

JUDICIAL DEFERENCE AND DEMOCRACY IN SOCIO-ECONOMIC RIGHTS CASES IN SOUTH AFRICA

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1 Introduction

In this article I evaluate the manner in which South African courts have chosen to deal with the range of institutional problems (problems with institutional capacity, legitimacy, integrity and security, as well as pure separation of powers problems) they face in the adjudication of constitutional socio-economic rights claims. I investigate, that is, judicial deference in socio-economic rights cases – the strategy of courts, when faced with difficult technical or contested social questions in such cases to leave decision of those issues, in different ways and to varying degrees, to the other branches of government.¹

I attempt an evaluation, or, more directly, a particular critique of the strategy of judicial deference in socio-economic rights cases. I ask how comfortably or uncomfortably judicial deference fits with what I see as the constitutional imperative that courts should, through their work in socio-economic rights cases, seek to advance, or at least to avoid limiting, the kind of democracy (a thick, or empowered conception of democracy) envisaged in the South African Constitution.²

Of course, neither judicial deference nor the institutional problems it is intended to address are unique to socio-economic rights adjudication. Deference operates also more generally in constitutional and in administrative

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¹ See K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 3-4 and 25-26 for a similar description of deference. See also, more recently, K McLean "Towards a Framework for Understanding Constitutional Deference" (2010) 25 *SAPL* 445.

² Constitution of the Republic of South Africa, 1996 ("the Constitution" or "the South African Constitution"). More about this conception of democracy later, but see in general terms for a description D Brand "Writing the Law Democratically: A Reply to Theunis Roux" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 97; T Roux "Democracy" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2006); B Cousins & A Claassens "Communal Land Rights and Democracy in Post-Apartheid South Africa" in P Jones & K Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 245 246-247; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 63-65.

law review in South Africa and elsewhere.³ I focus on deference specifically in socio-economic rights adjudication for no deep conceptual reason, nor because I claim that deference operates differently in this context than elsewhere. I do so, simply put, because my interest is in the first place in the effective enforcement of socio-economic rights specifically and in deference only to the extent that it relates to that enforcement. From the point of view of claimants, deference has so far in our courts' socio-economic rights jurisprudence operated as an obstacle to effective enforcement, leading in those cases where claims are successful to attenuated forms of relief⁴ and explicitly forming the basis for rejection of claims in the few cases so far where claimants have been unsuccessful.⁵ My focus on deference is intended to address this problem – I seek to debunk deference *as an obstacle to the effective enforcement of socio-economic rights*.⁶

To do so, the article consists of a description, an evaluation and a modest proposal. I first, in part 2 below, describe the manner in and extent to which judicial deference and the democratic justification for it operates in South African socio-economic rights adjudication. I then, in part 3 below, present a critique of such deference along two distinct but related lines: that judicial deference both reflects a conception of democracy at odds with the constitutional vision of democracy and, more importantly, actively counteracts the construction of that constitutional vision of democracy – that

³ For engagements with deference in constitutional review generally in South Africa see H Klug "Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review" (1997) 13 *SAJHR* 185; P Lenta "Democracy, Rights Disagreements and Judicial Review" (2004) 20 *SAJHR* 1; T Roux "Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 *Democratization* 92; T Roux "Principle and Pragmatism on the Constitutional Court of South Africa" (2009) 7 *J Con* 106. For the most prominent engagements with deference in administrative law review in South Africa, see H Corder "Without Deference, with Respect: A Response to Justice O'Regan" (2004) 121 *SALJ* 438; DM Davis "To Defer and When? Administrative Law and Constitutional Democracy" (2006) *Acta Juridica* 23; C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484; C Hoexter *Administrative Law in South Africa* (2007) 138-147; K O'Regan "Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law" (2004) 121 *SALJ* 424. For a sample of engagements with deference in administrative law review outside South Africa, see TRS Allan "Common Law Reason and the Limits of Judicial Deference" in D Dyzenhaus (ed) *The Unity of Public Law* (2004) 289; J Jowell "Of Vires and Vacuums: The Constitutional Context of Judicial Review" (1999) *Public Law* 428; DJ Mullan "Deference: Is it Useful Outside Canada?" (2006) *Acta Juridica* 24; D Dyzenhaus "The Politics of Judicial Deference: Judicial Review and Democracy" in M Taggart (ed) *The Province of Administrative Law* (1997) 279.

⁴ See, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

⁵ See, for example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 63 and 159. For a fuller description of this point, see Liebenberg *Socio-Economic Rights* 67-68.

⁶ The most prominent engagements with deference in the context of socio-economic rights in the South African context (M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383; DM Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301; DM Davis "Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years" (2004) 5 *ESR Review* 3; McLean *Constitutional Deference*; and Liebenberg *Socio-Economic Rights* 66-76) all share my assumptions that deference is a prominent feature of the approach of South African courts to the adjudication of socio-economic rights cases and additionally that it either can or in fact does operate as an important obstacle to the robust enforcement of these rights (see, for example, Liebenberg *Socio-Economic Rights* 67 and in particular Davis (2006) *SAJHR* 301-327). For an additional insightful engagement with deference in the context of socio-economic rights from outside South Africa that operates on the same assumptions (although drawing on the experience of South African courts) see R Dixon "Creating Dialogue over Socio-Economic Rights: Strong-Form Versus Weak Form Judicial Review Revisited" (2007) 5 *J Con* 391.

it is both a limited and an inappropriate response to the problem of democratic illegitimacy of review in socio-economic rights cases. I end up, in part 4 below, arguing that deference should be abandoned in favour of an alternative approach – one which I begin to describe in conclusion.

2 Description

I assume that I do not have to defend the claim that a set of institutional concerns – concerns about the institutional capacity, legitimacy, integrity and security of courts and about classical separation of powers requirements (otherwise referred to as “comity”⁷ or “constitutional competence”)⁸ – have centrally influenced the development of our courts’ approach to deciding socio-economic rights cases.⁹ Explicitly our courts have in these cases expressed concern for their capacity – both with respect to the ability to process the volumes of information at issue in such cases and with respect to technical expertise to engage with choices under scrutiny – to analyse, evaluate and decide the complex questions of social and economic theory and planning that arise in these cases.¹⁰ Courts have also voiced concern for the threat to their institutional integrity that might arise from them reaching decisions and issuing orders that, for reasons out of their control, prove to be impossible to implement.¹¹ In addition, our courts have shown themselves to be concerned for their institutional illegitimacy, in democratic terms, in evaluating decisions of the supposedly democratically accountable branches of government,¹² and for maintaining their proper place in the scheme of separation of powers.¹³ Implicitly our courts have certainly also been aware

⁷ McLean *Constitutional Deference* 25.

⁸ Hoexter *Administrative Law* 139; Jowell (1999) *Public Law* 451.

⁹ For an excellent early review of the role these concerns have played in shaping judicial thinking about socio-economic rights, see Pieterse (2004) *SAJHR* 383-417. See also McLean *Constitutional Deference* 89-115; and, most recently, Liebenberg *Socio-Economic Rights* 71-75. With respect to the role of these concerns more generally in constitutional review in South Africa, where they obviously also play a role, see Lenta (2004) *SAJHR* 1-31; Roux (2003) *Democratization* 92-111; Roux (2009) *I Con* 106-138.

¹⁰ See, for example, Sachs J in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 58:

“Courts are not the proper place to resolve the ... medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity ... require[s] us to be especially cautious.”

See also *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 128; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 61-62. See Liebenberg *Socio-Economic Rights* 71-75 for a fuller discussion of the manner in which this concern has featured in socio-economic rights cases. For an overview of the operation of this concern in administrative law review, see Hoexter *Administrative Law* 139-142.

¹¹ For example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 11; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 57.

¹² For example, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 61-62. See also Liebenberg *Socio-Economic Rights* 63-66.

¹³ For example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 58. See also Liebenberg *Socio-Economic Rights* 66-71; McLean *Constitutional Deference* 86. In the context of administrative law, see Hoexter *Administrative Law* 139.

of the threat to their institutional security that their deciding controversial and contested social and political questions might bring about.¹⁴

It is certainly not surprising, nor would I claim that it is inappropriate, that these institutional concerns should play a role and indeed a central role in shaping courts' approach to deciding socio-economic rights cases. Such institutional concerns, after all were important considerations at play in the debate about whether or not to include socio-economic rights in the South African Constitution¹⁵ and indeed have shaped approaches to constitutional review and related forms of review such as administrative law review in probably all jurisdictions with systems of constitutional judicial review.¹⁶ I regard all of these institutional concerns as reflecting real problems with constitutional review in general and constitutional review in the context of socio-economic rights in particular, and problems that are difficult – perhaps even intractable. Consequently, I believe that, for courts to develop in any way a useful and sustainable approach to deciding socio-economic rights cases they cannot avoid – they have in some way to take account of – all of these institutional problems.¹⁷

However, for me the interesting question is not so much the institutional problems themselves, which I accept as a given – rather, it is the response of courts to them. South African courts have in the main so far accounted for the institutional problems they face in socio-economic rights cases by depicting these problems in binary¹⁸ institutional relations terms. That is, our courts habitually describe these institutional problems as problems that courts face relative to the other branches of government. Courts do not simply describe themselves as institutionally incapable or illegitimate to decide

¹⁴ See in general in this respect Roux (2009) *I Con* 106-138; and with respect to socio-economic rights in particular S Glöppen "Social Rights Litigation as Transformation: South African Perspectives" in P Jones & K Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 153 173-174.

¹⁵ For an overview of this history and in particular the debate about the wisdom of rendering socio-economic rights justiciable (which centred on the institutional concerns dealt with here) see S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2003) 6 *LDD* 159 161-162; Liebenberg *Socio-Economic Rights* 7-21; D Brand "Introduction to Socio-Economic Rights in the South African Constitution" in D Brand & CH Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1 21-22.

¹⁶ For an overview of the pervasive influence of these institutional concerns in administrative law review, see in particular Hoexter *Administrative Law* 139-142; Hoexter (2000) *SALJ* 490 and 501; O'Regan (2004) *SALJ* 435-436. See also the sources listed in this respect in n 1 above.

¹⁷ Which is not to say that courts are ever able to overcome these problems definitively, whatever approach to doing so they follow. In this sense I align myself with Emilius Christodoulidis when, in his "Paradoxes of Sovereignty and Representation" (2002) *TSAR* 108 108, he makes the point that the problem of democratic institutional illegitimacy of constitutional review, despite stock attempts either to deny it or explain it away, remains "real, fascinating and persistent". In another sense, Hoexter's development of what she calls a "theory of deference" – a set of principles to guide the employment of deference in specific cases – is also premised on the realisation that institutional problems with review are not either there or not there, but are always to some degree present and have to be accounted for (Hoexter *Administrative Law* 142-143; Hoexter (2000) *SALJ* 501-502; see also Liebenberg *Socio-Economic Rights* 67 and L Williams "The Role of Courts in the Quantitative Implementation of Socio-Economic Rights: A Comparative Study" (2010) 3 *CCR* 141, both arguing for an engagement with institutional problems rather than simply a "ritualistic", either-or invocation of them to avoid decision).

¹⁸ I use "binary" here in its ordinary, literal sense: "dual, of or involving pairs"; or as it is used in astronomy: "two stars revolving round common centre or each other" (HW Fowler & FG Fowler (eds) *The Concise Oxford Dictionary of Current English* 4 ed (1959) 116).

certain issues – they describe themselves as such in relation or in comparison to the other branches of government. In short, in Michelman’s terms, these problems are depicted as “com[ing] down mainly, if not solely, to a matter of separation of powers”.¹⁹ Against this background, courts have then sought to deal with the institutional problems also in binary institutional relations terms – through the judicial strategy of deference, of deferring to *the other branches of government* those questions that they feel incapable of deciding, or with respect to which they feel democratically illegitimate, or which they feel threaten their institutional integrity or security, or require them to violate principles of separation of powers. So, for example, when Sachs J raises the problems of institutional capacity and constitutional comity in *Soobramoney v Minister of Health, KwaZulu-Natal*²⁰ to justify his choice not to interfere with a decision about provision of medical treatment, he does not simply choose not to interfere with the decision, but explicitly defers to “those better equipped” than the Court to make the allocational choices at issue, ie the provincial legislature and healthcare executive.²¹ When Yacoob J in *Government of the Republic of South Africa v Grootboom*²² declines to prescribe a particular solution to the problem of emergency shelter provision to the state on institutional capacity grounds, he does not simply decline such prescription, but defers explicitly to the legislature and executive the determination of the “precise contours and content of the measures to be adopted”.²³ When O’Regan J declines the invitation to attribute a particular substantive content to the right to have access to sufficient water on institutional capacity and democratic legitimacy grounds in *Mazibuko v City of Johannesburg*,²⁴ again she does not simply hold that she is incapable of making such a determination and leave it at that – she explicitly defers this question to the “two other arms of government”.²⁵ In sum, the solution is always not simply to leave difficult question alone or engage with them only to a certain degree or in a different way, but rather to defer those issues for decision to *the other branches of government*.

This strategy of deference in such binary institutional relations form is pervasive in all aspects of our courts’ socio-economic rights jurisprudence. Deference operates in the first place in its most extreme form²⁶ in the choice by courts of which questions to engage with at all and which to leave alone. We saw this in *Minister of Health v Treatment Action Campaign*²⁷ in the Constitutional Court’s decision not to decide the question whether a breast milk substitute should be provided to HIV positive women who had given

¹⁹ FI Michelman “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1 *I Con* 13 15.

²⁰ 1998 1 SA 765 (CC).

²¹ Para 58.

²² 2001 1 SA 46 (CC).

²³ Para 41.

²⁴ 2010 4 SA 1 (CC).

²⁵ Para 65.

²⁶ See McLean *Constitutional Deference* 25-26, where she describes the “overlap” between the concept of justiciability and deference, and describes a decision by a court that a matter is non-justiciable as reflecting “a position of extreme deference”.

²⁷ 2002 5 SA 721 (CC).

birth at public health facilities and had not transferred the HI virus to their children at birth, to avoid transmission later on. The decision not to decide this question was explicitly motivated by the complexity of the issue and the perceived technical incapacity of the Court, *as opposed to the legislature and executive* properly to analyse and decide the issue.²⁸ More recently we have seen this expression of deference in *Mazibuko*, with the court there again declining at all to determine the content of the right to have access to sufficient water – that is, declining to engage with that issue at all – on the argument that this is an exercise best and properly left to the legislature and executive.²⁹

Deference has also determined central aspects of the Court's doctrine in deciding socio-economic rights cases where the court in fact elects to engage with the issues. In *Grootboom* already the Court indicated, for example, that its reasonableness test was to be understood as what in administrative law terms is referred to as a dialectical reasonableness test – that is, that the purpose of the test is simply to determine whether or not a measure under evaluation falls within the bounds of reasonableness and not to determine what would be the best or most appropriate measure to address the social problem at issue.³⁰ This choice, so the approach related in the abstract at least goes, is always to be left to the relevant other branch of government – deference in operation.³¹ More recently, again in *Mazibuko*, we see deference operating in the formulation of the reasonableness test in absolute procedural or structural, rather than substantive terms that O'Regan J provides in that case. Again the motivation is explicitly that the content of social provisioning measures should be left to the other branches of government due to problems of institutional incapacity and illegitimacy, with the role of the court limited to evaluating form and process only.³²

Finally, we see deference operating as a strategy to avoid or account for institutional problems also in the penchant our courts have shown in socio-economic rights cases for broad-ranging forms of declaratory rather than directory relief, and their insistent avoidance of structural relief of any kind.³³ One example will suffice: the choice of the Court in *Grootboom* to issue a declaratory order only without any more specific prescription to the government and, perhaps more importantly, without in any way retaining jurisdiction over compliance with its order.³⁴

This tendency to see the institutional problems in binary terms – as problems of institutional relations between the courts on the one hand and the other branches of government on the other – and to attempt to account for them through the binary strategy of deference (deferring *to the other*

²⁸ Para 128.

²⁹ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 63-65.

³⁰ L Baxter *Administrative Law* (1984) 485. See also Hoexter *Administrative Law* 302.

³¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

³² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 65-67.

³³ For an early review and critique of the Constitutional Court's approach to remedies in socio-economic rights cases, see M Swart "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 *SAJHR* 215. See also, for a more recent account Liebenberg *Socio-Economic Rights* 75-76 and 377-460.

³⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 96-97.

branches of government) is not limited to the courts. Academic commentary on the operation of institutional concerns in socio-economic rights cases and more broadly the operation of these concerns in judicial review has equally been limited to a binary institutional relations perspective. This is true of those who respond to the accusation of the democratic illegitimacy of judicial review in socio-economic rights cases through problematising perceptions of the democratic accountability of the legislature and executive relative to the courts³⁵ or positing such review as instigating a “democratic dialogue” between the courts and other branches of government.³⁶ It is also true of those who engage the problem of institutional capacity by pointing out that, in particular in a developing state such as South Africa it is not self-evident that the legislature or executive has capacity for resolving issues of social policy superior to the courts.³⁷ Rich and nuanced as it undoubtedly is, such commentary in the main does not move outside of an institutional relations paradigm, that is, a paradigm in terms of which these institutional problems are seen as operating between the courts and the other two branches of government alone.³⁸

The point need not be belaboured: in sum, institutional concerns have, as can be expected, been prevalent in socio-economic rights adjudication. Further, the manner in which our courts have almost exclusively sought to deal with those concerns has been to employ in various ways and contexts and to differing degrees the strategy of deference, in a binary institutional relations mode – that is, by deferring decision to the other branches of government.

³⁵ Pieterse (2004) *SAJHR* 388 and 391.

³⁶ McLean *Constitutional Deference* 77-78; Liebenberg *Socio-Economic Rights* 69-71; Dixon (2007) *I Con* 391 393.

³⁷ McLean *Judicial Deference* 77; Pieterse (2004) *SAJHR* 395; Liebenberg *Socio-Economic Rights* 74-75.

³⁸ Also Davis, who criticises the Constitutional Court for what he sees as its overly deferential approach in socio-economic right cases remains within the binary institutional relations depiction of the problems of judicial review (Davis (2006) *SAJHR* 315-316 and 319-320), depicting in particular the problem of institutional capacity as a problem operating between the courts on the one hand and the other branches of government on the other. The same is clearly true of engagements with institutional problems of review in the context of administrative law. Hoexter, for example, in her influential and nuanced development of what she has variously referred to as a “theory”, a “doctrine” and a “view” of deference – a set of principles, that is, to “guide legal intervention and non-intervention” (A Cockrell “Can You Paradigm?” – Another Perspective on the Public Law/Private Law Divide” in TW Bennett, A Cockrell, R Jooste, R Keightly & CM Murray (eds) with H Corder (editorial consultant) *Administrative Law Reform* 227 247) – describes deference as judicial response to institutional problems with review as “ineluctably bound up with the separation of powers and the area of competence associated with each of the three branches of government” (Hoexter *Administrative Law* 139) and as “a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraint under which they operate” (Hoexter (2000) *SALJ* 501; see also Hoexter *Administrative Law* 142-143, slightly misquoting herself in this respect). Rich as her account is, it does not conceive of the problem and the strategy of deference outside the institutional relations mould. See also Dyzenhaus “The Politics of Deference” in *Province of Administrative Law* 279. It is important to state that my observation here that these engagements with deference still operate in a binary institutional paradigm does not amount to criticism of those engagements. The literature in South Africa on deference, both in administrative law and in the context of constitutional adjudication is rich and varied and the various proposals that have emanated from this literature for approaches to deference that take account of institutional problems without jeopardising constitutional principles and constitutional rights are equally rich and nuanced. But all of these engagements and critiques amount to internal critiques of deference – that is, they engage with deference on its own terms.

One final descriptive point: as noted in the introduction, judicial deference from the point of view of claimants in socio-economic rights cases is of course not a neutral feature of review. The employment by courts of the strategy of deference results in courts refusing to decide issues claimants place before them, which sometimes results in their claim being rejected. This was most clearly the case in *Mazibuko*, where the Court's decision not to determine the substantive content of the right to sufficient water resulted in the rejection of the applicant's challenge to the city's free basic water policy.³⁹ There where deference does not result in a court refusing to entertain issues it causes courts to deal with issues in what to claimants must seem to be a superficial manner only. Here again the *Mazibuko* Court's proceduralist description of the reasonableness test, leading to the failure of the applicants' case provides an example.⁴⁰ Finally, even there where claimants succeed in persuading the court to their view, the employment of deference results in the court handing down indirect, generalised, attenuated forms of relief – here *Grootboom*'s unsupervised declaratory order is the best example.⁴¹ It might seem obvious, but when courts employ deference in socio-economic rights cases to deal with problems of institutional capacity, legitimacy, integrity, security or constitutional comity, they favour the point of view with respect to the issues in dispute of one of the parties to that dispute (the state) over another (the claimants).⁴² In short, for claimants in socio-economic rights cases deference operates as an important obstacle to having their plight properly addressed.

3 Evaluation

3.1 Democracy in the Constitution

To develop my critique of deference in socio-economic rights adjudication I must digress somewhat.

³⁹ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 63 and 159.

⁴⁰ Paras 67 and 159.

⁴¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 96-97.

⁴² Lucy Williams has recently meticulously described the manner in which the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC), through the employment of a rather extreme degree of deference, in effect accepted without interrogating the state's depiction of technical issues in contention at the expense of the version put forward by the claimants in that case (Williams (2010) *CCR* 178-181). See also, for a similar description of the administrative law aspects of that case G Quinot "Substantive Reasoning in Administrative Law Adjudication" (2010) 3 *CCR* 111 128-136. See in general with respect to this kind of exclusionary reasoning in socio-economic rights adjudication D Brand *Courts, Socio-Economic Rights and Transformative Politics* LLD thesis Stellenbosch (2009) 217-256. It is interesting to compare the favouring of the point of view of one party to a case at play here, with the Constitutional Court's response to an argument that in a case involving a dispute between a school and one of its pupils (*MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC)), the supposedly superior experience and expertise of one of those parties must be acknowledged through employment of deference. In that case, which dealt with the question whether prohibition by a school of a form of outward expression of religious belief and culture (the wearing of a nose ring) amounted to unfair discrimination, the school argued that a degree of deference should be accorded the school governing body's (SGB's) experience and expertise in managing diversity at schools. The court rejected this contention, holding that it amounted to an argument that the SGB's judgment of what is fair in this context should be accorded deference; that the SGB was bound to show that its conduct was fair; and that "[a] court cannot defer to the view of a party concerning a contention that that same party is bound to prove" (para 81).

I subscribe to the notion first put forward by Karl Klare⁴³ and later developed by many others⁴⁴ that the South African Constitution is a transformative document in that it has a certain political character; in short that it embodies a certain vision of society⁴⁵ and requires positive action on the side of all agencies of the state toward the attainment of that vision.⁴⁶ This transformative duty – the duty to work toward the achievement of the constitutional vision of society – is one that rests also on courts. Courts must also, in both the outcomes they generate in their judgments and the manner in which they reach their judgments (their reasoning and judicial “method”), to the extent that it “innovate[s] and model[s] intellectual and institutional practices”⁴⁷ for the rest of society, work toward the achievement of the society envisaged in the Constitution.⁴⁸

One important aspect of the society envisaged in the Constitution is the establishment and maintenance of a particular kind of democracy – a “thick” conception of democracy, or what Klare has described as an “empowered” model of democracy.⁴⁹ Glossing over a complex and contested topic I will for the moment only say that this constitutional conception of democracy shows to my mind two important characteristics. First, and most basically, the Constitution envisages a representative/participatory democracy – a democracy that operates most obviously through formal representative institutions, but allows for and indeed requires participation in decision making outside of the formal representative institutions of the state, ie outside of regular general

⁴³ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146.

⁴⁴ See, for a sample of a by now very extensive literature, H Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 1)” (2002) *TSAR* 612; H Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 2)” (2003) *TSAR* 20; H Botha “Freedom and Constraint in Constitutional Adjudication” (2004) 20 *SAJHR* 249; H Botha “Democracy and Rights. Constitutional Interpretation in a Postrealist World” (2000) 63 *THRHR* 561; T Roux “Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?” (2009) 20 *Stell LR* 258; AJ van der Walt “Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law” (2002) 17 *SAPL* 258, AJ van der Walt “Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 *SALJ* 258; AJ van der Walt “Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court” (2001) 16 *SAPL* 1; K van Marle “Transformative Constitutionalism as/and Critique” (2009) 20 *Stell LR* 286; and, in particular in relation to socio-economic rights, Liebenberg *Socio-Economic Rights* (in general) and Brand *Transformative Politics* 13-73.

⁴⁵ Klare speaks of a “highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the ‘private sphere’” (Klare (1998) *SAJHR* 150). He also describes the societal ethos embodied in the Constitution as “post-liberal”, in that it “embraces a vision of *collective self-determination* parallel to (not in place of) its strong vision of individual self-determination” (original emphasis) (153).

⁴⁶ 149-150.

⁴⁷ 147.

⁴⁸ In subscribing to this notion, I assume that it is no longer necessary to justify it: the basic idea that the Constitution is generally transformative in nature and that this means that also courts should through their work – both through the outcomes they generate and in their interpretive method and the reasoning through which they reach those outcomes – participate in that transformative project is accepted by South African legal scholars of virtually all theoretical persuasions (even though there might be difference in opinion about what this basic fact implies in more concrete terms) (see, for example, Roux (2009) *Stell LR* in particular 283-285 for an argument supporting the basic transformative premise not from Klare’s own Critical Legal Studies/Critical Realist-inspired theoretical position but from a theoretically rather more centralist Dworkinian position).

⁴⁹ Klare (1998) *SAJHR* 153.

elections and the representative institutions that result from them.⁵⁰ In short, in the words of O'Regan J in *Mazibuko*, the Constitution requires “a form of ... democracy that holds government accountable and requires it to account between elections over specific aspects of government policy”.⁵¹

Second, and perhaps a little more tenuously, I would claim that the Constitution also envisages a substantive rather than only a procedural conception of participatory democracy. That is, the Constitution requires not only that processes and institutions for participation – opportunities for participation – should be available for people to make use of if they so wish. It also requires that state agencies should act in such a way that actual participation is enabled. This means that state agencies should work to enhance the capacity of people to participate in political life, to ensure that they are able in fact to make use of opportunities for participation.⁵² My argument in this respect is the following.⁵³ The Constitution clearly posits the ideal of a democratic society – that is, a society in which democracy in fact operates.⁵⁴ In order for that ideal society to be constructed, it explicitly requires that the basic institutional arrangements for a representative/participatory democracy be put in place and maintained – regular elections, democratically elected legislatures at national, provincial and local level, and structures, institutions and processes to enable participation in decision making outside those institutions and in between elections.⁵⁵

But that cannot be all the Constitution requires. A collection of democratic institutions and processes (elections, representative decision making bodies, processes for direct participation in decision making) is not democracy itself. Such institutions and processes constitute only the structure within which

⁵⁰ See Klare (1998) *SAJHR* 155:

“The Constitution envisages inclusive, accountable, participatory, decentralized and transparent institutions of governance.”

See also T Roux “The Principle of Democracy in South African Constitutional Law” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 79 where he describes the “principle of democracy” emanating from the text of the Constitution in part as follows:

“Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties; and (d) the reasons for all collective decisions are publicly explained...”

See also Liebenberg *Socio-Economic Rights* 63-64.

⁵¹ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 160.

⁵² See D Beetham *Democracy and Human Rights* (1999) 92 (arguing that institutions are not democratic only by providing space for democratic action but must operate in such a way as to promote and realise the basic democratic principles of popular control of decision making and political equality between citizens). See also Cousins & Claassens “Communal Land Rights and Democracy” in *Democratising Development* 246-247, where they distinguish “democratic institutions” (the procedural aspect of participatory democracy I refer to) and “democratic politics” (the substantive aspect of democracy I refer to). With the latter term they refer to the struggle for power over decision making or for access to power and goods (246). They then proceed to point out that for democratic politics to function and for a substantive democracy to operate, the key is to enhance “citizen capacity [for participation]” (247).

⁵³ For my own more complete elaboration of this point, see Brand “Writing the Law” in *Constitutional Conversations* 99-101.

⁵⁴ See, for example, the Preamble to the Constitution, referring to a “society based on democratic values”, a “democratic society” and a “democratic South Africa”.

⁵⁵ S 19 coupled with s 7(2) of the Constitution.

democracy operates, the mechanisms, if you will, through which democracy operates. Rather than that it consists of this collection of institutions, processes and structures, democracy is what must happen within these institutions, processes and structures. Democracy is in this sense a value system,⁵⁶ a discursive practice,⁵⁷ a societal grammar,⁵⁸ a mode of political action (a “politics”)⁵⁹ or a culture – in short, a way of doing things. In this light, a simply institutional or procedural understanding of democracy (or, more contentiously, a solely representative understanding of democracy) is an empty shell – it is the structure for democracy without the necessary content of democratic culture/practice. And further: a society in which all of the structures, processes and institutions of democracy exist and function smoothly is not yet the “democratic society” or “society based on democratic values” that the Constitution envisages. It is instead simply a society that has complied with a range of the essential preconditions for a democratic society to develop. If coupled with the affirmative, transformative democracy-related ethos of the Constitution (for example, a society based on democratic values must be “established”; a democratic South Africa must be “built”),⁶⁰ the democratic society envisaged in the Constitution requires not only the creation of democratic institutions and processes, but also the fostering and maintenance of democratic substance, of the practice of democracy.

The duty to work toward the achievement of this conception of substantive participatory democracy as a transformative goal rests on all state agencies, but of course also on the courts. Also courts should, both in the outcomes they generate in their judgments and in the manner in which those judgments are arrived at, be sensitive to the impact that their work might have on the achievement of this substantive constitutional conception of democracy.⁶¹

3 2 Deference and democracy

If this description of the constitutional conception of democracy is accepted, my critique of judicial deference becomes possible. In short it entails that the strategy of deference amounts to a failure in the democracy-related aspect of the transformative duty on courts, in two ways. First, the strategy of judicial deference embodies a conception of democracy simply at odds with the constitutional conception of democracy. Judicial deference in socio-economic rights cases – as is the case more generally – is often justified with reference to democracy. Along hackneyed “counter-majoritarian dilemma” lines, the argument goes that courts should defer to the legislature or executive on a particular point, because it is democratically inappropriate for a court, an

⁵⁶ Roux “Democracy” in *CLOSA* 23.

⁵⁷ N Fraser “Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies” (1989) 99 *Ethics* 291 297.

⁵⁸ B de Sousa Santos & L Avritzer “Introduction: Opening up the Canon of Democracy” in B de Sousa Santos (ed) *Democratizing Democracy: Beyond the Liberal Democratic Canon* (2007) xxxiv xliii-xlv.

⁵⁹ Cousins & Claassens “Communal Land Rights and Democracy” in *Democratizing Development* 246.

⁶⁰ See the Preamble to the Constitution:

“We ... adopt this Constitution to ... establish a society based on democratic values [and to] ... build ... a democratic South Africa.”

⁶¹ Klare (1998) *SAJHR* 149.

essentially non-accountable institution, to question the choices made or determine choices that should be made by the democratically accountable branches of government. In the words of O'Regan J in *Mazibuko*:

“[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive ... Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.”⁶²

Although this justification for deference is clearly motivated by a concern for democracy, it is a concern for exactly the kind of democracy that the Constitution does not require, or require alone: an institutional, procedural or structural conception of democracy, in terms of which democracy is equated with the formal representative institutions that result from it (the legislature and, more indirectly, the executive and the regular elections that give rise to them). In short, the deference accorded the legislature and the executive by equating democracy with the institutions and mechanisms for its operation, privileges and confirms a limited procedural/institutional conception of democracy that falls substantially short of the broader constitutional vision.

This, so I would argue, is problematic not only because it simply does not accord with the Constitution's transformative vision. It is also problematic because the limited conception of democracy underlying an approach of judicial deference leads to a limited understanding of what the tension between judicial review and democracy in fact entails. Stated differently, judicial deference becomes in this light a limited and insufficient response to the very problem it is intended to account for, being the counter-democratic effect of judicial review.

At the time that the entrenchment of justiciable socio-economic rights in the eventual 1996 Constitution was being debated, the democratic objection to making these rights subject to judicial review was prominent. Interestingly, however, it did not in the main take the usual counter-majoritarian dilemma line that also motivates judicial deference – that to give courts the power to pronounce on the validity of social and economic policy choices would allow them to limit the democratic will as expressed through the formal institutions of democracy, while lacking the democratic credentials to do so. Instead the concern most often expressed in this respect was with the extent to which adjudication of claims based on socio-economic rights would lead to the “judicialisation of politics” – would impact adversely precisely on the broader, substantive constitutional vision of democracy outlined above by allowing judges and courts authoritatively to decide issues which should properly be the subject of broad political contestation (“democratic politics”). Along Critical Legal Studies lines, for example, the concern was expressed that the entrenchment of these rights would lead to political energy and organisation being channelled into the courts instead of being directed at community organisation, advocacy and other forms of political action, with limited

⁶² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61.

prospects of real social transformation resulting from that.⁶³ The concern then seemed to be, in other words, about the impact that justiciable socio-economic rights could have on the practice or culture of democracy, rather than only on its possible impact on the structures or mechanisms of democracy. With the subsequent judicial focus on deference as a way in which to mitigate the tension between socio-economic rights adjudication and democracy, this, to my mind much more important aspect of the tension – the tension between socio-economic rights adjudication and democracy more broadly conceived – was lost sight of. Consequently courts have in the subsequent fifteen years or so failed to come up with coherent judicial strategies to deal with this broader aspect of the problem.⁶⁴ This leads to my second democracy-related critique of judicial deference in socio-economic rights cases.

For this second critique I must digress again, this time into the realm of political theory. Lucy Williams refers in her article in this issue to the tendency in political and other discourses to depict impoverishment and deprivation as somehow natural – caused by things outside of our control – or at least so prevalent and pervasive that nothing can be done about it.⁶⁵ We are, for example, used to hearing that impoverishment is caused by character deficiencies of impoverished people themselves (their perceived “laziness” or lack of entrepreneurial spirit); or by what are presented as “inexorable” movements of global markets; or uncontrolled population growth.⁶⁶ The intention with and effect of these depictions is to deny societal responsibility for and the political causes of impoverishment and so to depoliticise issues of impoverishment and deprivation – to remove them from the arena of political contestation. After all, if we cannot do anything about impoverishment because it is caused by forces outside of our control, we cannot be blamed for

⁶³ The strongest proponent of this view in the South African debate at the time was Dennis Davis, in his “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles” (1992) 8 *SAJHR* 475. For a more recent rehearsal of such arguments, see M Pieterse “Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29 *Hum Rts Q* 796.

⁶⁴ See Pieterse (2007) *Hum Rts Q* 796-822 for a detailed account of the manner in which this tension, more broadly conceived, appears in the socio-economic rights jurisprudence of South African courts, focussing on Critical Legal Studies “false consciousness” arguments. See also P Bond & J Dugard “Water, Human Rights and Social Conflict: South African Experiences” (2008) 1 *Law, Social Justice and Global Development* <http://www.go.warwick.ac.uk/elj/lgd/2008_1/bond_dugard> (accessed 09-11-2011); J Dugard “Civic Action and Legal Mobilisation: The Phiri Water Meters Case” in J Handmaker & R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71.

⁶⁵ L Williams “The Legal Construction of Poverty: Gender, ‘Work’ and the ‘Social Contract’” (2011) 22 *Stell LR* 463 465 468-470. See also L Williams “Welfare and Legal Entitlements: The Social Roots of Poverty” in D Kairys (ed) *The Politics of Law. A Progressive Critique* 3 ed (1998) 569; T Ross “The Rhetoric of Poverty: Their Immorality, Our Helplessness” (1991) 79 *Georgetown LJ* 1499.

⁶⁶ Of course none of these forces to which poverty is attributed, despite the fact that they are assumed and presented by those who employ them in this context as somehow natural and apolitical, are in fact themselves apolitical. Quite the contrary: what are perceived as negative character traits are determined by relative positions of power and the understanding of social dynamics; the movements of markets, despite being fondly described by those involved in them in apolitical terms, are at the same time acutely politically determined and driven, the subject of acute political contestation, and have diverse consequences depending on one’s position of power (one’s political position in society). The point, as becomes clearer below, is that these descriptions of the determinants of poverty are used for political purposes to deny the political nature of poverty – their description as apolitical is itself a political move.

it, so the argument seems to go, and it certainly does not help talking about it in the political world.⁶⁷

In the broader political debate, this has an obvious effect on the capacity of impoverished people to engage in political action to address their plight – to participate, that is, in political life or democracy. Before they can contest politically the causes of and possible solutions to their situation of deprivation and need, they must first struggle to have these problems recognised as the subject of political contestation.⁶⁸ This significantly limits the democratic space available to them.

These forms of “naturalisation” and “personalisation” of poverty are but one set of examples of strategies that operate in political discourses about impoverishment intended to remove questions of need, deprivation and poverty from political contestation – to depoliticise them. One other such way was highlighted by Nancy Fraser in an article she wrote in the late 1980s. There she describes the pervasive tendency in discourses about need and poverty to depict these issues as technically complex in nature and as such suitable for discussion only in technically proficient fora – the state bureaucracy, expert think tanks and other technocratic institutions.⁶⁹ The effect of this depiction of poverty and deprivation is equally depoliticising. Their description as technically complex is intended to convey exactly the message that they are unsuited to political contestation, cannot be engaged with in a useful fashion by those that are not technically proficient.⁷⁰

This technicisation of issues of impoverishment is of course also a move central to proceduralist or institutional models of democracy – the limited conception of democracy that motivates judicial deference. De Sousa Santos and Avritzer distinguish such proceduralist/institutional representative models of democracy (what they refer to as “liberal hegemonic” democracy)⁷¹ from participatory democracy amongst other things on the basis of the attitude of such models of democracy to the state bureaucracy. The liberal hegemonic model of democracy tends to insulate the state bureaucracy from democratic

⁶⁷ Williams “Social Roots of Poverty” in *The Politics of Law* 569; Ross (1991) *Georgetown LJ* 1501-1502; N Fraser & L Gordon “A Genealogy of Dependency: Tracing a Keyword of the US Welfare State” (1994) 19 *Signs: Journal of Women in Culture and Society* 309 323-324. Examples of this kind of “depoliticizing rhetoric” abound in South Africa – think of the tendency of state agencies to speak of a “culture of non-payment” as the reason for the high rate of default in payment for municipal services, implying in the process a lack of social responsibility and trustworthiness on the side of the impoverished (without the political justification of resistance to the apartheid regime that operated in campaigns of non-payment in the 1980s). Instead, as Desai points out, there is an “economics of non-payment” – impoverished people are simply too poor to pay because of the operation of a certain politically determined economic system and related politically determined state policies (A Desai *We are the Poors: Community Struggles in Post-Apartheid South Africa* (2002) 17). See also further D Brand “The ‘Politics of Need Interpretation’ and the Adjudication of Socio-Economic Rights in South Africa” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17 18-25.

⁶⁸ Fraser (1989) *Ethics* 298; Ross (1991) *Georgetown LJ* 1509-1513. Cousins & Claassens, for example, point to the “mismatch between the needs and realities of the poor and anti-poverty policies ... in relation to housing policy and the erroneous assumptions that poor people will benefit from mortgage finance” that arises from the exclusion of the poor from policy formulation processes (Cousins & Claassens “Communal Land Rights and Democracy” in *Democratizing Development* 247).

⁶⁹ Fraser (1989) *Ethics* 299.

⁷⁰ J Habermas “Law as Medium and Law as Institution” in G Teubner (ed) *Dilemmas of Law in the Welfare State* (1986) 204 210.

⁷¹ De Sousa Santos & Avritzer “Introduction” in *Democratizing Democracy* xxxv.

control on the argument that in modern societies there is an increase in social and political problems that require technical solutions. Such technical problems, so the argument proceeds, require for their resolution technical expertise and skill that reside in the bureaucracy and not the democratic process. As such decision of such technically complex issues must be removed from the democratic process and left to the state bureaucracy.⁷² Participatory democracy by contrast recognises the “monocratic” nature of the bureaucracy – that it “advocate[s] a homogenizing solution for each problem confronted”⁷³ and so fails to account for the fact that social problems most often require plural solutions. It also recognises the inability of a centralised, insulated bureaucracy to acquire and process all the information that is required to implement complex social policies. This means that the “knowledge held by social actors” outside the bureaucracy – by the “common citizen”, the democratic participant – becomes important for solutions to social problems, so that ways must be found to enable their participation in decision making with respect to such problems.⁷⁴

But what does this have to do with deference, apart from mirroring the conception of democracy that judicial deference is based on? The use by courts of judicial deference in socio-economic rights cases, so runs my claim, replicates this process of the technicisation of poverty and in the process works to limit the capacity for political action of impoverished people in a particularly powerful way. If one operates according to the broader, substantive view of democracy outlined above, it becomes clear that judicial deference operates to depoliticise the issues of poverty, need and social provisioning that arise in socio-economic rights cases in three closely related respects.⁷⁵ First, and most obviously, deference depoliticises in that it describes the issues in question as difficult ones that the court and the claimant party before the court alone might not have the capacity to deal with. The first step in deference in this context is after all always to recognise the fact that the issue before the court is complex. This first depoliticising step is to some extent inevitable and indeed desirable. One cannot and should not wish away the complexity of the issues in question or, for that matter the incapacity of a court, relative or otherwise, to deal with them on its own.⁷⁶ However, second, deference depoliticises in that it then almost inevitably describes the problems

⁷² xxxix-xl. The point is of course not that issues of a technical nature are apolitical in some way – it is in fact exactly the opposite, that the issues are described as technical and therefore devoid of political content by those with an interest in removing them from political contestation.

⁷³ xl-xli.

⁷⁴ xli.

⁷⁵ It is important to be clear here. Deference operates, of course, on the basis of an understanding of what is political and what is not – courts defer to the other branches of government in part precisely because what are seen as “political” issues are left to the “political branches”, being the legislature and executive. However, my point is that this move – deferring to the supposedly “political” branches – is based on an impoverished, limited understanding of what the “political sphere” or the proper space for democratic politics is. Leaving certain decisions to these supposedly political branches – authoritatively stating that these are the only places where they may be decided – insulates them from real democratic/political control.

⁷⁶ In fact, recognising complex issues as such and as issues that neither the court, nor the other branches of the state, nor civil society can engage with alone is an important first step in the approach of judicial prudence that I propose below.

at issue as technical rather than political in nature. On the understanding that a technical approach to a problem such as impoverishment and the standard of efficiency that underlies it is politically a neutral approach, the problems of impoverishment at issue in socio-economic rights cases are in this way bluntly depicted as devoid of politics, problems that can be solved without the need to engage political questions of redistribution and social justice.⁷⁷ And third, and most problematically, deference depoliticises in that it explicitly cedes the authority to deal with these complex issues to the formally constituted “political” branches of government “whose responsibility [and exclusive right] it ... [becomes] to deal with such matters”.⁷⁸ This third move sends a particularly strong, legally countenanced message to impoverished people, social movements, nongovernmental organisations and others who might want to engage in a democratic, political sense with homelessness, hunger, ill-health and other incidences of impoverishment. What a court employing deference to account for any one of the range of institutional problems confronting it on review tells them is not only that these are difficult issues in a technical sense, requiring of them sustained, informed engagement which they, like the Court, might not on their own have the capacity for. Deference also tells them that such issues are, as with the Court, simply not their business. In this way the rhetoric of deference casts them not as active participants in democratic life, capable of political action to address their particular socio-economic needs, but as the passive recipients of services – their needs, predefined by the political branches of government, are administered to them through a process of therapeutic assistance.⁷⁹

One response might be that what I describe here as a powerful depoliticising move is simply rhetoric that has no discernible effect on democratic politics and political agency. Such a response would be inaccurate. When courts engage with issues of impoverishment in socio-economic rights cases they also in different ways engage with, participate in and influence the political discourse about impoverishment. First, courts’ work in socio-economic rights cases is part of this political discourse, even a medium for it. Participants in the political discourse use socio-economic rights litigation as tools for democratic political action, with judgments becoming political currency in

⁷⁷ See JW Singer “Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism” (1990) 63 *S Cal L Rev* 1821–1824, where he points out that a “complacent” pragmatist (a technocratic) approach to social problems with its exclusive focus on “what works” is adopted precisely to avoid the need to engage substantive political questions of redistribution and social justice.

⁷⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 29.

⁷⁹ Habermas “Law as Medium” in *Dilemmas of Law* 210; Fraser (1989) *Ethics* 307. As will become clear below, I do not propose instead of deference an activist court that decides complex technical and politically contested questions unilaterally. Quite the contrary: I propose a court that recognises its own limitations, but that, instead of then deferring only to the other branches of government, opens itself and the issues up to a broader arena of democratic politics, in which it remains itself engaged. See also Brand “Politics” in *Theories of Social and Economic Justice* 31–33.

political struggles.⁸⁰ Second, courts also play a symbolic or exemplary role in political discourses about impoverishment. Because of its authority, their vocabulary and rhetorical strategies are used in and so influence political discourses about impoverishment, influencing in particular perceptions about the role and political agency of participants in that debate.⁸¹

In sum then, judicial deference not only reflects a limited understanding of democracy at odds with the Constitution's substantive participatory vision of democracy – it also replicates the depoliticisation of issues of poverty that routinely occurs in other spheres of society and so actively works against rather than promotes the political capacity of impoverished people and the “establish[ment of] a ... democratic society” in the constitutional sense. In this light – and this is the strongest claim of this article – judicial deference is an inappropriate (and in relation to its democratic justification, a counter-productive) strategy to account for the range of institutional problems courts face in the exercise of their review powers in socio-economic rights cases, at least there where it is used unreflectively and in isolation. Something must be found in its stead.

4 Proposal

Emilios Christodoulidis provides a critique of the idea of representation and the counter-majoritarian dilemma as a central preoccupation of constitutional theory that is suggestive for my purposes.⁸² In short (and I apologise for the inevitable reduction and reformulation) he points out that to describe the democratic problem with constitutional review in only binary institutional terms, as a counter-majoritarian depiction of that problem does – that is, as simply a problem of the relationship between courts and a constitution on the one hand and a legislature and executive as repositories of the democratic will on the other – is a limited view of the problem. He reminds us that, although this binary relationship is an important aspect of the democratic problem, one should not forget about popular sovereignty – “the people” – something that resides outside of, obviously, courts and a constitution, but also outside of the representative branches of government. Instead of seeing the democratic

⁸⁰ See R Ballard “Social Movements in Post-Apartheid South Africa: An Introduction” in P Jones & K Stokke (eds) *Democratising Development. The Politics of Socio-Economic Rights in South Africa* (2005) 78 87-88; M Heywood “Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health” (2003) 19 *SAJHR* 278 314-315; Liebenberg (2003) *LDD* 159.

⁸¹ Consider the manner in which the reasonableness test with which courts evaluate the state's social provisioning activities has shaped civil society monitoring of planning and delivery with respect to social services and the political advocacy informed by that monitoring on the one hand and state responses to such advocacy on the other. See, for example, J Streak & J Wehner “Children's Socio-Economic Rights in the South African Constitution: Towards a Framework for Monitoring Implementation” in E Coetzee & J Streak (eds) *Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges* (2004) 50 79. The kind of disabling, depoliticising rhetoric about the political role of impoverished people that I identify here in judicial language is of course prevalent in official and elite discourses about impoverishment, in a particularly acute way. The impoverished are routinely described as lazy, devious and greedy, requiring instead of state assistance, motivation through the withholding of such assistance. As such current political discourse about impoverishment is fertile ground for courts' depoliticising rhetoric. See Brand “Politics” in *Theories of Social and Economic Justice* 20.

⁸² Christodoulidis (2002) *TSAR* 108-124.

problem with constitutional review in binary terms, he concludes, we should recognise that it occurs within a more complex triangular relationship – between a constitution and courts, the representative branches of government and popular sovereignty/the people.⁸³

This seems like a simple point, but it is important – important because it is precisely the failure to see the triangular nature of the democratic problem with judicial review in socio-economic rights cases and the insistence to depict that problem in binary institutional terms that leads to the problems with judicial deference outlined above. This analysis, simple as it might seem, therefore suggests possibilities for my critique of judicial deference as a response to institutional problems in socio-economic rights adjudication. In short my proposal is that courts should move away from regarding the institutional problems they face in deciding socio-economic rights cases in binary, institutional relations terms and to seek to resolve these problems by deferring to the other branches of government. Instead they should recognise that, with respect certainly to the democratic problem with judicial review, they stand in relationship not only to the representative branches of government, but also to Christodoulidis’ third point of the triangle, the sovereign people. This shift of perspective, should they be able to operationalise it in their doctrine, techniques and reasoning, would enable them to embrace instead of deference with its attendant problems, an approach of what can perhaps be called judicial prudence. Such an approach would, on the understanding that courts in the exercise of their review powers stand in a complex triangular relationship with the other branches of government and the rest of the world (civil society, ordinary people), indeed recognise the difficulty of the institutional problems of capacity, legitimacy, integrity and security. But such an approach would in fact seek both to engage with these problems in every case in which they arise, and to do so by looking for inventive solutions to them elsewhere than simply in a deferral to the other branches of government.⁸⁴

How would an approach of judicial prudence differ from judicial deference? Prudence and deference are similar in that in both approaches courts are aware of their institutional limits and seek ways in which to overcome them.⁸⁵ But once this first step (recognition of which issues a court cannot resolve on its own and why it cannot do so) is over, judicial prudence departs from judicial

⁸³ 108 and 112. These are my terms – he uses “constitutional reason”, “democratic will” and “the sovereign people”.

⁸⁴ This point resonates with Lucy Williams’ recent argument on the operation of separation of powers concerns in socio-economic rights cases (Williams (2010) *CCR* 141-199). She makes the argument there that institutional concepts such as “separation of powers”, or “institutional capacity” have no self-evident meaning that provides “guidance to or restraint upon decision making” (142) in socio-economic rights cases. Instead, so she proposes, courts should in each specific case engage with the issues before them to determine themselves, for example, the extent of their institutional capacity or incapacity for those particular issues, relative to the legislature or executive. My point is similar – that concepts such as “separation of powers” cannot become place-holders for judgment – but broader. Whereas Williams’ criticises the *manner* in which the South African Constitutional Court has employed deference, I criticise deference as such.

⁸⁵ Acting wisely in the Socratic sense, that is (“[all I know is] that I know nothing at all”. Socrates quoted in Plato *The Republic* (transl B Jowett) (1894) <<http://classics.mit.edu/Plato/republic.2.i.html>> (accessed 01-11-2011) 354b (conclusion of book 1)).

deference in two important ways, both related to how a court then deals with its institutional limits. The first is that it seeks assistance in resolving the issues not only from the other branches of government – instead it seeks to engage, together with the other branches of government, the particular claimants in a case, groups more generally interested in the issues that arise in a case and perhaps organs of civil society that can make a contribution in a process aimed at resolving the complex issues at stake. The second difference is less clear-cut than the first, but amounts to the following: A court employing judicial prudence instead of judicial deference precisely does not defer, in the sense of leaving decision of an issue to another forum (the “political” branches). In the context of administrative law review, a theory of judicial deference has been described as a set of principles to “guide [judicial] intervention and non-intervention”.⁸⁶ In the general architecture of an approach of deference, the choice is in other words between the court itself deciding an issue, or leaving it be, for the other branches of government to decide. Although the sterling efforts of a number of administrative law scholars to develop a theory of deference has in part been aimed at “grading” involvement of a court in particular decisions – softening the edges of deference so to speak so that it doesn’t amount to an either/or proposition⁸⁷ – the basic structure of deference remains that it is either the court that decides an issue or certain aspects of an issue (leaving others to the administration), or it is the administration. In addition, with notable exceptions our courts, in particular in the context of socio-economic rights claims, have primarily employed judicial deference as a “judicial can’t”,⁸⁸ indicating either unilateral judicial decision or complete deference to the other branches.⁸⁹ In an approach of judicial prudence by contrast, the emphasis would be on the court *retaining involvement* in the resolution of difficult or contested issues, to the extent of its capacity. Instead of leaving decision of certain matters to other fora, the court would engage those other fora in a process aimed at resolving the issues in question both by creating such a process in institutional terms⁹⁰ and by setting the normative parameters within which any resolution must occur.

An approach of judicial prudence so described would in the first place be a more coherent and defensible response to the institutional problem with review that has been the focus of this article – the problem of its democratic legitimacy. If courts could find ways in their work in socio-economic rights cases of involving not only the other branches of government, but also elements of “the people” (the claimants before court; social movements and

⁸⁶ Cockrell “Paradigm” in *Administrative Law Reform* 227.

⁸⁷ It is in particular the work of Cora Hoexter that has been prominent in this respect (proposing an approach of variability of stringency of review depending on a contextual determination by a court of the relative limits of its powers with respect to a particular issue). See Hoexter (2000) *SALJ* 499-503; Hoexter *Administrative Law* 142-147. See also, in general, Cockrell “Paradigm” in *Administrative Law Reform* 227-247 but in particular 247; Dyzenhaus “The Politics of Deference” in *Province of Administrative Law* 279-307.

⁸⁸ R Cover *Justice Accused: Anti-Slavery and the Judiciary Process* (1975) 119-120.

⁸⁹ With respect to socio-economic rights cases, see Williams (2010) *CCR* 141-199 and with respect to administrative law, see Quinot (2010) *CCR* 111-139.

⁹⁰ See below for indications of what this means in operational terms.

other pressure groups) in the resolution of politically and socially contentious issues this would both accord more clearly with and so confirm the broader constitutional vision of substantive participatory democracy outlined above and avoid the depoliticising, democracy-limiting effect that deference's privileging of the legislature and executive has.

An approach of judicial prudence could also provide more coherent and practically more viable answers to at least the institutional problem of competence, which I have only touched on in passing in this article. Deference as a response to institutional competence concerns, by leaving decision of technically complex issues of social transformation that arise in socio-economic rights cases to the legislature, executive or state administration reflects a centralist, "top-down" approach to socio-economic transformation in terms of which a "benevolent and rational state" "sets the agenda for" socio-economic transformation "and other actors and stakeholders have to embrace and support the path chosen".⁹¹ Such an understanding of the nature of and requirements for sustainable socio-economic transformation conflicts with the general consensus in the fields of development studies and economics that sustainable and viable socio-economic transformation is only possible with broad participation by a range of social actors other than the state in development processes – participation that can be enabled through fostering and strengthening the political agency of impoverished individuals and groups on the one hand,⁹² and fashioning developmental institutions and processes that allow for effective political contestation around issues of poverty and need on the other.⁹³ An approach of judicial prudence instead of deference, that recognises and attempts to involve in decision making the third leg of Christodoulidis' triangle – social actors other than the state – better accords with this updated account of socio-economic transformation and development and is simply a more realistic response to problems of complexity and the resultant incapacity of a court.⁹⁴

What would an approach of judicial prudence so described be in institutional terms – how, in other words to operationalise it? At the outset it seems that an approach of judicial prudence would require our courts to

⁹¹ E Pieterse & M van Donk "The Politics of Socio-Economic Rights in South Africa. Ten Years after Apartheid" (2004) 5 *ESR Review* 12-14. See also E Pieterse & M van Donk "Incomplete Ruptures: The Political Economy of Realising Socio-Economic Rights in South Africa" (2002) 6 *LDD* 193-195-196; P Heller "Local Democracy and Development in Comparative Perspective" in E Pieterse, S Parnell, M Swilling & M van Donk (eds) *Consolidating Developmental Local Government* (2008) 152-152.

⁹² See, for example, A du Toit *Chronic and Structural Poverty in South Africa: Challenges for Action and Research* PLAAS Chronic Poverty and Development Policy Series No 6, Chronic Poverty Research Centre Working Paper No 56 (2005) 16-17 <<http://www.plaas.org.za/pubs2/downloads/CP6%20du%20Toit.pdf?searchterm=None>> (accessed 22-11-2011). See also Cousins & Claassens "Communal Land Rights and Democracy" in *Democratising Development* 247 and particularly S Mnisi Weeks & A Claassens "Tensions between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them: 'We Love these Fields that Feed Us but Not at the Expense of a Person'" (2011) 22 *Stell LR* 823-829-830, 834-837 for a thorough conceptual account and a graphic practical illustration of the dangers of unilateral, top-down developmental approaches, within the context of rural land rights.

⁹³ E Pieterse, S Parnell, M Swilling & M van Donk "Consolidating" in E Pieterse, S Parnell, M Swilling & M van Donk (eds) *Consolidating Developmental Local Government* (2008) 18-20.

⁹⁴ See Brand *Transformative Politics* 26-31. See also Liebenberg *Socio-Economic Rights* 437 for a brief account of this point.

develop fundamentally new approaches to access to court. The concern that courts in terms of an approach of judicial prudence would have to show for participation in litigation by actors other than the state would require that it be much easier than currently is the case for such non-state social actors to approach courts with socio-economic rights claims. This is not only so with respect to the rules of standing, other justiciability issues and the processes of approaching courts, but also with respect to the nature of the litigation process itself and the doctrine and forms of reasoning employed in it. Also, an approach of judicial prudence rather than deference, given the premium that it would place on a court's actual engagement with both politically contested and technically complex issues that come before it, would require adaptation of the currently still fundamentally adversarial approach to constitutional adjudication in South Africa toward a more inquisitorial model, with the more directly involved role for courts that such a model entails.

But quite apart from these two fundamental structural adaptations, a number of other obvious, more concrete ways in which our courts can operationalise an approach of judicial prudence present themselves, some of which have already taken root in our courts' socio-economic rights jurisprudence. First, courts, when confronted with technically complex or socially contested questions that they feel incapable of deciding on their own can instead of falling back on deference, employ different techniques of involving persons or institutions in litigation that are not directly party to that litigation but who possess the expertise or political representivity required to assist the court to resolve those issues. One thinks here in the first place of the possibility of joinder – our courts have recently, most notably in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue*,⁹⁵ joined local authorities to eviction proceedings between private property owners and squatters on the argument that such local authorities, although they have no direct interest in the litigation, have a constitutional duty to provide adequate housing that is implicated in the dispute.⁹⁶ This technique might be extended to allow courts to join also parties that don't have a direct interest in the litigation, or whose constitutional duties are not implicated by the litigation, but who possess particular expertise that might be helpful to the court, or represent particular interests that are implicated by the case. More obviously applicable perhaps, courts can expand existing practices of inviting friends of the court to make submissions in litigation, or more directly, appoint a *curator ad litem* to investigate and report to the court on complex matters that the court feels incapable of deciding, as our Constitutional Court has done in the past, most

⁹⁵ 2009 1 SA 470 (W).

⁹⁶ Other cases in which the same technique was employed are: *ABSA Bank Ltd v Murray* 2004 2 SA 15 (C); *Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 1 SA 332 (T); *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W); *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W); *Chieftain Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 5 SA 387 (T). For a discussion and evaluation of these joinder developments in eviction law, see G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD thesis Stellenbosch (2011) 231-255.

notably in the case of *S v M*.⁹⁷ A more radical development in this respect would have our courts following the example of apex courts in other jurisdictions deciding cases that raise complex and contested question of a technical nature. In jurisdictions such as Colombia, Argentina and India, courts have employed techniques of engagement in the course of deciding a case, to assist them in gathering information or resolving difficult technical or contentious political issues – courts have ordered, that is, the creation of discussion or negotiation *fora* both to advise them on complex technical issues that arise in the course of litigation and to reach agreement on contested questions that stand in the way of final judicial decision.⁹⁸

In a slightly different vein, another obvious way in which our courts can introduce mechanisms of participation in their processes to assist them in resolving technically complex or politically contested questions presents itself, one that has of late been quite prominently used by our courts in socio-economic rights cases. South African courts have over the last several years displayed a growing inclination to resolve politically contentious or technically difficult issues that arise in the course of socio-economic rights litigation by requiring the parties before the court – the claimants and the state – to, as it has come to be called, “engage” with each other.

This has happened in a variety of ways. In cases such as *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd*,⁹⁹ *Port Elizabeth Municipality v Various Occupiers*¹⁰⁰ and *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*¹⁰¹ our courts established that there is a constitutional duty on state agencies seeking to remove people from land to attempt to resolve the problem through “engagement” (read negotiation intended to reach agreement) with the occupiers of the land in

⁹⁷ 2008 3 SA 232 (CC). In this case, which concerned the constitutionality of the imposition of a term of imprisonment for fraud on a primary care-giver of minor children, the Court issued an invitation to interested parties to address it as *amici curiae* on a number of specified issues (para 5). The Centre for Child Law at the University of Pretoria joined as *amicus* and “made wide-ranging written and oral submissions on the constitutional, statutory and *social context* in which the matter fell to be decided” (para 6) (own emphasis). The Court also appointed a *curator ad litem* who, with the aid of a social worker, compiled a report that was considered by the Court. Finally, counsel for the Department of Social Development and the Department of Justice and Constitutional Development also submitted an extensive report on the position of children whose primary care-givers were sentenced to terms of imprisonment, compiled by a group of social workers.

⁹⁸ See, for example, the Colombian Constitutional Court decision T-760/2008 (decision requiring dramatic restructuring of the health care system, which has to be effected in part through a participatory process involving a range of stake-holders) (for a discussion and evaluation of this decision see A Ely Yamin & O Parra-Vera “How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court” (2009) 6 *PLoS Medicine* 1); and the decision of the Argentinian Supreme Court in *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/dáños y perjuicios (daná derivados de la contaminación ambiental del Río Matanza-Riachuelo)* (decision attributing responsibility for the degradation of a river, reached on the basis of a participatory process managed by the Court during which interested parties participated in determining the decision of the Court) (summary in English available at <http://www.farn.org.ar/participacion/riachuelo/resumen_ingles.html> (accessed 03-08-2011)); and the Indian Supreme Court case of *People’s Union for Civil Liberties v Union of India* (Writ Petition [Civil] 196 of 2001) *Right to Food Campaign* http://www.righttofoodindia.org/mdm/mdm_scorders.html> (accessed 03-08-2011) (a range of interim orders issued with judgment pending, including orders that a commission be appointed to investigate aspects of the case).

⁹⁹ 2004 6 SA 40 (SCA).

¹⁰⁰ 2005 1 SA 217 (CC).

¹⁰¹ 2008 3 SA 208 (CC).

question before seeking an eviction order from a court, such that courts may deny an application for an eviction order in the absence of a showing that a reasonable such effort had been made.¹⁰² Indeed, in *Olivia Road* Yacoob J went so far as to remark in passing that a duty to engage is also an aspect of the reasonableness test used to determine the constitutional cogency of measures intended to give effect to socio-economic rights in general,¹⁰³ a possibility that seems to have been applied by the Court subsequently in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*.¹⁰⁴

In *Port Elizabeth Municipality* the possibility was mooted to make the granting of an eviction order subject to the resolution through mediation or negotiation between the parties of technically complex or politically intractable aspects of the dispute – in that case, the question in particular of what would be suitable alternative accommodation for the potential evictees.¹⁰⁵ This technique was applied subsequently in *Joe Slovo* where the implementation of the eviction order granted in that case was made dependent on the parties reaching agreement on, among other things, the timing and manner of removal of the occupiers.¹⁰⁶

Finally, in *Joseph v City of Johannesburg*¹⁰⁷ the scope of application of administrative law procedural fairness guarantees was broadened through an inventive interpretation of a variety of sections of the Constitution and legislation to apply to any decisions related to the “public law duty” of the state to provide basic services effectively, efficiently and fairly and the concomitant “public law right” of people to receive those services in that manner.¹⁰⁸

In South Africa these developments are still in their infancy, and it is unclear what their purpose and implications are and whether or not there is

¹⁰² See with respect to *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) paras 27 and 33-38 (see also *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, amici curiae)* 2005 5 SA 3 (CC) paras 27-38); with respect to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 45, 55-57 and 59; and with respect to *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 13-21.

¹⁰³ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 17-21.

¹⁰⁴ 2010 3 SA 454 (CC) para 117.

¹⁰⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 39-46.

¹⁰⁶ *Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7, ss 5, 6, 7 and 11 of the order.

¹⁰⁷ 2010 4 SA 55 (CC).

¹⁰⁸ Paras 34-47. In *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) the Constitutional Court also signalled its willingness to leave the resolution of a case wholly to the parties by ordering them to resolve their dispute through “engagement” prior to handing down judgment – effectively to order the parties to settle the case on the basis of engagement (paras 5-6). This particular instance of the use of engagement in adjudication is clearly problematic from my perspective. In fact, as one of the anonymous reviewers of this article pointed out, it amounts to an extreme form of deference in which the Court wholly abdicated its decision making powers to the parties (the Court gave no indication either beforehand or after the fact when approving the agreement that was reached of the normative parameters within which agreement must be sought). As such it is not an example of a technique that gives expression to an approach of prudence.

scope for their further development.¹⁰⁹ But in a variety of other jurisdictions the engagement techniques employed by our courts have been developed far beyond the manner in which they have played a role thus far in South Africa.

So, for example, in a jurisdiction such as Colombia the Constitutional Court has issued what we would in South Africa call structural or supervisory interdicts that, apart from retaining for the Court jurisdiction over the implementation of its orders require all manner of broader societal involvement in the resolution of difficult technical or contentious political issues that remain after the court has decided a case.¹¹⁰ The scope and ambition of the “engagement” aspects of these orders far exceed the role it has thus far played in South Africa.

These engagement techniques are themselves by no means unproblematic. Apart from the significant practical or logistical problems that attend their use – how to decide who to involve in different processes of engagement; where the numbers of involved parties are large, how to set in place manageable structures and processes for the negotiation; and how to ensure equality in power in ensuing negotiations or discussions – the utility of rights as particular kinds of tools in political struggles might be argued to suffer if their content is to be determined through negotiation between interested parties rather than through authoritative interpretation and pronouncement by a court.

Nevertheless, such techniques of engagement, if carefully developed by courts, achieve exactly the kind of shift in perspective from a binary to a triangular view of institutional problems in constitutional review that I advocate above – they enable courts, when confronted with contested political questions or technically complex issues in socio-economic rights litigation, to turn not only to the other branches of government, but also to the “sovereign people” for their resolution.

SUMMARY

In this paper I present a problematisation of deference as a judicial strategy to account for institutional problems with judicial review in socio-economic rights cases. On the assumption that deference operates as an obstacle to effective judicial enforcement of socio-economic rights, I describe certain internal inconsistencies in its conception and use. In particular I point out that the democratic justification often offered for deference – that courts as unaccountable institutions defer to the democratically accountable branches out of concern for democracy – both reflects an

¹⁰⁹ For recent commentary on these developments see in this issue G Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” (2011) 22 *Stell LR* 742-758; L Chenwi “A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road v City of Johannesburg*” (2009) 2 *CCR* 371 and “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *SAPL* 128; WA Holness “Equality of the Graveyard: Participatory Democracy in the Context of Housing Delivery” (2011) 26 *SAPL* 1; K McLean “Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*” (2010) 3 *CCR* 223; Liebenberg *Socio-Economic Rights* 418-423. See also, for a well-developed and established engagement with the use of these techniques in the context of remedies in socio-economic rights adjudication C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 165-223 and in particular 215-217; and Liebenberg *Socio-Economic Rights* 434-438.

¹¹⁰ See T025/04, a judgment of the Colombian Constitutional Court with respect to the rights of internally displaced persons (the “IDP case”). For a discussion, see MJ Cepeda-Espinosa “How Far May the Colombian Constitutional Court Go to Protect IDP Rights?” (Dec 2006) *Forced Migration Review* 21 <<http://www.fmreview.org/FMRpdfs/BrookingsSpecial/13.pdf>> (accessed 09-11-2011).

impoverished conception of democracy and actively counteracts a more substantive conception of democracy, by confirming and legitimising political discourse that seeks to exclude broad participation in development-related decision making. I describe an alternative approach to take account of institutional problems in socio-economic rights-related judicial review that better accords with and affirms a broader vision of democracy. This approach would have courts both retain rather than relinquish judicial involvement in the resolution of issues that present them with institutional difficulties and actively involve in the resolution of such issues also social actors other than the state. I conclude by presenting a variety of possible judicial techniques through which this approach can be operationalised.