of their rights to equality and to dignity. The same legislation defines them out of eligibility for social assistance and the State has done nothing to give effect to the right – it has done nothing to expand the categories of grants to include any able-bodied adults suffering income poverty, nor are there any plans or programmes afoot that might achieve some progressive realisation of the right.¹³⁵ This state of affairs, and the impact of the denial of access to social assistance for the claimants calls for strict scrutiny of the State's justificatory claims.¹³⁶ *Grootboom* set a reasonable review standard requiring courts to assess whether the programme in question is *inter alia* comprehensive, balanced and flexible. The current programme for social assistance is inconsistent with the normative vision called for by the Constitution's transformative aspirations.

The implications of a finding relating to the content of the right, as pressed for above, that the able-bodied adult poor do have a substantive right to appropriate social assistance, must go beyond a mere declaration of invalidity of the governing legislation.¹³⁷ O'Regan J, in *Mazibuko*, considered it appropriate for the Court to question a failure of government to do anything to cater for those most desperately in need and to require it to set targets for progressive realisation.¹³⁸

“The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.”¹³⁹

¹³⁴ Hypothetically, made up of some persons between the ages of eighteen and 24 years, some caregivers of children in receipt of the CSG, some between the ages of 25 and 35, some between 36 and 59.

¹³⁵ See further n 30.

¹³⁶ Liebenberg *Socio-Economic Rights* 197.

¹³⁷ Despite its theoretical importance, the unsupervised declaratory order granted in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) offered no relief to the claimants (such as emergency temporary housing) and entailed no ongoing supervisory role for the Court. See also n 94.

¹³⁸ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 67.

¹³⁹ Paras 160-161, citations omitted, cited also by Williams (2010) *CCR* 144. As Williams points out, the judgment did not live up to this vision. It ducked these issues, found without deep enquiry that the legislative scheme for basic water was adequate, and dismissed the claim. It said one thing and did another.

Following this approach, and drawing on that of the German court in *Hartz*, a court would ask whether the Legislature has openly provided a description of the goal of ensuring a subsistence level that does justice to all the constitutional rights involved.¹⁴⁰ The court would enquire whether a suitable method of calculation for assessing what an appropriate level of social assistance should be has been developed and whether all the necessary facts were ascertained; and it would consider whether the Legislature has used plausible figures in light of its chosen methodology. If the response to these sorts of questions is flawed, relief is due.¹⁴¹ It would also set out what positive steps, in the context of reasonableness, have to be taken by the Legislature to explain its choices to exclude persons in the position of the claimants; to provide information on the process it has followed in reaching those conclusions and in reviewing them. The court is not, it must be stressed, being asked to take over the duties of the elected branches of government, but it must scrutinise their actual conduct and decisions by requiring them to provide detailed evidence of the considerations and processes that informed their policy choices and budgetary allocations. The court must maintain a role of oversight including, where necessary to its deliberations, sending the matter back for remedial action and reporting back, within a set time limit.¹⁴²

8 3 Available resources: The affordability argument

Determinations of what social assistance is appropriate do not account for what is affordable. It will be common for socio-economic rights cases to have resource-allocation implications that bring into question the extent to which it is proper for the courts to intrude into the accepted budgetary domain of the political branches of government.¹⁴³ And the latter, as respondents, may legitimately assert that there are insufficient resources to provide the service, in this case the social assistance, to the extent or in the amount that acceptable calculations have demonstrated would be appropriate.

The cost of extending social grants to all persons who cannot support themselves and their dependants would undeniably be very high. It would have substantial distributive implications; it would affect the national

¹⁴⁰ The UN CESCR has stated that a State party must take all reasonable steps to the maximum of its available resources to achieve progressively the realisation of the provisions of the Covenant, which include the right to social assistance, and it must do so within a transparent and participatory decision-making process at national level: UN CESCR *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant* (2007) UN Doc E/C.12/2007/1 para 11, cited by Liebenberg *Socio-Economic Rights* 196.

¹⁴¹ Williams (2010) *CCR* 158 n 57.

¹⁴² Williams (2010) *CCR* 145-146. Brand (2011) *Stell LR* 630-637 presses for an adaptation of the adversarial approach of our courts towards more of an inquisitorial model where courts remain more directly involved.

¹⁴³ As Theunis Roux points out, the court is not at liberty to substitute its own view of how resources should be allocated for that of the Legislature and Executive but, if its motive is to enforce the rights enshrined, the political branches should "accept the resource-allocation effects of the court's decision as a necessary part of the constitutional compact". T Roux "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 *Democratization* 92 98. As to the separation of powers argument and institutional capacity, see part 8 1 above.

budget.¹⁴⁴ Again, the court itself cannot determine what is affordable but, since the information critical to such a determination lies within the exclusive knowledge of the political branches of government, the onus must be on them to divulge in a transparent way their calculations of the cost implications of providing the service and to provide proof of their inability to meet those costs.¹⁴⁵ Where the government does not place convincing evidence before the court demonstrating that it lacks the necessary resources or has other more urgent claims upon its resources, orders with budgetary implications are appropriate.¹⁴⁶ And gross costs of making social assistance comprehensive must be offset by the potential for clawing back some of these costs through the tax system and taking into account increased final consumption by households.¹⁴⁷ These issues require proper calculations to be done and provided to the court.

On the facts under discussion, the cost of full provision, *versus* progressive realisation would be important to the court's enquiry. Full provision that is unaffordable does not automatically mean that the State can do nothing for anyone in the excluded group:

“[E]quality in relation to resources can only be achieved as the aspirational end of progressive realisation, where everyone is entitled equally to an adequate level of service-provision.”¹⁴⁸

Some inequality is permissible in the interim. At this point, singling out the most vulnerable in the excluded group for relief – eighteen to 24 year olds, and caregivers of children who are the beneficiaries of Child Support Grants, for example, would be one avenue a court should want to be sure

¹⁴⁴ Liebenberg *Socio-Economic Rights* 195 argues for the courts to adopt a view that the availability of resources can be assessed beyond the parameters of existing budgetary allocations to the relevant department or sphere of government. Surely she is correct.

¹⁴⁵ Liebenberg *Socio-Economic Rights* 197 n 360 and UN CESCR *General Comment No 20* para 40. Despite its commendable outcome, the court in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) undertook no detailed examination of the costs or implications of its finding. Admitting that the information before it was inadequate, but reassured by the fact that the estimated cost of extending the grants in issue to non-citizens would be a mere fraction of the total cost of social grants, it asserted without much ado that the extension would have limited impact on State spending and was manageable.

¹⁴⁶ Liebenberg *Socio-Economic Rights* 193, assessing the jurisprudence.

¹⁴⁷ Meth *Basic Income Grant: There Is No Alternative! (BIG: TINA)* 31-33 points to the simulations that were done for the Taylor Committee showing that a grant of R100 per month in 2000 prices was feasible. These simulations, unlike those of the opponents of a BIG, make a distinction between gross and net costs. Taking into account changes in the tax system requiring the top two income deciles to sacrifice a portion of increase in consumption they would otherwise enjoy, and taking into account total increases in consumption, the net cost of the BIG was calculated to be around 35-40% of the gross cost. Meth is adamant that the increase in tax for the top deciles would not be intolerable and that keeping the value of the BIG constant at R100 in 2000 terms would be feasible into the future. He berates Treasury for not devoting time to both the micro- and macro-economic issues or, at least, for not making its work public. Instead, outsiders have built the models necessary to address the affordability issue. He laments the precious years that have been wasted because of political and/or ideological objections to the BIG. Most cogently, he warns that no account has been taken by government of the chances and consequences of a failure of its plans for creating jobs and growing the economy at rates that are not achievable. His message about impending social and political upheaval is echoed in this article.

¹⁴⁸ Bilchitz (2010) *SALJ* 604. See also 591 603.

is explored.¹⁴⁹ Another, which has the advantage of major reduction in administrative cost and complexity would be to order that the sums be done, properly, for a Basic Income Grant. Bald declarations of unaffordability are not enough.¹⁵⁰ Simulation exercises by economists would be indispensable to a proper evaluation by the court of assertions of unaffordability adduced by the State.

In a truly participative democracy that goes beyond electing a government every five years, the “everyone” of the Constitution has a right to know why his or her rights are being curtailed. The spending priorities of the government, set forth in appropriation bills that confirm the budget each year, should also be explained and justified. The financial impact of the failure to arrest the depletion of resources by corruption, generally, but more especially in the Department of Social Development, requires interrogation in the context of recasting the debate about the resources available for realising the right of “everyone” to appropriate social assistance.¹⁵¹

¹⁴⁹ This is not an argument for such an approach, but it cannot be said to be illegitimate. The increased vulnerability of caregivers of children is acknowledged in UN CESCR *General Comment No 19* para 32. The National Planning Commission identified the youth as particularly vulnerable to unemployment (National Planning Commission *National Development Plan 10*), as did the DSD *Creating our Future*. The court would need to know what an extension to each of the age groups eighteen to 24 would cost, at various levels of support. A youth unemployment grant set at the level of, say, the CSG currently R280 per month, or around US\$1.5 per day, could be considered. Powerful arguments can be made to demonstrate how difficult and costly it would be to identify the able-bodied adult poor. Such arguments point to a basic income grant as the better solution. The work of Charles Meth is immensely valuable here: Meth *Unemployment and Poverty Halved by 2014?*; Meth *Basic Income Grant: There Is No Alternative! (BIG: TINA)*; C Meth *The (Lame) Duck Unchained Tries to Count the Poor* Working Paper 49 (2008).

¹⁵⁰ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 88. Meth *Basic Income Grant: There Is No Alternative! (BIG: TINA)* 29 explains the difficulty of identifying the able-bodied poor in making the argument for a universal BIG.

“The able-bodied poor ... have none of the distinguishing characteristics so necessary for the successful running of bureaucratic systems. Someone who is poor and unemployed is distinguishable from someone who has a flourishing informal-economy business, only by close observation.”

Close observation entails a degree of administrative complexity in determining who is and who is not eligible for a grant that is very expensive. Over- and under-inclusion are considerable problems. The advantages of a universal BIG would be the reduction of complexity and the current huge cost of administration. Smart-card technology and the experience of SARS could make for a much more efficient and streamlined system of social assistance with far less opportunity for corruption.

¹⁵¹ A major aspect of the affordability issue is the excessive cost of administering the system of social grants. In 2011 the budget for administration of the South African Social Security Agency (“SASSA”) was R5.7 billion (R9 billion for social security administration as a whole). More integrated administration must be effected as a matter of urgency and the use of smart-card technology to reduce fraud should also be explored. There are 15.3 million grant beneficiaries (roughly 30% of the population), of whom 10.3 million are children, representing 69% of recipients. The cost of social assistance grants in 2011 was R97.6 billion, of which R35.6 billion was for the CSG (National Treasury *National Budget Review 2011* (2011) 100-102). The rampant corruption uncovered in SASSA is well known. See T Reddy & A Sokomani *Corruption and Social Grants in South Africa* Monograph 154, Institute for Security Studies (2008). The Special Investigating Unit (“SIU”) reports that R25-R30 billion of the government’s procurement budget is lost to corruption each year (D de Lange “Graft Costs SA R30bn – Hofmeyr” *Cape Times* (13-10-2011) 1). This Unit was contracted in 2005 to investigate social grant fraud. It reports that 120,000 public servants are on the social pension system and that it has obtained 16,800 convictions (G Khanyile “SIU Costs More than It Is Worth, Says Minister” *Sunday Independent* (30-10-2011) 2). In 2010 the Auditor General, unable to verify information relating to R10.5 billion, gave the DSD a disclaimer (L Ensor “Officials in Hot Seat over Deficit Bungling at Social Grant Agency” *Business Day* (15-06-2011) 3). Recovery of even a part of this enormous wastage could fund a substantial expansion of the social grant system. And then there are the notorious unspent budgets in several government departments.

“Requiring the State to demonstrate that it is doing all that it reasonably can to increase its control over resources, and to allocate and spend them efficiently ... fosters a culture of justification and dialogue encouraged by transformative constitutionalism.”¹⁵²

8 4 Appropriate remedies

What remedies might the Constitutional Court fashion to achieve a result that respects the different roles and functions of the three branches of government but does not insist on bright-line boundaries that restrain its imagination and impoverish the imperative of transformative constitutionalism? The Constitution confers wide powers on the courts to grant appropriate relief, including a declaration of rights.¹⁵³ Read with a provision requiring a striking down of laws inconsistent with the Constitution, its powers enable courts to craft any order that is “just and equitable”.¹⁵⁴

It has been argued here that the definitional modus of the Social Assistance Act constitutes unfair discrimination and that the legislation is unconstitutional. “Reading in”, as a remedy, despite its effective use in the case of *Khosa*, is not the appropriate solution in this case. Although the Act is under-inclusive in its exclusion of the able-bodied adult poor, the legislative scheme for social grants does not admit of a simple “reading in”. It needs to be substantially re-crafted to be comprehensive in its definitions and its scope.¹⁵⁵ For reasons of institutional competence and democratic legitimacy, a declaration of invalidity suspended for a fixed period and a declaration of rights would appear to be more appropriate.¹⁵⁶ Although the suspension of invalidity will allow “an unconstitutional state of affairs”¹⁵⁷ to continue, striking down the whole Act or the definition sections¹⁵⁸ would create as untenable a situation as would a reading in of the excluded group. A declaration of rights can accompany the order of invalidity. Its purpose is to stipulate the obligations of the parties in terms of the Constitution.

¹⁵² Liebenberg *Socio-Economic Rights* 198. The UN CESCR *General Comment No 20* para 13 requires every effort to be made to use all resources at a State party’s disposal to eliminate discrimination and rejects a defence of lack of resources unless this has been demonstrated.

¹⁵³ S 38 of the Constitution.

¹⁵⁴ S 172, which provides also for limiting the retrospective effect of an order of invalidity and for suspending such order for a period to allow the competent authority to correct the defect.

¹⁵⁵ See the guidelines for testing the appropriateness of the reading-in remedy in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 75 and 76 and Liebenberg *Socio-Economic Rights* 384. The size of the group to be added, the budgetary implications and the range of possible policy options are important considerations.

¹⁵⁶ The declaration of invalidity should be made non-retrospective so that, if it comes into force, it does not do so from the date of the coming into operation of the 2004 Social Assistance Act, or of the Constitution. See Liebenberg *Socio-Economic Rights* 388 and the authority there cited.

¹⁵⁷ This expression is taken from the Colombian health-care context. Williams (2010) *CCR* 196 n 173 describes the remedies crafted by the Constitutional Court of Colombia for health care for internally displaced persons as “exceptionally creative”. Operating within the confines of the separation of powers, the Court has, as a remedy, declared the existence of “an unconstitutional state of affairs”, retained jurisdiction, obliged government to submit periodic reports including cost estimates for rectifying the matter, to negotiate with the stakeholders and NGOs and, if unable to afford the solution, to declare that it is “regressing” in the enforcement of rights. In such an event, the Court would retain jurisdiction and oversee government plans to develop the capacity to bring an end to the unconstitutional state of affairs.

¹⁵⁸ The provision requiring fundamental amendment is s 1 of the Social Assistance Act. But also implicated are ss 5(1)(a) and 6-13 (see part 3 of this article).

In *Grootboom*, no specific relief for the applicant community was ordered, but three declaratory orders were made. One required the State to devise and implement in accordance with its resources a programme progressively to realise the right of access to adequate housing; a second demanded that the programme included reasonable measures to provide relief to people with no access to land, no roof over their heads and who were living in intolerable or crisis situations; the third declared that the housing programme in question fell short of what was required in the second order.¹⁵⁹ From that time on, the Court was no longer seized of the matter. Declaratory orders in similar terms for the able-bodied adult poor who are income destitute would clearly be necessary. But the normative vision and the transformative imperatives of the Constitution require more.

Should there be interim relief for the applicants? Should the court be content that the elected branches of government, left to their own devices, will undertake the necessary corrective action timeously and effectively, without further input and oversight from it, taking into account the impact of the violation on the claimants?

Determining whether the litigants (and persons similarly situated) should be afforded immediate relief can be complex.¹⁶⁰ On the facts in issue here, it would seem to be possible but difficult to single out a group of able-bodied poor for interim social assistance, leaving others similarly situated without such succour. What would be the amount of an interim grant? Still to be determined is what amount would be “appropriate” in terms of section 27(1) and whether such an amount is within the resources available. It might be possible, albeit not the best solution, to single out the most vulnerable groups, such as youths aged 18-24 years and caregivers of children receiving child support grants, as a measure of progressive realisation. Because the issues around welfare, social protection and social assistance are contentious, admitting of a range of constitutionally valid policy options and implementation, an appropriate approach by the court would be to require the Executive and the Legislature to take the lead in ensuring a realisation of the transformative vision of the Constitution.¹⁶¹

In *Grootboom* the Constitutional Court took on trust that government would be willing and able to comply with its orders. This article has demonstrated that government is ideologically and politically antipathetic towards welfare generally and towards social grants in particular. It is argued in and outside of government, notably by the well fed, that expanded social assistance, even on a temporary basis, will ruin the economy. The millions of jobs that will flow from rapid economic growth and the promise of better education and training must satisfy the poor and hungry for now and until (unrealistic?) targets, not

¹⁵⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 99. Liebenberg *Socio-Economic Rights* 400-401 explains how a negotiated settlement affected the orders made by the Court.

¹⁶⁰ See the discussion of this issue and the relevant cases by Liebenberg *Socio-Economic Rights* 391-393.

¹⁶¹ A mandatory order is appropriate where the nature of the benefits can be defined clearly and provided relatively expeditiously. It seems unlikely that such an order would be made for the extension of social assistance to the able-bodied adult poor.

reached in the past, are reached in the future, by 2030 when, the National Development Plan predicts, poverty will be “eradicated”.¹⁶²

No court should have difficulty with the proposition that the government does not accept that it is under an obligation progressively to realise the right of everyone to access to social assistance. In the current political climate there can be no confidence that effective and expeditious steps will be taken to fulfil obligations set forth in the declaratory orders envisaged.¹⁶³ On this basis,¹⁶⁴ structural remedies are indispensable, not as a last resort, but integral to ensuring a just and equitable outcome in line with the transformative imperatives of the Constitution.

Structural remedies give the court the opportunity to monitor compliance with its orders but also have a broader function that underpins participation by affected communities in the process of developing measures to actualise the normative content of the court’s orders. The process of engagement, as has been shown by the Constitutional Court of Colombia, continues until the court is satisfied that the constitutional infringement has been rectified.¹⁶⁵ These orders accommodate the difficulty of issuing a once-off order in instances where reform of the law requires an ongoing process of development over time. They provide the political branches of government the latitude to devise policies and plans to give effect to the court’s orders, while preserving ongoing judicial supervision. A “political blockage” which makes the relevant public institutions unresponsive to reform through normal channels and processes is a powerful reason for a court to issue a structural interdict.¹⁶⁶ Oppositional stances relating to the separation of powers can be avoided by orders that encourage accountability, responsiveness and openness in the solving of complex problems through collaborative learning between the parties themselves and between them and the court. In order to devise solutions to the problem in issue here, the court should use the structural remedy to oversee the development and implementation of a national plan for truly comprehensive social assistance that gives normative content to the right in question and that

¹⁶² The National Planning Commission *National Development Plan* targets 11 million additional jobs by 2030, the eradication of poverty and a reduction in inequality. See further nn 3, 23, 34.

¹⁶³ This view is strengthened by the stance taken in the *National Development Plan*. Government ideology on welfare is unchanged. Planning Minister Trevor Manuel’s position, made clear when he was Finance Minister, has not changed. The policy focus remains job creation and a social wage approach (housing, health, education) now to include public works programmes, to resolve poverty and unemployment. That grants are negatively regarded is clear:

“The type of public employment that the Commission advocates is not just income transfer in disguise. It is about inculcating a new mindset that empowers people to contribute to their communities.”

National Planning Commission *National Development Plan* 344.

The Plan states that what is required is “shifting from a paradigm of entitlement to a development paradigm that promotes the development of capabilities, the creation of opportunities and the participation of all citizens” (5). Communities must “become their own engines of development, and government must support this” (4). No one disputes this view. But it is unrealistic for it to be considered a complete alternative to expanded social assistance. And it is argued here that it is not in line with the vision of the Constitution.

¹⁶⁴ And, for further reasons, see Liebenberg *Socio-Economic Rights* 408-409.

¹⁶⁵ The creative remedies fashioned by the Colombian Constitutional Court are cited by Williams (2010) *CCR* 196 n 173 (see n 157 above). See also Liebenberg *Socio-Economic Rights* 424.

¹⁶⁶ Liebenberg *Socio-Economic Rights* 435.

satisfies the transformative imperatives of the Constitution.¹⁶⁷ It should also appoint a team of experts from disciplines central to the success of such a plan. Economists and tax and technology experts must be commissioned to undertake a range of simulations to determine costs, put forward claw-back mechanisms within the tax system and examine technological tools to guarantee effective distribution and administrative integrity for a comprehensive social assistance system.¹⁶⁸ Sandra Liebenberg stresses the transformative potential of these remedies and urges that the courts should neither be reluctant to use them nor regard them as exceptional where systemic socio-economic rights violations are before them.¹⁶⁹

9 Conclusion

That redistribution of income to eradicate poverty is required in the interests of advancing social justice and human rights in South Africa is surely not a contentious proposition. That it should be a project of the political branches of government to obtain the political buy-in that would make such redistribution acceptable and then to effect such changes to the law as are necessary is clear. Continuing poverty “contradicts the Constitution”.¹⁷⁰

It is not ideal for judges to have to order the elected branches of government to fulfil their constitutional duties and to adjudicate upon whether the action they take satisfies the demands of the supreme law. These demands are not self evident. They acquire meaning only through interpretation. And it has been acknowledged that moral and political issues are inextricably tied in with giving meaning to the words of the Constitution. In this context, a commitment by the judges, both privileged and burdened with the task of doing so in order to achieve the normative vision and the transformative aspirations of the Constitution, is fundamental.

If the New Growth Path and the National Development Plan do not produce the requisite number of jobs to cater for the able-bodied adult poor and there is no “Plan B” to deal with the consequences, the choice for the Constitutional Court in socio-economic rights cases will become stark. Sheltering formalistically behind the separation of powers, claiming that formulating a normative conception of the Constitution in interpreting its text is not its

¹⁶⁷ This should be a policy priority, to accord with UN CESCR *General Comment No 19* para 41. Para 68 expresses the duty to develop a national strategy and implementation plan to realise the right to social security (including non-contributory schemes).

¹⁶⁸ Powerful arguments for the use of positive economic theory by jurists engaged in projects of social justice, and expressly including the question of affordability of a Basic Income Grant, are made by SA du Plessis “New Tools for the Constitutional Bench” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 37 52-53. The services of several economists were used by the National Planning Commission during its preparation of the *National Development Plan*. Their work is valuable, but should be complemented by that of those whose views differ from those of government about the proper role and potential of an expanded social grant system, including a basic income grant. Charles Meth’s important work has been cited in this article nn 19, 147; his work and that of like-minded economists merit serious attention.

¹⁶⁹ Liebenberg *Socio-Economic Rights* 438. The Constitutional Court in Colombia has issued structural interdicts and courts in Argentina and India have employed techniques of engagement such as constituting special fora to advise them: Brand (2011) *Stell LR* 635; and see n 157 above.

¹⁷⁰ Former Chief Justice PN Langa “The Role of the Constitution in the Struggle against Poverty” (2011) 22 *Stell LR* 446.

business, will deeply tarnish its legacy. It will amount to an avoidance of the Court's own share of legal, moral and political responsibility for realising what the poor, the historically marginalised, believe the Constitution promises: social justice. And if violence and social and political upheaval provoked by unbearable poverty damage the rule of law while the Court demurs, it will be hard pressed to persuade anyone that, in the interests of its institutional legitimacy, or because of its fidelity to a formalistic interpretation of the content of socio-economic rights, it had to refrain from fashioning a role for itself that would do justice to its duty to be the custodian of the Constitution. How deeply impoverished the constitutional project will be.

SUMMARY

The article points to the incidence and impact of poverty and the inadequacy of current policies to deal with it. It presses for acceptance of the view that the persistence of high levels of severe poverty coupled with unfairly restricted access to social assistance grants are unconstitutional. Acknowledging that the elected branches of government bear primary responsibility for correcting the inequitable distribution of income, it argues that the courts cannot defensibly stand back, employing arguments of deference and institutional incapacity while the Constitution of the Republic of South Africa, 1996 demands a transformative vision that will give content to the socio-economic rights enshrined. The particular focus of the article is income poverty of unemployed, able-bodied adults aged 18-59 years and the constitutional right of everyone to access to social assistance grants. It claims that the definitional modus in the Social Assistance Act 13 of 2004 is unfairly discriminatory and violates the rights to dignity and equality of the group. It also argues for an interpretation of the socio-economic right to social assistance that would be faithful to the transformational vision of the Constitution. Not only should the offending sections of the Social Assistance Act be declared invalid and in need of re-crafting, but section 27 of the Constitution must be interpreted to give enforceable content to the right it protects. To achieve this will require an understanding of the separation of powers and the reasonableness standard developed by the Court different from the approach taken, for example, in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). Substantial reliance is placed on the commendable decision of the Constitutional Court in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). Reasonableness review, progressive realisation and available resources are traversed before a clutch of remedies is examined. The structural interdict, entailing a process in which the Court retains jurisdiction, and used so creatively in Colombia, is advocated to remedy a situation in which the Executive has failed to achieve its own goals for tackling unemployment and poverty. If the Constitutional Court demurs while growing civil unrest damages our democracy, the Court's legacy will be irretrievably tarnished. It must reconsider its role as the custodian of the Constitution and make the business of interpreting constitutional text within a normative vision its business.