

## Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take 'other measures'

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### Summary

*The framework for constitutional democracy in South Africa assigns to the courts a pivotal role in assuring effective protection and translation of the range of entrenched socio-economic rights into material entitlements. This has enabled the courts in some instances to exercise considerable authority that has significantly influenced policy to the extent that power relations between the judiciary and the political arms of government have been threatened. Proponents of the doctrine of the separation of powers have expressed concerns, claiming that the meddling of the courts in the domain of policy making is politically incorrect. Consequently, the judicial enforcement of socio-economic rights has increasingly suffered setbacks, which to a large extent have retarded the constitutional vision of social transformation. Thus, in spite of South Africa's acclaimed global leadership in the enforcement of socio-economic rights, little has actually been accomplished in terms of improving the livelihood for victims of socio-economic deprivation. Considering that the enforcement of socio-economic rights is context-specific, I question the rationale for avoiding a 'jurisprudence of exasperation', which demonstrates greater potential to produce transformative outcomes than the preferred 'jurisprudence of accountability' which has shown little transformative effect. Just as the realisation of socio-economic rights through political strategies amounts*

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*to material entitlement, I argue that the result of positive adjudication should equally amount to entitlement to the same material things promised by the rights in question. I conclude with the suggestion that the judicial enforcement of socio-economic rights should be seen as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government.*

**Key words:** *socio-economic rights; South African Constitution; judicial enforcement; separation of powers; 'other measures'*

## 1 Introduction

This article aims to examine the socio-economic rights jurisprudence of South African courts following retired Justice O'Regan's assertion that the courts have avoided a 'jurisprudence of exasperation' in pursuit of a 'jurisprudence of accountability'.<sup>1</sup> The assertion was made as a reaction to controversies bordering around the enforcement of socio-economic rights in relation to the question of the separation of powers. Acknowledgment is given to the fact that it is democratically granted for the political arms of government to provide a framework for the progressive realisation of socio-economic rights.<sup>2</sup> However, within the context of a constitutional democracy, the courts are equally mandated and have practically demonstrated potential, albeit marginally, to contribute to the achievement of envisaged social change. I do not advocate for the courts to become crusaders of democracy, but as arbitrators of fair play in the political game between government and the governed the role of the courts cannot be ignored. This article needs to be understood from a socio-legal perspective, to consider what contribution the judicial enforcement of socio-economic rights could make as a complementary strategy to the achievement of social change in an otherwise disparate society. I argue that the courts (particularly the Constitutional Court) have increasingly restricted their role and therefore also limited the purpose of judicial enforcement, which to a large extent has retarded the constitutional vision of social transformation.

At the core of the impasse is a build-up of tension and mistrust between politicians and judges, triggered by allegations of judiciary usurpation of the function of 'policy formulation' and also by claims

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1 K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39.

2 M Pieterse 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy and Development* 1-2; S Cumming & D Rhodes 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 612; S Gloppen 'Social rights litigation as transformation: South African perspectives' in P Jones & K Stokke *Democratising development: The politics of socio-economic rights in South Africa* (2005) 167.

that political opponents are using the courts as a means to 'co-govern' the country.<sup>3</sup> These assertions stem from the fact that marginalised constituencies have through the agency of civil society progressively pressured the state by taking it to court – articulating popular demands for change, challenging government conduct, contesting the constitutionality of legislation and policies as well as claiming entitlement to futile political promises. In some instances, the Constitutional Court has handed down controversial judgments that have too frequently left the state on the losing side of the scales of justice – judgments which the political arms have considered jeopardising to the purpose of separation of powers.<sup>4</sup>

On this account, the state has questioned the role of the courts as well as the impact of socio-economic rights jurisprudence in transforming South African society.<sup>5</sup> More so, the relevance of the Constitution as a framework for democracy has been contested and political narratives have labelled the judiciary as a 'counter-revolutionary' force that may drive the country into 'judicial dictatorship'.<sup>6</sup> From other quarters, it is contended that litigation lacks the potential to change the socio-economic conditions that poor people contest.<sup>7</sup> While the Constitutional Court has recorded significant accomplishments, the impact it has had on the seemingly intractable problems of socio-economic injustices has been negligible.<sup>8</sup> Thus, a series of questions relating to the nature of socio-economic rights and the doctrine of the separation of powers have asked whether, how and to what extent courts should get involved in the enforcement of socio-economic rights as well as the trade-offs that are necessary to balance the role of courts and political institutions.<sup>9</sup> These questions need to be considered against the background of contentious state conduct that often adversely affect the social welfare of millions of people,<sup>10</sup> and also within the framework of the logic of

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3 O'Regan (n 1 above) 5.

4 T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 136.

5 Department of Justice and Constitutional Development 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state' (2012) *Media Statement* ii.

6 O'Regan (n 1 above) 3.

7 S Gloppen 'Public interest litigation, social rights and social policy' paper presented at the World Bank Conference on New Frontiers of Social Policy, Arusha, Tanzania, 12-15 December 2005 1.

8 E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 577.

9 D Butt 'Transformative constitutionalism and socio-economic rights: Courts and the making of public policy and the social contract revisited' (2008) *Centre for Socio-Legal Studies* 2.

10 I Trispiotis 'Socio-economic rights: Legally enforceable or just aspirational?' (2010) 8 *Opticon* 1826 1.

rights as a tool to curb the coercive powers of the state in order to protect the individual.<sup>11</sup>

The South African Constitution enshrines a Bill of Rights that forms the building blocks to the country's constitutional democracy.<sup>12</sup> This article focuses on the socio-economic rights contained in the Bill which, for the purpose of my arguments, I define as 'empowerment rights'. The political organs of state bear the major responsibility to ensure the progressive realisation of socio-economic rights. However, it is equally possible for realisation to happen through the courts – when contestation is raised challenging political strategies.<sup>13</sup> Stewart has ascertained that courts are mandated to utilise their 'quasi law-making' powers to translate entrenched socio-economic rights into enforceable legal claims.<sup>14</sup> Judicial enforcement thus constitutes a key strategy for protecting and empowering dispossessed groups, particularly when political channels of realisation become unavailable, ineffective, inaccessible or insufficient.<sup>15</sup>

When this happens, the contention is that the doctrine of the separation of powers becomes blurred, thereby threatening the essence and survival of democracy.<sup>16</sup> Arguments in this regard hold that socio-economic rights raise questions of policy, which fall exclusively within the jurisdiction of elected representatives of the people and not unelected and politically-unaccountable judges.<sup>17</sup> In an attempt to clear these misconceptions, Justice O'Regan's Helen Suzman memorial lecture focused on contextualising the role of the judiciary and the type of jurisprudence that is appropriate for the enforcement of socio-economic rights in relation to the question of the separation of powers. The lecture highlighted two interesting jurisprudential approaches, namely, 'jurisprudence of exasperation' and 'jurisprudence of accountability'. These constitute the point of

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11 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 386; M Rendel *Whose human rights?* (1997) 23.

12 Sec 7 Constitution of the Republic of South Africa, 1996.

13 Secs 34 & 38 Constitution.

14 L Stewart 'Adjudicating socio-economic rights under a transformative constitution' (2009) 20 *Penn State International Law Review* 506.

15 Cumming & Rhodes (n 2 above) 606.

16 OLM Ferraz 'Between usurpation and abdication? The right to health in the courts of Brazil and South Africa' (2009) <http://ssrn.com/abstract=1458299> (accessed 18 March 2013) 1; M Brennan 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9 *Queensland University of Technology Law and Justice Journal* 72; M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 13.

17 C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 17; E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464; D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475; S Liebenberg 'Social and economic rights: A critical challenge' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 79.

departure for this article. I intend to subject both approaches to scrutiny in order to determine to what extent they have been effective in the advancement of socio-economic rights and ultimately to social transformation. Before proceeding, two key issues need clarification, namely, the question of the separation of powers and the question of jurisprudence.

The abstract doctrine of the separation of powers (not explicitly enshrined in the Constitution) conveys the idea of power sharing between the executive, the legislature and the judiciary to ensure essential checks and balances with the aim to curb the abuse of power by any one of these organs.<sup>18</sup> According to this arrangement, the legislature is granted the powers to make laws, the judiciary to interpret and apply laws and the executive to implement laws.<sup>19</sup> It has been argued, however, that the separation of powers is not absolute and that there is 'no sovereign, unlimited power in a constitutional democracy'.<sup>20</sup> I will return to this later in the discussion.

I look at the question of jurisprudence from the viewpoint of 'exasperation' and of 'accountability'. A jurisprudence of exasperation, as O'Regan explains, refers to the tendency of judges to base their judgments on exasperation with the state of affairs in the country rather than on reasoned arguments based on the possibilities and limits of the law.<sup>21</sup> Applying this approach in adjudication has the tendency of leading the courts to apply a more stringent measure of accountability on the government.<sup>22</sup> It is cautioned that, if not properly crafted, a jurisprudence of exasperation may 'produce worse outcomes' or have a more devastating effect than the presumed bad government policy that the courts may intend to remedy.<sup>23</sup> A jurisprudence of accountability, on the other hand, recognises that the political branches are responsible for government action, which must be subject to judicial scrutiny, especially when contestation is raised in court challenging such action.<sup>24</sup> From these explanations, I take for granted that the difference between exasperation and accountability lies in the degree of scrutiny that the courts may apply in testing government action in relation to its obligations. The questions to answer are the following: What if the jurisprudence of accountability proves inadequate in advancing envisaged

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18 CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 305-306; Brennan (n 16 above) 72.

19 E Wiles 'Aspirational principles or enforceable rights? The future for socio-economic rights in national law' (2007) 22 *American University International Law Review* 43; see also Langford (n 16 above) 31.

20 O'Regan (n 1 above) 6; C O'Regan 'Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 1 *Potchefstroom Electronic Law Journal* 15.

21 O'Regan (n 1 above) 39.

22 As above.

23 As above.

24 O'Regan (n 1 above) 41.

transformation? What if the political and the socio-economic contexts necessitate the application of the jurisprudence of exasperation?

In section 2 below, I examine the constitutional imperative with regard to the enforcement of socio-economic rights, in which case I look at the transformative vision as well as the obligations imposed by the Constitution to ensure the enforcement of socio-economic rights. In section 3, I give an account of limitations to the enforcement of socio-economic rights. I illustrate with evidence from the *Mazibuko* case how the Constitutional Court's application of the jurisprudence of accountability caused a setback to the enforcement of the right to water. I argue that a possible combination of accountability with exasperation could have changed the course of the litigation to a more transformative outcome. In section 4 I draw attention to the obligation imposed on the state to take 'other measures'.<sup>25</sup> I argue that it does not only constrain the state to do more than business as usual, but it also requires the judiciary to be more transformative in the exercise of its broad remedial powers. I illustrate with reference to the *Modderklip* case the extent to which a measure of exasperation was applied to produce a more transformative outcome. In seeking to transform South African society, it is strategically unreasonable to dissociate exasperation from accountability and therefore I suggest that judicial enforcement should be seen as complementing political strategies to achieving social transformation rather than as an oppositional force to government.

## 2 Essence of judicial enforcement

### 2.1 Transformative vision

I examine the enforcement of socio-economic rights from the perspective of the purpose for which the rights were included in the Constitution. Knowledge of why socio-economic rights gained constitutional recognition and what they aim to achieve is important for determining the appropriateness of a strategy to ensure their enforcement. The Preamble outlines the historical context that sets the pace for the transformative vision. It provides that the Constitution was adopted to –<sup>26</sup>

- [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- [l]ay the foundations of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- [i]mprove the quality of life of all citizens and free the potential of each person ...

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25 Secs 26(2) & 27(2) Constitution.

26 Preamble to the Constitution.

Post-apartheid national exigency prioritises the construction of South African society on the pillars of democracy, social justice and fundamental human rights, by which sweeping social change would potentially be achieved through non-violent political processes guided by the law.<sup>27</sup> This envisages not just redressing the wrongs of the past, but promises to improve the quality of life and to free the potential of each person.<sup>28</sup> The process entails transforming the socio-economic *status quo* bequeathed by apartheid as well as the societal imbalances generated by the present system.<sup>29</sup> The Constitution does not only enshrine justiciable socio-economic rights, but makes provision for a comprehensive range of obligations and mechanisms relating to their realisation. It happens sometimes that the political framework becomes practically deficient in translating constitutional guarantees into real entitlements, thereby adversely affecting those whom the rights are meant to empower and to protect.<sup>30</sup> It thus becomes legitimately requisite for the political approaches and processes to be subjected to judicial scrutiny,<sup>31</sup> which virtually translates into the courts playing a complementary role in the process of social transformation.

Mbazira has noted that judicial enforcement defines the courts' commitment to fulfilling the constitutional vision of transformation from socio-economic deprivation to equitable distribution of resources with the aim of advancing the welfare of the poor.<sup>32</sup> It ensures that government is responsive and accountable to its people, not only through democratic processes, but also through litigation.<sup>33</sup> This does not make the courts an oppositional force to the state or litigation an instrument for solving political problems, but rather a response to political failure – a reaction to the realities of social injustice and a means of policing state action.<sup>34</sup> Based on the symmetrical power relations between the judiciary and government, it is more likely for government to abide by the decisions of the courts on socio-economic claims than it would respond when such claims are articulated through popular demands alone. When government uses power wrongfully or excessively, or when by omission or commission it derogates from its obligations, the courts have the authority to require it to render account in accordance with the prescribed rules of

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27 F Coomans 'Reviewing implementation of social and economic rights: An assessment of the "reasonableness" test as developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

28 S Liebenberg *Socio-economic rights: Adjudicating under a transformative constitution* (2010) 25.

29 Coomans (n 27 above) 169.

30 Pieterse (n 2 above) 2.

31 As above.

32 Mbazira (n 17 above) 1.

33 *Mazibuko v City of Johannesburg* CCT 39/09 (2009) ZACC 28 paras 98 & 160.

34 Christiansen (n 8 above) 611.

law and the interest of those to whom the rights are due.<sup>35</sup> In instances where the government fails to actualise socio-economic rights,<sup>36</sup> the courts have the task to interrogate and to insist that the state's failures be redressed.<sup>37</sup> This implies that government is not infallible. Thus, I argue that, where it becomes absolutely necessary to apply a jurisprudence of exasperation in order to sanction state conduct and the courts fail to do so, they may leave poor victims in the worst state of desperation.

Ferraz has argued that it is legitimate for courts to encroach into the province of the political organs of the state when necessary because the political decision to give socio-economic rights constitutional recognition also gives the courts the power to enforce the rights.<sup>38</sup> This argument dissolves the question of the courts' legitimacy in matters of enforcement and, therefore, negates any supposed breach of the principle of the separation of powers.<sup>39</sup> This is still a dilemma in South Africa where the question of legitimacy and the institutional competence of the judiciary as enforcement mechanism is still fervently contested.<sup>40</sup> Thus, the courts have been left with the option to either abdicate their role in the transformation process or to safeguard that role and therefore sometimes to encroach into the political domain.<sup>41</sup> The question that I proceed to examine is whether such an incursion would be legitimate if the courts decide to take the latter option.

## 2.2 Constitutional obligations

According to section 7(2) of the Constitution, the state is compelled to respect, protect, promote and fulfil the range of socio-economic rights as a matter of obligation – a rule of law that must be accomplished. These obligations suggest duties for the state, either to take positive action to implement the rights or to refrain from action that could limit full realisation.<sup>42</sup> The core socio-economic rights impose more qualified positive obligations on the state as provided for by sections 26(2) and 27(2), to take reasonable legislative and other measures to ensure that the entitlements promised by the rights are progressively achieved. It is understandable that government holds the democratic mandate to engage in policy decision making regarding the progressive realisation of these rights. What is often not taken into consideration is what may happen if the state fails in its commitment or if it decides to use its powers to subjugate the people

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35 S Gloppen 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights Journal* 22.

36 Pieterse (n 2 above) 5.

37 Pieterse (n 2 above) 17.

38 Ferraz (n 15 above) 1.

39 As above.

40 Ferraz (n 15 above) 1-2.

41 See Ferraz (n 15 above) 20.

42 Coomans (n 27 above) 167.

whose mandate it holds or to deny them their socio-economic rights. It is under such circumstances that the obligations attributed to the courts relating to the enforcement of these rights become relevant.

Given South Africa's historical background, there was a genuine political reason for entrusting into the hands of the judiciary part of the obligation to protect the vulnerable and the marginalised against state repression. Therefore, section 8(1) enjoins the judiciary, equally as it does other organs of state, to ensure that the rights contained in the Constitution are enforced. Section 34 grants authority to the courts to adjudicate on any dispute that can be resolved by application of the law. In addition, section 38 empowers the courts with broad remedial powers to provide appropriate relief when an infringement or threatened violation of a right is established. These extensive powers give the courts the latitude to enforce socio-economic rights, which the Constitutional Court has declared justiciable and worthy of protection from improper invasion.<sup>43</sup> By the very nature of their justiciability, an opportunity is provided for converting socio-economic rights into actual entitlements, as right-holders have the option to insist on the fulfilment of the rights through the judicial process.<sup>44</sup>

This enables individuals and groups of persons to move the courts to make decisions on the impact of policies and legislation concerning the fundamental interests protected by socio-economic rights.<sup>45</sup> Justice Yacoob affirmed in the *Grootboom* judgment that the application of socio-economic rights is 'an obligation that courts can and, in appropriate circumstances, must enforce'.<sup>46</sup> The obligation consequently translates into a political commitment to construct post-apartheid South Africa on the pillar of social justice. However, Klare has observed that judges have been reticent and hesitant in assuming this wide range of powers invested in them.<sup>47</sup> Not only have the courts come short of exercising the full measure of their authority in matters of judicial enforcement but, in instances where they have done so, objections have been raised contesting that the courts are jeopardising the doctrine of the separation of powers. In what follows, I look at the impact of such objections.

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43 *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) para 78.

44 Pieterse (n 2 above) 3.

45 Liebenberg (n 27 above) 34.

46 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 94.

47 Klare (n 28 above) 165.

### 3 Limitations on the judicial role

#### 3.1 Separation of powers objection

Objections to the judicial enforcement of socio-economic rights in South Africa date back about two decades when negotiations for the drafting of a new constitution began. Davis, for instance, argued that to over-emphasise the importance of socio-economic rights by giving them constitutional recognition was to put too much powers in the hands of the judiciary, which lacks the kind of democratic accountability that the legislature and the executive are gifted with.<sup>48</sup> The *Certification* judgment, however, made it clear that arguments with regard to the encroachment of the judiciary into matters of policy and budgetary allocation were unfounded.<sup>49</sup> The arguments have persisted because, as a matter of fact, the enforcement of socio-economic rights has seen the courts exercising substantial influence on policy making.<sup>50</sup> Proponents of the doctrine of the separation of powers have contended that this intrusive practice perpetuated by the courts is politically incorrect.<sup>51</sup> It is believed that when courts enforce socio-economic rights, judges tend to make decisions determining the types of programmes the government should implement. Meanwhile, according to these perceptions, the judiciary is supposed to interpret and apply the law only and not to make decisions that would have a policy or budgetary implication.<sup>52</sup>

Taylor has argued that the separation of powers is not distinctly partitioned into distinct 'institutional boxes'.<sup>53</sup> It has also been stressed that there is no absolute separation of powers under a South African constitutional democracy, which is particularly shaped by a 'delicate balancing' of functions in order to avoid a repetition of the errors of the past and to focus on societal transformation.<sup>54</sup> Consequently, the executive duty to develop and implement national policy is subject to scrutiny by the courts.<sup>55</sup> In effect, the separation of powers requires the judiciary to regulate and to moderate government conduct that has caused or is likely to cause an adverse effect on the population. In this regard, the courts have constantly been challenged with how to enforce the positive obligations imposed

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48 Davis (n 17 above) 489.

49 *Certification* (n 43 above) paras 77-78; Coomans (n 27 above) 172.

50 MM Taylor 'The judiciary and public policy in Brazil' (2008) 4 *DADOS* 14-15.

51 Taylor (n 50 above) 15.

52 Brennan (n 16 above) 72.

53 Taylor (n 50 above) 14.

54 O'Regan (n 1 above) 22; C O'Regan 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in J Barnard-Naude *et al Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 10; Fombad (n 18 above) 309.

55 O'Regan (n 1 above) 22.

by socio-economic rights and at the same time respect the limits of the separation of powers.<sup>56</sup>

The Constitutional Court has struggled with this dilemma – seeking to find a point of balance in the overlapping functions between the judiciary, the legislature and the executive.<sup>57</sup> Constrained by the enduring tension, the courts have preferred to err on the side of abdication as a way of managing the somewhat strained politico-judicial relationship.<sup>58</sup> While this may seem reasonable, considering that the doctrine of the separation of powers is an important tenet of the hard-earned democracy, I argue that the tension creates unnecessary restrictions on the proper functioning of the courts as a complementary mechanism in the transformation process. In the narrative that follows, I explain how the judiciary has been the architect of its own limitations. I illustrate how this has caused difficulties and setbacks to the enforcement of socio-economic rights.

### 3.2 'Jurislimitation'

The Constitution grants the courts the widest possible review powers, including a broad scope in the enforcement of socio-economic rights. This autonomy has been eroded gradually through a process of 'jurislimitation'. By 'jurislimitation' I refer to the practice by which the judiciary has consciously or unconsciously succumbed to political pressures, academic criticisms or imposed unnecessary restrictions on its legitimate powers to the extent of frustrating its proper functioning, especially in the enforcement of socio-economic rights. The Court stated in the *Treatment Action Campaign* case, for example, that<sup>59</sup>

[t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.

In reality, the Constitution does not contemplate such a narrow role as coined by the court. Christiansen has noted that the court is endowed with incredibly unfettered authority and the liberty to set its own limits or to work without them.<sup>60</sup> The only limitations that are legitimate are those of general application contemplated by section 36, which of course aims at the broader interests of society.<sup>61</sup> Otherwise, the restraints that seem obvious are those which the

56 Coomans (n 27 above) 174.

57 Coomans 167.

58 T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf> (accessed 14 March 2013) 13.

59 *Minister of Health v Treatment Action Campaign* (1) 2002 10 BCLR 1033 (CC) (TAC) para 38.

60 Christiansen (n 8 above) 594.

61 See C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 2 *South African Law Journal* 283.

judiciary has acknowledged or imposed on itself by avoiding to explore and to exercise the full parameters of its role or by delineating a narrower margin of scrutiny than is provided by the Constitution.

Providing constitutional protection to socio-economic rights means that the courts are granted the jurisdiction to interpret rights and to adjudicate upon their infringement or threatened violation. Therefore, the courts are not only permitted, as Pieterse has argued, but are authorised by the Constitution to give meaning to socio-economic rights through interpretation, evaluation, scrutiny and the granting of appropriate remedies when a breach of the rights is established.<sup>62</sup> The courts have, however, increasingly abridged these wide-ranging powers and have reduced it to the 'lowest standard of reasonableness – mere rationality review'.<sup>63</sup> Through such self-imposed restraint, even on matters that it has authority to adjudicate upon, the courts have made the context for the enforcement of socio-economic rights difficult,<sup>64</sup> as illustrated by this excerpt:<sup>65</sup>

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.

In essence, the Constitution does not make provision for this limited kind of interpretation. Sections 25(5), 26(2) and 27(2) clearly stipulate that the obligation to realise socio-economic rights is to take 'reasonable legislative and *other measures*' (my emphasis). It is unnecessarily restrictive for the courts to acknowledge that 'a wide range of possible measures could be adopted by the state to meet its obligations', but to declare that a 'court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted'. An even broader scope for interpretation is provided obliging the courts, in order to give effect to a right in the Bill to apply, or where necessary to develop the common law to the extent that legislation does not give effect to the right in question.<sup>66</sup> This provision allows the courts to do more than defer decision making to the political organs.

Also illustrative of the practice of jurilimitation is the allegation of the courts' rejection of the jurisprudence of exasperation, which I

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62 Pieterse (n 11 above) 383.

63 Steinberg (n 61 above) 281.

64 HJ Richardson III 'Patrolling the resource transfer frontier: Economic rights and the South African Constitutional Court's contributions to international justice' (2007) 9 *African Studies Quarterly* 96.

65 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 41.

66 Sec 26(2) Constitution.

think is illogical. I argue that the jurisprudence of exasperation demonstrates greater potential to advance the enforcement of socio-economic rights. The reasons for such rejection – probably to address the question of the separation of powers – may sound appropriate,<sup>67</sup> but in effect is restrictive of the courts' agency in ensuring that the state complies with its constitutional obligations. The jurisprudence of accountability, which seems a preferred alternative, in my argument is not set to achieve envisaged radical transformation. It simply gives way to conformity with government's slow-pace reformist approaches to the realisation of socio-economic rights. In instances where the Constitutional Court has relied principally on accountability, it has left much to be desired of its judgments. I justify this claim with reference to the *Mazibuko* case, in which I demonstrate how the Court faltered in its application of the jurisprudence of accountability.

### 3.3 Considering the *Mazibuko* case

The *Mazibuko* case dealt with the section 27(1)(b) right to have access to sufficient water. Lindiwe Mazibuko and four others, representing the community of Phiri, were extremely poor when they launched their action challenging the City of Johannesburg's water policy, which they claimed deprived the community of their constitutional right to sufficient water.<sup>68</sup> They alleged that the free basic water provided by the City was not sufficient water to guarantee a life with dignity.<sup>69</sup> Their claim was grounded on the constitutional promises to improve quality of life and to make every individual fit to survive.<sup>70</sup> As part of the plan to fulfil this promise, Dugard submits that the government recognised the need to 'redistribute water resources and services more equitably'.<sup>71</sup> In accordance, a 'progressive legislative framework for water services', comprising a national free basic water policy was passed, guaranteeing the provision of a sustenance quantity of water per household per month.<sup>72</sup> The good intentions of the water policy were eventually replaced by a neo-liberal obsession with cost recovery through a metering system that mechanically disconnected the water supply once the basic allowance was exhausted.<sup>73</sup> As a result, large numbers of poor people and households were deprived of access to sufficient water, partly because they could not afford to pay.<sup>74</sup>

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67 See Richardson (n 64 above) 96.

68 *Mazibuko* (n 33 above) para 44; G Quinot 'Substantive reasoning in administrative law adjudication' in K Heinz *et al Constitutional law review* (2010) 124.

69 *Mazibuko* (n 33 above) para 44.

70 See Preamble to the Constitution.

71 J Dugard 'Civic action and the 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) 73.

72 Dugard (n 71 above) 73.

73 Dugard 74 77.

74 *Mazibuko* (n 32 above) para 166.

With support from an alliance of water rights activists and public interest litigation organisations,<sup>75</sup> the aggrieved residents instituted action against the City of Johannesburg on a number of constitutional grounds.<sup>76</sup> They contested the six kilolitres monthly basic water allowance as not amounting to 'sufficient water' and also argued against the installation of pre-paid metres as unlawful, unreasonable, unfair and discriminatory.<sup>77</sup> They urged the Court to define the content of the right to water and to quantify the amount of water that should amount to sufficient water to guarantee a right to life with dignity, which in their argument should be 50 litres per person per day.<sup>78</sup> The Court held that the nature of a right can only be understood within the context of the obligations imposed by it.<sup>79</sup> It further stated that the obligation imposed on government is one to take reasonable legislative and other measures to ensure progressive realisation.<sup>80</sup> The Court ruled that it was inappropriate for it to give a quantified content to what constitutes sufficient water because it is the prerogative of government to do so.<sup>81</sup> Judgment was pronounced in favour of the City of Johannesburg – finding its water policy reasonable and the installation of pre-paid metres lawful.<sup>82</sup>

### 3.3.1 Accountability compromised

Accountability is one of the central principles in the protection of human rights. Yamin has illustrated, with particular focus on the right to maternal health, the need for transformative accountability in dealing with socio-economic rights.<sup>83</sup> She underscores the fact that accountability requires more than just setting out abstract norms, but entails the formulation of policies and programmes to ensure the implementation and evaluation of socio-economic rights as well as the provision of remedies in the event of violations.<sup>84</sup> In Tomasevski's view, accountability necessitates explicit standards of measurement of a government's performance as well as procedures to ensure the attainment of those standards.<sup>85</sup> It requires the state to justify measures taken in the realisation of socio-economic rights. According to Yamin, accountability entails 'holding actors responsible for their

75 Dugard (n 71 above) 87-88.

76 As above; Quinot (n 85 below) 124.

77 Constitutional Court of South Africa *Mazibuko v City of Johannesburg* CCT 39/09 [2009] ZACC 28 (2009) Media summary 2.

78 *Mazibuko* (n 32 above) para 51.

79 Stewart (n 14 above) 504.

80 Stewart 504; *Mazibuko* (n 32 above) para 67.

81 *Mazibuko* para 61.

82 *Mazibuko* paras 9 & 169; Quinot (n 68 above) 126.

83 A Yamin 'Toward transformative accountability: Applying a rights-based approach to fulfil maternal health obligations' (2010) 7 *SUR International Journal on Human Rights* 95-121.

84 Yamin (n 83 above) 97-79.

85 K Tomasevski 'Strengthening pro-poor law: Legal enforcement of economic and social rights' (2005) *ODI – Rights in Action* 7.

actions in light of standards of behaviour and performance', which in a human rights framework combines elements of 'responsiveness, answerability and redress'.<sup>86</sup>

The manner in which the Court arrived at its conclusions in the *Mazibuko* case as well as its application of the reasonableness standard has been criticised for want of accountability on the part of the City of Johannesburg as duty bearer. Instead of applying the principles of accountability in the *Mazibuko* case, the Court rather took a biased and sympathetic standpoint, stating that 'the case needs to be understood in the context of the challenges facing Johannesburg as a city'.<sup>87</sup> Quinot has observed that the Court's approach was evidently lacking of the same kind of consideration for the dismal personal circumstances of the litigants and the impact of the inadequacy of water on their lives.<sup>88</sup> Requiring policy decisions that affect people's rights to be justified and subjecting those justifications to public scrutiny are fundamental to accountability.<sup>89</sup>

In accordance with Mureinik's conception of a culture of justification,<sup>90</sup> the Court should have required the City of Johannesburg to provide substantive justification for its refusal to provide the quantity of water that the litigants were laying claim to. By a culture of justification, Mureinik refers to the situation where<sup>91</sup>

every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.

Another account of a culture of justification requires government to provide 'substantive justification' for its conduct in terms of the 'rationality and reasonableness of every action and the trade-offs that every action necessarily involves'.<sup>92</sup>

The City of Johannesburg was not called upon to justify its action to deprive the community of sufficient water. The Court rather recounted the hardship that the City had suffered as a result of significant water losses and the problem of non-payment, the efforts made by the City in constantly reviewing the water policy and the apparent success and rate of 'customer satisfaction' of the water project.<sup>93</sup> How the Court came to the conclusion that the water policy was reasonable remains questionable.<sup>94</sup> Quinot has argued that

86 Yamin (n 83 above) 97.

87 *Mazibuko* (n 32 above) para 7.

88 Quinot (n 82 above) 126.

89 Yamin (n 83 above) 100.

90 E Mureinik 'Bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

91 Mureinik (n 90 above) 32.

92 M Cohen-Eliya & I Porat 'Proportionality and the culture of justification' (2011) 59 *American Journal of Comparative Law* 466-467.

93 Quinot (n 82 above) 126; *Mazibuko* (n 32 above) paras 12, 18 & 40.

94 Quinot (n 82 above) 128.

alternative interpretations seemed possible and wonders why the Court did not explain its preference for reasonableness.<sup>95</sup> Considering the litigants' desperate circumstances, it is necessary to ask whether it was prudent for the Court to rely solely on accountability as mode of adjudication. In Lehmann's view, the *Mazibuko* case presented an occasion for the Court to articulate its role as an 'effective agent of social change' or as custodian of the transformation project, but it failed to utilise the opportunity.<sup>96</sup>

### 3.3.2 Missing the mark

I presume that the judicial enforcement of socio-economic rights would not amount to the constitutional imperative to improve quality of life and to free the potential of every citizen if the circumstances of the poor are not taken into consideration during litigation. If the assertion is true that the courts have rejected a jurisprudence of exasperation, it means that the courts have portrayed themselves virtually out of touch with the lived realities of the poor. The litigants' claim in the *Mazibuko* case was not just about the right to water, but about having access to *sufficient* water to meet livelihood needs. It is unreasonable that the Court failed to take the desperate circumstances of the litigants into consideration or to acknowledge the fact that they simply could not afford to pay for extra quantities of water.

Approaching the case from the angle of exasperation, on the one hand, would probably have enabled the Court to undertake an empirical scrutiny of the deplorable socio-economic circumstances of the litigants.<sup>97</sup> Had the Court then combined its finding with a measure of accountability, on the other hand, by requiring the City of Johannesburg to justify its water policy as well as its decision to refuse to grant the litigants additional water, the Court could have arrived at a more robust and probably more transformative conclusion. Alternatively, owing to the doctrine of the separation of powers, the Court could simply have drawn the City's attention to its constitutional obligation to take 'other measures' to ensure that the deprived residents get sufficient water.

If the Court had sufficient justification to believe that the City's water policy was reasonable, there is clearly a parallel obligation imposed by section 27(2) on which the Court with its broad remedial powers could have based its accountability measurement, to require the City to take additional measures to give effect to the litigants' claims. According to the Court's argument that the content of a right

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95 Quinot (n 82 above) 129.

96 K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 165.

97 See *Mazibuko* (n 33 above) para 10.

is determined by the obligation imposed by it,<sup>98</sup> section 27(2) actually imposes such an obligation to take other measures to realise the right to sufficient water. This means that, as the City's water policy was challenged, the corresponding obligation to take other measures needed to have been interrogated.

According to this logic it would have been appropriate for the Court to hold the City a bit more accountable – probably to apply a measure of exasperation, considering that the Phiri residents were acutely poor and could not afford to pay for additional consumption of water.<sup>99</sup> It was at the Court's discretion, after analysing the necessity of water to life and the consequences of the lack of it on livelihood, to proceed to consider the matter perhaps not merely on the basis of a socio-economic right, but possibly as a 'right-to-life' case.<sup>100</sup> Water is life, which means a denial of the right to water amounts to a denial of the right to life.

The Constitutional Court has also established that the enforcement of socio-economic rights is context-specific.<sup>101</sup> It is therefore irrational for the courts to avoid one jurisprudential approach in favour of another when each of the approaches may become relevant, depending on the situation. The context in the *Mazibuko* case offered an opportunity for the Court to combine the jurisprudence of accountability with that of exasperation, but it failed to do so. It was possible for the Court to accomplish this without having to defer to the state to determine the content of the right to sufficient water. The Court could effectively have exercised its share of responsibility within the 'dialogue' of the separation of powers by ensuring that government abides by its constitutional obligations, while also providing legal protection to the poor against the state's 'coercive' powers.<sup>102</sup> By relying solely on accountability, which somehow got compromised by deference, the Court practically limited its agency and therefore also restricted the potential of socio-economic rights litigation to advance transformation.<sup>103</sup> I did make mention of the obligation to take other measures. I now turn to examine what this entails.

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98 *Mazibuko* (n 33 above) para 67.

99 *Mazibuko* para 31.

100 See M Langford *Litigating economic, social and cultural rights: Achievements, challenges and strategies*, Centre on Housing Rights and Evictions (2003) 14.

101 *Grootboom* (n 46 above) para 25.

102 Taylor (n 50 above) 2.

103 Quinot (n 82 above) 136.

## 4 Obligation to take other measures

### 4.1 Matter for interpretation

The socio-economic rights enshrined in the South African Constitution impose obligations on the state to take reasonable legislative and *other measures* within its available resources to ensure their progressive realisation.<sup>104</sup> The obligation underlines that it is not one option or the other. It demands concurrent action. If the state has simply taken legislative measures, it is the duty of the courts to test the reasonableness of the laws in relation to the purpose of the socio-economic rights in question. It is also within the courts' broad review powers to interrogate the other measures that the state is obliged to take. This constitutes a challenge to the Constitutional Court's insistent refusal to determine the substantive content of socio-economic rights.

The Constitution does not define 'other measures', leaving it to interpretation by the courts. If the state cannot establish evidence of other measures, it falls within the interpretative duty and the broad remedial powers of the courts as custodians of the Constitution to determine what constitutes other measures. Klare has stated that 'interpretation is a meaning creating activity'.<sup>105</sup> Taylor has also referred to this activity as the 'definition of alternatives'.<sup>106</sup> Accordingly, the courts have a duty to establish what the Constitution means when it says that the state must take other measures alongside legislative measures. Interpreting this obligation in accordance with section 39(2) would require the courts to apply the rules of the common law where legislation remains silent about the rights in question.

The obligation imposed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) 'to take steps ... by all appropriate means', including the adoption of legislative measures,<sup>107</sup> relates closely to the obligation to 'take reasonable legislative and other measures' contained in the South African Constitution. The Committee on Economic, Social and Cultural Rights (ESCR Committee) has stated that the obligation 'to take steps' is not qualified or limited by other considerations, but entails such steps to be deliberate, concrete and clearly targeted towards realisation.<sup>108</sup> The adoption of legislative measures, the Committee notes, is not exhaustive of a state's obligations and thus the requirement 'by all

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104 Secs 26(2) & 27(2) Constitution.

105 Klare (n 39 above) 159.

106 Taylor (n 50 above) 1.

107 Art 2(1) ICESCR.

108 ESCR Committee General Comment 3, The nature of states parties' obligations UN Doc HRI/GEN/1/Rev.6 14 (2003) para 2.

appropriate means' must be given its broadest interpretation, which may include the provision of judicial remedies.<sup>109</sup>

The ESCR Committee considers other measures to include, but not be limited to, 'administrative, financial, educational and social measures'.<sup>110</sup> In its concluding observations on Peru, for example, the Committee recommended the government of Peru to provide detailed information on the legislative and *other measures* and practices adopted in connection with the right to adequate housing and the right to social security.<sup>111</sup> The Committee ascertains its duty to make the ultimate determination as to whether all appropriate measures have been taken.<sup>112</sup> In the context of South Africa, it is also the duty of the Constitutional Court to determine whether other measures have been taken.

#### 4.2 Matter of content

The enforcement of socio-economic rights is problematised by an inability to define their content.<sup>113</sup> With the courts' current approach which focuses principally on scrutinising government measures for reasonableness, the courts would hardly be able to determine the material content of each of the socio-economic rights. It requires considering the circumstances of the poor, which in turn means interpreting the rights provisions in a manner that addresses those circumstances. The obligation imposed on the state to take other measures requires the courts, when adjudicating socio-economic rights, to consider the lived experiences of the poor. This duty may require the courts to compel the state, where perhaps it has taken only legislative measures, to also take other measures to address the dismal conditions of impoverished communities, which more often than not constitute the basis for litigation.

Steinberg has argued that defining the content of socio-economic rights is typically a policy-making procedure and, thus, allowing the judiciary to perform that function stifles the constitutional conversation.<sup>114</sup> While it is important to keep the conversation alive, it is even more important to prioritise the constitutional vision to ensure that it does literally translate into making life better for the poor. The role of the courts in the transformation process may thus entail compelling the state to explicitly define the content of each of the entrenched socio-economic rights upon which the courts may then be able to base their adjudication. The obligation to take other measures may also form the basis on which civil society organisations could

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109 ESCR Committee General Comment 3 paras 4-5.

110 ESCR Committee General Comment 3 para 7.

111 Concluding observations of the Committee on Economic, Social and Cultural Rights: Peru 16 May 1997 E/C.12/1/Add.14 para 40.

112 ESCR Committee General Comment 3 para 4.

113 O'Regan (n 1 above) 32.

114 Steinberg (n 61 above) 272-284.

formulate *amicus curiae* arguments in determining the content of socio-economic rights.

The realisation of socio-economic rights through political strategies generally translates into the material things guaranteed by the rights. I argue that, when the violation of a right is challenged in court, the result of positive adjudication should equally amount to entitlement to the same material things promised by the right in question. This may sound contrary to the principle of progressive realisation but, in effect, a positive judgment in my view implies that the adjudicated right has matured for immediate realisation. The effective implementation of court orders therefore becomes imperative to ensure that adjudicated rights translate into material entitlements. By immediate realisation I mean, at least, taking the first steps to guarantee that the entitlement can then progressively be expected.

Interpreting the obligation to take other measures as a matter of giving content to socio-economic rights may therefore imply mandating the state to take such action that would respond to or result in entitlement to the tangible things that realisation of the rights would amount to. It may also imply compelling the state, after taking legislative measures, to also establish the minimum core of each of the rights or, better still, to set an 'invariable universal standard', as suggested by Stewart.<sup>115</sup> If making this determination 'constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution', as the Court has acknowledged.<sup>116</sup>

### 4.3 Matter for adjudication

Besides interpretation and the determination of content, the duty is also incumbent on the courts to adjudicate on the basis of the provision to 'take other measures'. It means that, when the state defaults in this obligation, the courts are tasked to interrogate why other measures would not be taken and if not satisfied with the justification, to compel the state to take such other measures as mandated by the Constitution. This constitutes a pragmatic adjudication tool at the disposal of the courts to hold the state accountable for its socio-economic rights obligations. Coomans argues that, when the core elements of a right are at stake in a case, a higher degree of justification should be required from the government to justify non-implementation, in which case it also becomes legitimate for a court to apply a more profound measure of scrutiny.<sup>117</sup> Having to subject only legislative measures to enquiry is not enough, as the Constitutional Court rightly acknowledged in the *Grootboom* case:<sup>118</sup>

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115 Stewart (n 14 above) 494.

116 *TAC* (n 59 above) para 99.

117 Coomans (n 27 above) 190.

118 *Grootboom* (n 46 above) para 42.

Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive ... The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

Adjudicating on the basis of the obligation to take other measures may entail looking at the desperate circumstances of the poor. This may not overrule the possibility of the courts resorting from time to time to a jurisprudence of exasperation, if that is what it requires to remedy a situation. This may significantly *influence* the formulation of policy or the allocation of budgets, but certainly does not allow the judiciary to take over the political function. It also does not grant the courts the escape route to defer on matters which it has a discretion to adjudicate upon. I illustrate these arguments in the analysis that follows.

#### 4.4 Revisiting the *Modderklip* case

The *Modderklip* case<sup>119</sup> concerned the state's obligations in the context of a private landowner's property rights against a community of informal settlers unlawfully occupying the former's farm land.<sup>120</sup> The case narrowly dealt with the section 26 right of access to adequate housing.<sup>121</sup> The litigation originated when a group of squatters from the overcrowded Daveyton Township invaded farm land in the Benoni locality belonging to Modderklip Boerdery (Modderklip).<sup>122</sup> Initially the spill-over population occupied a strip of government-owned land from which they were immediately forcefully evicted.<sup>123</sup> In their desperation, the squatters found an alternative on the Modderklip farm, which they invaded and established what became known as Gabon Informal Settlement.<sup>124</sup> Modderklip obtained an eviction order from the Johannesburg High Court, which never was executed because all relevant state authorities failed to collaborate.<sup>125</sup>

119 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

120 S Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2005) *Centre for Human Rights and Global Justice Working Paper* 823; K Tissington 'Demolishing development at Gabon Informal Settlement: Public interest litigation beyond *Modderklip*' (2011) 27 *South African Journal on Human Rights* 192.

121 S Wilson 'Judicial enforcement of the right to protection from arbitrary evictions: Lessons from Mandelaville' (2006) 22 *South African Journal on Human Rights* 535; Tissington (n 120 above) 192.

122 S Wilson 'Breaking the tie: Evictions from private land, homelessness and a new normality' (2009) *South African Law Journal* 276; *Modderklip* (n 119 above) para 3.

123 *Modderklip* (n 119 above) para 3.

124 *Modderklip* paras 7-8.

125 *Modderklip* para 8.

Modderklip then launched action requesting the Pretoria High Court to compel the state to enforce the order.<sup>126</sup> Finding the state in contravention of the obligations imposed by sections 26(1) and (2) of the Constitution, the High Court issued a structural interdict requiring the state to present a comprehensive plan on how it intended to implement the eviction order.<sup>127</sup> Not comfortable with the ruling, the state petitioned the Supreme Court of Appeal, which substantively upheld the decision of the lower court and further ordered the state to pay compensation to Modderklip for damages incurred as a result of the unlawful occupation.<sup>128</sup> In a further appeal, the Constitutional Court found the state in breach of its constitutional obligations<sup>129</sup> and pronounced that the state was doubly responsible to protect Modderklip's right to property, and at the same time upheld the right of the squatters to have access to adequate housing.<sup>130</sup>

The orders required the state to pay compensation to Modderklip for the entire duration of the unlawful occupation,<sup>131</sup> while the squatters were granted entitlement to remain on the land until an alternative arrangement for their resettlement was made by the state.<sup>132</sup> In essence, as Brand has noted, the order required the state to pay tenancy so that the squatters could be guaranteed shelter, without further infringing on Modderklip's property rights.<sup>133</sup> In contrast to the *Mazibuko* case, the Court in the *Modderklip* case showed greater sympathy towards the poor and therefore went to greater lengths to make particularly robust findings.<sup>134</sup> I proceed to examine the circumstances that necessitated the Court to come to its robust decision.

#### 4.4.1 Nowhere to go

One of the challenges for the poor to survive in democratic South Africa has to do with the acute problem of homelessness,<sup>135</sup> which poses 'questions of major political concern'.<sup>136</sup> In the *Modderklip* case, the Constitutional Court reasoned that<sup>137</sup>

[t]he frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the

126 *Modderklip* (n 119 above) para 11.

127 *Modderklip* para 8.

128 *Modderklip* para 16.

129 *Modderklip* paras 68(3)(a) & (4).

130 D Brand *Courts, socio-economic rights and transformative politics* (2009) 109.

131 *Modderklip* (n 119 above) para 68(3)(b).

132 *Modderklip* para 68(3)(c).

133 Brand (n 130 above) 109.

134 Brand 249-250.

135 *Modderklip* (n 119 above) para 36.

136 Brand (n 130 above) 61.

137 *Modderklip* (n 119 above) para 36 (footnote omitted).

chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.

The manner in which the Court approached this case mattered immensely in determining the outcome. If the Court had relied on accountability alone, probably by requiring the state to justify the reasonableness of measures taken, it might have had to return to the same decision it took in the *Grootboom* case. Five years after the *Grootboom* case, the state found itself in the *Modderklip* case unable to respond to the urgent housing needs of desperate squatters who had virtually nowhere else to go.<sup>138</sup> It required a certain degree of exasperation to see the situation of the squatters as necessitating immediate action. Firstly, overcrowded Daveyton could no longer contain them. Secondly, they were forcefully and arbitrarily evicted from state-owned land. Thirdly, they were convicted on criminal charges for trespassing and given a legal warning upon release not to return to the farm. These notwithstanding, the squatters defied the odds and returned to continue their unlawful occupation of the Modderklip farm from which they were haunted with eviction.<sup>139</sup> Because they had nowhere else to go, they simply proceeded to establish the informal community, lined with streets, fenced and numbered homes, commercial activities and a functional civic structure.<sup>140</sup>

If the Court had relied on the jurisprudence of accountability, the state would obviously have been able to justify its action with a housing policy that it intended to pursue progressively but which, under the circumstances, could not adequately remedy the desperation of the squatters. The state overlooked the constitutional obligation to take other measures, but it turned out to be the most reasonable action as the Court was later to decide. In Wilson's view, judges must exercise the extensive authority assigned to them with profound sensitivity to the particular needs of the large number of destitute people who often are confronted with threats of arbitrary eviction.<sup>141</sup> The steadfastness of the squatters to stay on the Modderklip land unlawfully portrayed exasperation on such a scale that the Court could not ignore it. This played an instrumental part in determining the vigour of scrutiny of the facts of the case.<sup>142</sup> The state failed or refused to engage when Modderklip sought its co-operation with reasonable suggestions to finding a durable solution to the squatters' plight.<sup>143</sup> Exasperated by the state's intransigence and the fact that the squatters were extremely desperate, the Court came to the conclusion that, although their occupation of the Modderklip

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138 *Modderklip* (n 119 above) para 25.

139 *Modderklip* paras 5 & 7.

140 *Modderklip* para 8.

141 Wilson (n 121 above) 535-536.

142 Brand (n 130 above) 157.

143 *Modderklip* (n 119 above) paras 4 & 6.

land was unlawful, they could not be evicted unless the state provided suitable alternative accommodation.<sup>144</sup>

#### 4.4.2 Outcome of the litigation

As a consequence of the type of jurisprudence the Court applied, which I argue amounted consciously or unconsciously to exasperation, the *Modderklip* case produced a far more transformative outcome than in the *Mazibuko* case, which the Court adjudicated on the basis of accountability. In line with my earlier argument, the judgment resulted in direct entitlement to the material things promised by the section 26 right to have access to adequate housing. The Chief Albert Luthuli Extension 6 Township, constructed some 3,5 kilometres from the Modderklip site for relocation of the Gabon community, is reported to be a direct outcome of the judgment.<sup>145</sup> Thus, the judgment not only granted the squatters the entitlement to remain on the Modderklip land, but also provided immediate access to suitable alternative accommodation in the event of unavoidable eviction.<sup>146</sup> Further to granting direct entitlement to the squatters, the judgment is said to have also extended housing entitlement to other similarly-situated impoverished squatters from other communities within the municipality.<sup>147</sup> This was accomplished without the Court having to take over the political responsibility to decide how the housing project should be planned or executed. The Court determined that the state's obligation goes beyond the mere provision of 'mechanisms and institutions' for enforcement.<sup>148</sup> The Court simply directed the state to do what it initially refused to do.

The judgment created a significant precedent that has considerably advanced the right of access to housing. The decision in the *Grootboom* case required the state to have a reasonable housing policy that responds to the needs of the most desperate in society and that such a policy must provide at least temporary shelter for those with no access to land.<sup>149</sup> It is apparent, as Thomas has stated, that simply having a policy and progressively working according to that policy to provide housing to everyone 'in the long run' is not enough.<sup>150</sup> To support this claim, Wilson observes that<sup>151</sup>

[e]ven though *Grootboom* and the Emergency Housing Policy had the potential to revolutionise the way in which the courts responded to private eviction applications which may lead to homelessness, the consequences of *Grootboom* for eviction applications were not immediately seized on by the

144 Brand (n 130 above) 157.

145 Tissington (n 120 above) 200 204.

146 Wilson (n 122 above) 289.

147 Tissington (n 120 above) 200.

148 *Modderklip* (n 119 above) para 43.

149 *Grootboom* (n 46 above) paras 42, 44 & 99; Wilson (n 122 above) 277.

150 G Thomas 'Taking socio-economic rights seriously in South Africa' in G Thomas *The discourses on the right to housing in Gauteng Province 1994-2008* (2010) 174.

151 Wilson (n 122 above) 276.

courts. It appears that the courts needed another exceptional case to take the next logical step in securing the right to housing for people facing eviction. This step was to be taken in the *Modderklip* case.

Contrary to the *Grootboom* case – decided on the basis of accountability, which held that the homeless cannot claim ‘shelter or housing’ from the state ‘immediately upon demand’<sup>152</sup> – the *Modderklip* case formed a ‘new normality’ according to which ‘the state [was] under a duty to act positively to give effect to the right of access to adequate housing and to provide suitable alternative shelter in the event that an eviction order would otherwise lead to homelessness’.<sup>153</sup> It is acknowledged that the *Modderklip* case contributed enormously in shifting the ‘goalposts’ in the judicial enforcement of socio-economic rights.<sup>154</sup>

## 5 Conclusion

Envisaged transformation for South Africa, Richardson claims, will not be achieved by continuous nostalgia about a history and a socio-economic inheritance that remains scarred by the consequences of apartheid.<sup>155</sup> Justice Yacoob has emphasised that the Constitution obliges the state to act positively to ameliorate the deplorable conditions throughout the country.<sup>156</sup> Without appropriate checks and balances by the courts, decision making by the political system may seem efficient but may indeed be challenged by serious irregularities.<sup>157</sup> The judicial enforcement of socio-economic rights has in fact demonstrated a potential to balance oscillations in legislations and policies that sometimes inflict adverse consequences on the poor as a result of defective political decision making. I have shown how, through political intransigence, the state has in some instances not complied adequately with its socio-economic rights obligations, which has allowed the courts the latitude to require the state to justify its actions or in-action. Such intervention has no doubt created tension on the grounds of the separation of powers which, as indicated, has adversely affected the courts’ jurisprudence, thus creating a potentially limiting effect on the enforcement of socio-economic rights.

Consequently, Wilson notes that aspirations of that kind of a judiciary that will radically interpret the Constitution and moderate the law in a manner that gives the poor a greater armoury of rights to socio-economic resources has not inspired much hope.<sup>158</sup> Justice

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152 *Grootboom* (n 46 above) para 95.

153 Wilson (n 122 above) 289.

154 Tissington (n 120 above) 204.

155 Richardson (n 64 above) 81.

156 *Grootboom* (n 46 above) para 93.

157 Taylor (n 50 above) 16.

158 Wilson (n 121 above) 548-549.

Cameron has also acknowledged that the Constitutional Court's socio-economic jurisprudence is far from ideal.<sup>159</sup> However, I have pointed out the constitutional provision that obligates the state to take more positive action and, more importantly, requires the courts to subject the state to a greater measure of accountability. Interrogating the obligation to take other measures provides the opportunity for the courts to conceptualise a socio-economic rights jurisprudence that allows for more transformative outcomes. This commitment requires the courts not only to endeavour to showcase some institutional integrity in respect of the doctrine of separation of powers,<sup>160</sup> but essentially to adopt a more compelling jurisprudence in holding the state to greater responsiveness to the plight of the poor.<sup>161</sup> It is imperative for the constitutional vision of social transformation to be achieved, but such transformation will not be accomplished through complacency or mediocrity.

I have shown how the application of the jurisprudence of accountability has had but minimal effect in terms of social transformation, while the application of the jurisprudence of exasperation has proven to produce more transformative outcomes. I argued that to avoid a jurisprudence of exasperation in favour of a jurisprudence of accountability is not only strategically miscalculated, but practically illogical and also detrimental to the enforcement of socio-economic rights. Courts are sometimes better placed to protect the socio-economic interests of the poor than the coercive arrogant majority who wield excessive political influence over government.<sup>162</sup> In order to ease the tension created by the question of the separation of powers, the judicial enforcement of socio-economic rights should be seen and acknowledged as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government.

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159 E Cameron 'What you can do with rights' (2012) *Fourth Leslie Scarman Lecture*, London, 9.

160 D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 23.

161 D Landau 'The reality of social rights enforcement' (2012) 53 *Harvard International Law Journal* 402.

162 Langford (n 100 above) 18.