

Are Socio-Economic Rights a Form of Political Rights?

David Bilchitz¹

1. Introduction

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.²

In this much-quoted passage, Justice Albie Sachs eloquently recognises the importance of the right to vote in South Africa and that there is something remarkably powerful and moving about the voting process and sense of worth it accords to every South African. Yet, increasingly, there is a sense in South Africa that simply having the vote once every five years is not sufficient for ensuring a vibrant democracy. This is so particularly for the vast majority of South Africans who are poor and some of whom appear, at least partially, to be losing faith with the formal political structures of the state. Protests have erupted around the country against the poor delivery of services by the government and the failure of representative structures adequate to address the needs of the poor.³

In this paper, I wish to focus on this particular problem in South Africa – and that has arisen in many developing democracies around the world – concerning the frequent failures of

¹ Professor, University of Johannesburg; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law; Secretary-General, International Association of Constitutional Law

² *August v Independent Electoral Commission* 1999 (3) SA 1 (CC) para 17.

³ See, for example, J Duncan 'The Politics of Counting Protests' *Mail and Guardian* (17 April 2014) <<http://mg.co.za/article/2014-04-16-the-politics-of-counting-protests/>> ; Laura Grant 'Research Shows Sharp Increase in Service Delivery Protests' *Mail and Guardian* (12 February 2014) <<http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests>> ; and Caryn Dolley 'Five Protests a Day in SA' *Independent Online* (7 February 2014) <http://www.iol.co.za/news/south-africa/western-cape/five-protests-a-day-in-sa-1.1643320#.U_Xls8WSxRQ>.

representative institutions adequately to represent and address the interests of the poor. After exploring some of the underlying reasons that have been advanced to explain this political science phenomenon, I shall conclude that a simple form of representative democracy rooted in a right to vote – whilst important – is not sufficient to lead to an adequate representation of the interests of the poor. The current expressions of participatory democracy in South Africa also cannot solve this problem. In part III, I focus on the recognition of fully justiciable socio-economic rights in many modern constitutions. In this section, I contend that, suitably interpreted and given effect to, they offer one means of correcting the flaw in representative democracy that leads to the systematic under-representation of the interests of the poor. In the last section of the paper, I seek to illustrate this political dimension of socio-economic rights through an analysis of some of the case law on the subject in South Africa. I highlight several possibilities that socio-economic rights offer to correct flaws in the current political system: the under-representation of particular interests and classes; correcting power imbalances; and requiring responsive governance. I conclude by reflecting on the manner in which, at least partially, socio-economic rights can be seen as a species of political rights and how this contributes further to breaking down the division between different classes of rights.

II: Democracy and the Interests of the Poor

2.1 The Poor in Developing Democracies

Theoretically, representative democracy requires a responsiveness by politicians to the electorate in order to remain in power.⁴ In developing country contexts, there tend to be large numbers of people who suffer from the deprivation of the most basic socio-economic resources.⁵ In South Africa, for instance, in 2011, 46 percent of South Africans (or 23 million people) lived below the

⁴ H Pitkin *The Concept of Representation* (1967) 233 famously wrote that '[i]t is not that a government represents only when it is acting in response to an express popular wish; a representative government is one which is responsive to popular wishes where there are some. Hence there must be institutional arrangements for responsiveness to these wishes'.

⁵ I focus in this paper on developing countries and democracy within those countries. Similar problems may well arise in developed democracies, though the poor in those cases are often a minority rather than a majority.

poverty line of R620 per month.⁶ This means that almost a majority of South Africans fall into the category of being very poor. Conceptually, democratic theory would suggest that in such situations (particularly, where a majority of people are poor) and in countries where the poor have the right to vote for representatives, their interests should be strongly addressed through the democratic system. Political rights thus would be a vehicle through which the poor can, through democratic means, gain recognition for and advance their interests in improved socio-economic well-being.

However, in practice, the relationship between representative democracy and the interests of the poor is a much more complex one.⁷ Dreze and Sen have shown, for instance, that democracies generally do not have famines: since governments are to some extent accountable to the people, they organise their affairs in such a way that they do not run out of food.⁸ Yet, in a recent book, the same authors provide a comparison of how India and China have fared on a range of indicators relating to the improvement of the economic conditions of the poor. On almost all the indicators, China has done considerably better than India despite its not being a democracy.⁹ Though the vast majority of Indians are poor by any measure and constitute the majority of the electorate, their interests have often failed to attract the attention and priority they might deserve from their own elected representatives.¹⁰

⁶ Here I use the upper-bound poverty line which is still very low but represents 'an unambiguous threshold of relative deprivation below which people cannot afford the minimum desired lifestyle by most South Africans'. See Statistics South Africa 'Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2011' Report No. 03-10-06, 3 April 2014, 8, 12 <<http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>>.

⁷ Political scientists in more developed democracies have done detailed studies showing a systematic under-representation of the interests of the poor in democratic politics: see, for example, M Gillens 'Inequality and Democratic Responsiveness' (2005) 69 *Public Opinion Quarterly* 778, 778-796; N Giger et al 'The Poor Political Representation of the Poor in a Comparative Perspective' (2012) 48 *Representation* 47, 57.

⁸ J Dreze and A Sen *Hunger and Public Action* (1989) throughout.

⁹ J Dreze and A Sen *An Uncertain Glory* (2013) 8,292-336.

¹⁰ *Ibid.*250.

A similar trend can be discerned in other developing countries in the Global South. In Colombia, the parliament has often failed to address the lives of those who are worst off, leading to a severe skepticism of representative institutions.¹¹ Similarly, in South Africa, although there is considerable social spending on the poor, there remains no universal social security net, a major backlog in the provision of housing, sub-standard conditions in public hospitals and schools and much else.¹² At some level, this situation calls for explanation: whilst the poor do indeed have political rights and often the power to shape governments, their interests often appear not to attract the priority and dedication that could be expected given that power. This is what I term the ‘representation gap’: the gap between, on the one hand, the exercise of political rights by those who are poor, (their theoretical political power) and, on the other hand, the relative attention and priority elected representatives afford to their interests (their practical power).¹³ I shall now investigate a few possible reasons for this phenomenon.¹⁴

2.1.1 *The Poor as a Political Interest Group*

One problem that arises is to constitute the poor as a coherent and powerful political interest group with distinct interests of their own.¹⁵ People who are homeless, for instance, will often be

¹¹ R Uprimny Yepes ‘The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates’, in R Gargarella, P Domingo and T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 127, 129-30 explains the strong approach adopted by the Colombian Constitutional Court as resulting from two structural political factors: ‘the crisis in political representation, and the weakness of social movements and opposition parties in Colombia’.

¹² The South African National Development Plan: Vision for 2030 (available at <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>) does identify many of problems and begins to outline a plan to address them.

¹³ See M Taylor-Robinson *Do the Poor Count?: Democratic Institutions and Accountability in a Context of Poverty* (2010) 2-3 who also identifies this gap.

¹⁴ This paper cannot seek to engage this question exhaustively, but drawing some of the key themes from literature in political science is sufficient for the argument in the paper.

¹⁵ See S Friedman, K Hlela, and P Thulare ‘A Question of Voice: Informality and Pro-poor Policy in Johannesburg, South Africa’ in N Hamdi (ed.) *Urban Futures: Economic Growth and Poverty Reduction* (2005) 65. S Friedman ‘Participatory Governance and Citizen Action in Post-apartheid South Africa’ *International Institute for Labour Studies Discussion Paper* DP 164/2006, 13 < <http://www.ilo.org/wcmsp5/groups/public/---dgreports/--->

difficult to organise into a common set of interests or social movement: they come from a wide range of disparate backgrounds and are not concentrated in one geographic location, being dispersed across a large country such as South Africa. Relatively successful movements have often been largely local in nature, being unable to achieve the benefits of a full national scale movement.¹⁶ Moreover, the needs and priorities of poor people are diverse: some people may be focused on acquiring homes; others focus on ensuring their families have enough to eat; others prioritise needs such as schooling and health-care. It thus becomes difficult to create a strong, distinct political interest group of the ‘poor’ which addresses all these intersecting issues. There is therefore no organised, coherent powerful constituency of the ‘poor’ to which elected representatives need to be responsive.

2.1.2 Resources and Power

The very condition of being poor means that individuals lack access to considerable financial and material resources. Political organisation, even at the local level, involves the use of some economic resources; trying to develop a national scale often requires access to much larger amounts of money.¹⁷ The lack of resources often translates into a power differential between those with significant resources and those without. In turn, this impacts upon the ability of the poor to have their concerns heard and responded to. As Gilens argues, ‘[t]here has never been a democratic society in which citizen’s influence over government policy was unrelated to their financial resources’.¹⁸ One important consequence of a lack of resources is the inability adequately to monitor elected officials for failures to represent the interests of those who elect them. Taylor-Robinson identifies the ‘stark difference in the capacity to monitor and in the tools

inst/documents/publication/wcms_193613.pdf> discusses this problem in the context of participatory governance structures in South Africa.

¹⁶ See T Madlingozi ‘Post-apartheid Social Movements and Legal Mobilisation’ in M Langford et al (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 106-122 for a discussion of Abahlali BaseMjondolo, a successful, local social movement of shack-dwellers in Kwazulu-Natal.

¹⁷ Ibid 101.

¹⁸ Gilens (note 6 above) 794.

available for sanctioning unacceptable performance' as a key challenge for representational democracy in developing countries.¹⁹

2.1.3 The Representation Problem and Elites

The above quote indicates a structural problem with representative democracy itself. Representative democracy is based on individuals electing representatives to give expression to their interests, and those representatives being responsive to those who elect them.²⁰ Yet, a major problem that arises in this context is often the lack of identity of interests between the representatives and those who vote for them.²¹ Representatives tend to be middle class or become middle-class (once elected) which often places a distance between themselves and their poorer constituents. Representatives thus often lack the same interests of their constituents and fail to give effect to them. TSR Subraiman, a cabinet minister in India, expressed this problem when he stated that: "[v]ery few, if any, of the ministers had any interest in developmental matters or in the economic or social transformation of India. Genuine alleviation of poverty, and upliftment of the rural masses, was the last thing on their minds. Their only interest was their own future - aside from feathering the nest."²² A similar problem has been experienced in Latin America where 86 percent of respondents in a major survey of 18 Latin American countries felt that politicians were not interested, or very little concerned in their interests.²³

2.1.4 One-party Dominant Democracy

Societies that come from traumatic pasts where grave injustices took place often have difficulty in developing true multi-party democratic systems. The movements that liberated the country and helped form the new order often are elected as the ruling party and they remain in that

¹⁹ Taylor-Robinson (note 13 above) 172.

²⁰ Pitkin (note 3 above) 209.

²¹ Friedman et al (note 14 above) 56 suggest some reasons for this.

²² See R Ramesh 'The last thing on their minds' *Guardian* (13 May 2004)
<<http://www.theguardian.com/world/2004/may/13/india.randeepramesh>>

²³ Taylor-Robinson (note 13 above) 7.

position for many years after change has taken place.²⁴ Large segments of the electorate struggles to change affiliation from the liberation party even when it is underperforming, with the result that it is often largely guaranteed a victory in elections for a lengthy period of time. The Congress Party in India has ruled (in some cases with a coalition) for 49 years out of the 66 years of Indian democracy. The African National Congress in South Africa is now in its 20th year and has just been re-elected with a majority of 62 percent. In these circumstances, there is no real fear of losing power which allows the ruling party to avoid being truly responsive to the needs of the poor (or other parts of the electorate). Moreover, often the party itself becomes such a dominant force in the polity that can undermine independent institutions – such as the judiciary and chapter nine institutions in the South African context - that are meant to check the power of the majority party.²⁵ Such parties may also have control over grants that poor people rely on as well as access to economic and job opportunities. In such systems, it thus often becomes ‘personally very costly for a poor person to try to sanction policy work that does not represent their interests’.²⁶ One-party dominant democracies thus require close attention to the institutional structures of government and doctrines of constitutional law to ensure that true democracy is preserved.²⁷

2.2 *Is Participatory Democracy a Solution?*

In the last section, we saw that there are a range of structural reasons why, even where the poor are the majority of citizens and have a constitutionally entrenched right to vote, their interests do not necessarily receive the weight and priority they should in government legislation and policies. In addressing this problem, one possibility is to move beyond a representative model of democracy alone to one that includes more participatory elements. Indeed, the Constitutional Court of South Africa has recognised that

²⁴ S Choudhry “‘He had a mandate’ The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 22.

²⁵ Ibid 3.

²⁶ Taylor-Robinson (note 13 above) 5, 10.

²⁷ Choudhry (note 24 above) 33ff explores some of these possibilities in the context of general cases relating to political design and participation.

[t]he democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.²⁸

The court goes on to say that ‘[p]articipatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist’.²⁹ In the particular case in question, the legislature was held to be under a duty to take steps ‘to afford the public a reasonable opportunity to participate effectively in the law-making process’.³⁰ This involves two aspects: there is a duty to provide meaningful opportunities for the public and a duty to ensure that people have the ability to take advantage of these opportunities.³¹ Apart from the context of developing new legislation, post-apartheid South African statutory law has in many cases required consultation with local communities surrounding local government matters and the delivery of services.³²

It is no doubt important that individuals are able to be heard in the process of legislative or executive decision-making. Yet, there are several factors that render this process once again less than effective in ensuring that the interests of the poor receive the attention and priority they deserve. First, it is important to consider the balance between representative and participative aspects of South African democracy. In *Merafong Demarcation Forum v President of the Republic of South Africa*³³, a majority of the Constitutional court made it clear that—

²⁸ *Doctors for Life international v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 116.

²⁹ *Ibid* para 115.

³⁰ *Ibid* para 129.

³¹ *Ibid*.

³² See, for example, section 78 of the Local Government: Municipal Systems Act 32 of 2000 where community consultation is required in the context of deciding upon mechanisms for service delivery.

³³ 2008 (5) SA 171 (CC)

being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.³⁴

The majority of judges in *Merafong*, whilst stressing that the legislature must be open to the views aired in public consultations, also ultimately recognised that final decision-making would be in the hands of elected representatives and that they were not bound by what emerged in public consultations. This holding ultimately gives priority to representatives and executive officials to determine which legislation to pass or policy decisions to make. Whilst public participation may allow the interests of the poor to be voiced, it is ultimately their representatives who must translate what they hear into legislation, policies and effective programmes. Given the representation gap identified above, there is once again likely to be a structural problem in ensuring the interests of the poor are adequately addressed and prioritised. The *Merafong* case is a good illustration of this problem: despite clear opposition from most of the people in the area to being transferred from the Gauteng province to the North-West province, the government proceeded to do so.

There are many other problems with the manner in which public participation has been conceived in South Africa (and many other developing countries) at present. Many of the problems arise from the way in which formal public participations proceedings are conceived and operate, struggling to give expression to the interests of those who are not organised.³⁵ The

³⁴ Ibid para 50.

³⁵ Friedman (note 15 above) 13. These empirical problems may reflect a broader theoretical issue relating to the way in which participation is conceived in the public sphere: see N Fraser 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25/26 *Social Text* 56.

agenda for participation in public consultation meetings is also often already set by the legislature and executive without hearing what people in fact wish to speak about.³⁶ Hearings can only feasibly be held in one or two places per province and the financial ability of some poor people to reach those sites is doubtful.

If those who are poor reach the participation forum, public consultation may often take place on technical matters (such as the structure of the provider of services) and on national policy matters rather than on the concerns facing the poor.³⁷ To be able to engage actively in the public participation process as it is currently conceived, often requires having access to computers and documents. It also may require a reasonable level of education in order to engage meaningfully with laws which is often lacking in particularly poor areas of developing countries. In Latin America, 55 percent of respondents in the 2005 Latinobarometro poll agreed that ‘politics is so complicated that people like us often do not know what is happening’.³⁸ With 11 official South African languages, the language of consultation is important. Consultations, however, often only occur in English.³⁹ The diversity of interests and perspectives amongst the poor also needs to be recognized but can prevent a particularly strong lobbying group from arising in specific matters.⁴⁰

For these reasons (and others), it does not seem at present that the formal participative democratic elements in South African democracy will themselves succeed in solving the representation gap. A range of factors render the current structures of participative democracy not wholly effective in both giving voice to the poor and ensuring that their interests are adequately addressed and prioritised. Of course, it may be possible to introduce reforms to the institutional structures aimed at the improving the structures of representative and participatory democracy such that they operate better in addressing the interests of the poor. I shall not

³⁶ Ibid 8-9.

³⁷ Ibid 14. See also Taylor-Robinson (note 15 above) 16.

³⁸ Taylor-Robinson (note 13 above) 15.

³⁹ Friedman (note 15 above) 14.

⁴⁰ Ibid 13-14.

consider these possible political reforms in this paper but instead turn to the possibilities that constitutionalised social rights hold for addressing the representation gap identified in this section.

III Socio-Economic Rights: a Political Justification

The South African Constitution expressly includes in its Bill of Rights entitlements to have access to adequate housing, to sufficient food and water, to health-care services and to social security. In this section, I want to articulate what I term a *political* justification for these rights, and for their enforcement through judicial review. There are several other justifications that have been offered for these rights, whether on the basis of corrective justice for historical wrongs (in a country like South Africa) or distributive justice to ensure resource distribution meets the most pressing needs of individuals and thus treats them with equal importance.⁴¹ The justification provided here is not meant to discount these other important reasons for social rights; rather, it seeks to explore and develop a dimension of socio-economic rights that is often ignored: namely, their *political* role in ensuring that representative democratic institutions adequately address and prioritise the interests of the poor.

3.1 Socio-Economic rights and Political participation

There are different types of political justification for socio-economic rights. One common argument is that the protection of socio-economic rights is a necessary condition for the democratic participation of the poor; in other words, for political rights to be exercised by the poor, it is necessary to ensure that the material conditions of their deprivation are addressed.⁴² As stated in this way, in its sweeping form, there appear to be two major problems with this claim. The first difficulty is that it is simply not true to empirical experience that there is a necessary or sequential relationship between the realisation of social rights and the exercise of political rights. South Africa's recent election in 2014 had a turnout of 74 percent of the electorate with over 18

⁴¹ D Bilchitz *Poverty and Fundamental Rights* (2007) 64-65.

⁴² See D Davis 'Socioeconomic Rights: Do They Deliver the Goods' (2008) 6 *International Journal of Constitutional Law* 687, 688; and Michelman 'In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice' (1973) 121 *University of Pennsylvania Law Review* 962, 1000-1001.

million people voting.⁴³ Many of those who voted live in conditions of grinding poverty which indicates that poor people participate in elections even where their social rights are largely not realised. Poor people also often organise political structures to represent their interests despite not having their socio-economic interests realised.⁴⁴ The second difficulty relates to a circularity problem inherent in this argument. The claim is that it is necessary to realise socio-economic rights of individuals in order for them to participate in democratic politics. Yet, for many poorer individuals, the very point of participation in democratic politics is to ensure that their socio-economic rights are realised. If participation is partly about ensuring the socio-economic interests of the poor are a strong factor in democratic politics, the full realisation of those interests cannot be an absolute necessary condition for participation in the first place.⁴⁵

It thus appears that, if this kind of argument is to succeed in a more general manner, we need to consider alternative, more plausible formulations. It could perhaps be argued that this claim may be salvaged if we consider people suffering from severe levels of desperation: if a person is starving and ravaged by the illnesses of malnutrition, they may well not be able to vote or participate to any meaningful degree in politic organisation. Where extreme deprivation translates into severe physical harms, this would indeed hamper and often prevent participation. Such a line of reasoning appears to be plausible and would support the claim that political rights require the government to guarantee at least a minimum core threshold of social rights that ensures individuals are free from the general threats to survival.⁴⁶ It does not, however, alone require much more than this and thus cannot justify why socio-economic rights are formulated in the Constitution (and internationally) as providing an entitlement to an ‘adequate’ standard of

⁴³ See summary of 2014 National Elections at <http://www.elections.org.za/content/NPEPublicReports/291/Results%20Report/National.pdf>

⁴⁴ Consider, the development of a range of social movements and organizations in South Africa such as Abahlali BaseMjondolo: see Madlingozi (note 16 above) 114ff.

⁴⁵ The argument also instrumentalizes socio-economic rights in a way that is undesirable.

⁴⁶ Bilchitz, 2007 (note 39 above) 178-196. See also J Rawls *Political Liberalism* (1993) 326 who distinguishes more generally between ‘liberty’ and the ‘worth of liberty’.

living which presumably goes beyond such a low minimum and requires a higher standard of provision to enable individuals to live a decent life.⁴⁷

Sandra Liebenberg defends a more nuanced version of this form of political justification for social rights. She claims that political participation will not be equitable unless it addresses ‘the material conditions that impede such participation’.⁴⁸ She argues that ‘[p]overty and the multiple, intersecting forms of inequality in South Africa profoundly affect, not only people’s survival, health and psychological well-being, but also their ability to participate on equal terms in the shaping of our new democracy’.⁴⁹ Courts can play a significant role in providing protection for these material conditions as well as in being sites of deliberation on the content of these rights-based guarantees. The constitutionalisation of socio-economic rights thus represent a commitment to ‘ensuring that all have access to the social services and economic resources necessary for participation as equals’.⁵⁰

Liebenberg does not argue that social rights are necessary for participation per se; her focus is the notion of participation *as equals*. In developing her account, she draws on the work of Nancy Fraser who articulates the wider ideal of parity of participation in social life.⁵¹ For Fraser, what matters is the ability of an individual to participate as a ‘peer in social life’, as ‘full partners in social interaction’.⁵² There are three elements to this: there is the dimension of recognition which requires addressing ‘institutionalised patterns of cultural value that constitute one as comparatively unworthy of respect or esteem’⁵³; there is dimension of redistribution: ‘equal participation can be impeded when some actors lack the necessary resources to interact with

⁴⁷ See Bilchitz *ibid* 193-194.

⁴⁸ S Liebenberg *Socio-economic rights: Adjudication under a Transformative Constitution* (2010) 32.

⁴⁹ *Ibid* 27.

⁵⁰ *Ibid* 76.

⁵¹ N Fraser ‘Rethinking Recognition’ (2000) 3 *New Left Review* 107, 116.

⁵² *Ibid* 113.

⁵³ *Ibid* 114.

others as peers';⁵⁴ and, finally, there is the dimension of representation which relates to whether political decision rules and boundaries help facilitate parity of participation.⁵⁵

There is some plausibility to the claim that those who are struggling with inadequate housing and health-care, insufficient food and water will not be able to participate on equal terms in democratic politics as those who need not worry about these problems. This may arise both from sources relating to recognition – where the contributions of the poor are not adequately valued – and from those relating to redistribution – where the lack of resources of the poor translates into reduced abilities to participate politically.

Nevertheless, there remain a number of difficulties with Fraser's argument in this context which particularly relate to the specification of what it means as an ideal to participate *as equals*. First, Fraser seems to consider such equal participation as the key social justice ideal. It may be questioned whether equal participation, whilst no doubt valuable, captures the full range of individual interests in living well including as Honneth points out self-realisation.⁵⁶ Secondly, the ideal appears to be under-specified: what exactly is involved in *equal* participation? Fraser is concerned to identify a number of social, economic and political factors which no doubt contribute towards inequality in the ability to participate in social life. However, is equality of participation a viable and realisable ideal given the wide range of individual differences? Consider, for example, a middle-class person who has the characteristic of being shy and introverted. If such a person finds it difficult to attend public meetings and is terrified to speak in such fora, can s/he be regarded as participating as an equal in discussions that ensue? There might be some social obligation to create methods of participation which address such psychological barriers yet are there limits to this and how do we judge when equality is reached? This example illustrates the problem of developing the notion of participation *as equals* to render it more determinate and to prevent it from being so expansive that it is impossible for any society to realise.

⁵⁴ Ibid 116.

⁵⁵ The latter is an addition to the earlier binary framework of Fraser: see N Fraser 'Reframing Justice in a Globalizing World', (2005) 36 *New Left Review* 1, 5-11.

⁵⁶ See A Honneth *The Struggle for Recognition* (1996) 172-173.

Finally, in the context of social rights, it is no doubt clear that some resources would be necessary to participate as equals but how much is required? Fraser's notion certainly seems to be more demanding than protection for survival interests alone but would seem to require a high level of equality in the distribution of resources in a society.⁵⁷ This raises questions as to whether it provides an appropriate theory with which to conceive of socio-economic rights which are not meant to determine fully the distribution of resources in a society but rather to specify a threshold below which individuals should not be allowed to fall.⁵⁸ Moreover, it would seem inappropriate to grant judges power of judicial review to determine the full distribution of resources in society according to such a vague ideal.⁵⁹ Without further specification and development of this notion, this rationale for protecting social rights cannot be regarded as entirely successful.

3.2 Social Rights as a Substantive Focus for Political Representation

Whilst the above forms of justification for social rights have some force, I wish to make a different political argument for social rights in this paper. I contend that the inclusion of socio-economic rights in a constitution is (partially) designed to address some of the flaws of formal representative and participative democracies that were identified above. In particular, the recognition of justiciable socio-economic rights in a bill of rights is an attempt substantively and institutionally to address the representation gap and to ensure the fundamental interests of the poor are given the attention and priority that they deserve. I now elaborate upon these claims.

3.2.1 Substantive Interests

⁵⁷ Fraser does not seem to be clear on this point stating '[t]his does not mean that everyone must have exactly the same income, but it does require the sort of rough equality that is inconsistent with systemically generated relations of dominance and subordination'. See N Fraser 'Rethinking the Public Sphere: a Contribution to the Critique of Actually Existing Democracy' in C Calhoun (ed.) *Habermas and the Public Sphere* (1992) 109, 121. It is not clear how extensive this rough equality would be but her criterion appears to be demanding.

⁵⁸ See D Bilchitz 'Egalitarian Liberalism, Distributive Justice and the New Constitutionalism' (2014) *Theoria* (forthcoming).

⁵⁹ *Ibid.*

Constitutions embrace both substantive values and institutional arrangements: the constitutional rights enshrined in the bill of rights are a reflection of the substantive values that a society holds dear. The entrenchment of fundamental rights entails that they are not the subject of ordinary democratic politics and are provided with special protection. These rights protect the important substantive interests of individual members of the political community to ensure their freedom, well-being and participation in those communities. A bill of rights is thus meant to be a guide to the substance of democratic politics. It is generally accepted that democratic majoritarian bodies must ensure that the legislation and policies that they develop do not violate these fundamental rights.

However, I would suggest that the bill of rights is not simply there as a constraint upon majoritarian institutions. It also actively sets part of the programme for representative government. The South African Bill of Rights is explicit about this: section 7(2) reads that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’. This language implies that the state is not merely bound by negative obligations to ensure these rights are not violated; instead, it also has positive duties actively to realise these rights.⁶⁰ This is highly significant in that it means that the legislative and executive goals and objectives are, at least partially, set by the requirement to realise the rights in the bill of rights. Far from having a wide-ranging discretion conferred upon them by the electorate, representatives are themselves already required by the bill of rights to take a certain set of substantive interests seriously and to ensure that they are realised.

This is true of course in connection with all rights in the Bill of Rights. Some rights such as the right to have access to information (section 32) expressly envisage legislation being passed to realise them. Importantly, some of the key socio-economic rights in the Constitution provide that the ‘state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’.⁶¹ Whilst the focus of many courts decisions has been on the limitations these provisions envisage on what the government is required to do, it is

⁶⁰ See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44; and *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) paras 69-70.

⁶¹ Sections 26(2) and 27(2) of the Constitution employ this language.

important not to lose sight of the fact that these sections impose an affirmative obligation on the state to take ‘reasonable legislative and other measures’. The Constitutional Court has confirmed that this implies that legislative measures alone will also not be sufficient. The government has a duty to develop programmes to ensure these rights are realised.⁶² The bill of rights thus places the interests of those lacking these basic needs at the heart of the legislative and executive programme and requires that they be adequately addressed.

3.2.2 Institutional Possibilities

The mere inclusion of these rights in a constitution cannot be regarded as sufficient. The problems South Africa has encountered in ensuring the interests of the poor are adequately addressed and prioritised through democratic institutions shows that it is necessary to identify and develop a range of institutions and structures that can attempt to correct for these problems. The Constitutional Court in the *Glenister* case held that section 7(2) of the Constitution ‘imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection”. Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective’.⁶³ In meeting these obligations, it is important to consider the institutions currently set up by the Constitution and their possibilities for addressing the representation gap.

3.2.2.1 Democratic political possibilities

I have argued in the first part of this paper about the deficit of majoritarian institutions in ensuring the rights of the poor are adequately addressed and realised. Whilst this requires that we look beyond majoritarian institutions given various structural failing, it does not mean that we should not consider how they can *better* function adequately to represent the interests of the

⁶² *Government of the Republic of South Africa v Grootboom* (2001) (1) SA 46 (CC) para 42.

⁶³ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 189 quoting in part *Carmichele* (note 60 above).

poor.⁶⁴ There are institutional arrangements currently that hamper the participation of the poor: consider, for instance, the requirement that a large deposit must be paid to register as a political party and that this is forfeited if the party fails to garner a seat in parliament.⁶⁵ Such a requirement effectively excludes those who are poor and unable to muster the required finance. It could easily be dispensed with and increase participation in the party political system. Furthermore, the Constitutional Court's insistence in a recent case on the importance of internal party democracy can also help bolster the participation of the poor.⁶⁶ If the branches which are close to the people can truly function democratically (and not be manipulated), they could help ensure that representatives are elected who are responsive to the interests of the poor. Moreover, consideration should also be given to reform of the electoral system: a mixed constituency/proportional representation system may assist in ensuring that representatives are more accountable to the people who elect them. These are just some of a range of possibilities which exist for democratic structures to address the current representation gap.

3.2.2.2 Courts

Some of the systematic problems with representative (and participatory) democracy in dealing with the poor suggest that majoritarian institutions alone will not always be adequate to ensure their interests are given the attention they deserve. The courts are one crucially important mechanism for doing so. In the South African constitutional system, they have been given the power of judicial review to ensure conformity of legislation and executive conduct with the bill of rights. The judicial enforcement of socio-economic rights is often challenged as lacking democratic legitimacy.⁶⁷ However, in fact, the converse may be the case: through ensuring

⁶⁴ Taylor-Robinson (note 13 above) 8-12 consider, for instance, in the context of Latin America better and worse institutional structures and incentives to ensure democratic institutions respond to the needs of the poor.

⁶⁵ Sections 27(2)(e) and 106 of the Electoral Act 79 of 1998. See, however, *Economic Freedom Fighters v President of the Republic of South Africa and Others* [2014] ZAGPPHC 109. The Constitutional Court has yet to determine the constitutionality of this requirement.

⁶⁶ *Ramakhatsa v Magashule* 2013 (2) BCLR (CC) paras 66, 71, 74.

⁶⁷ M Pieterse 'Coming to terms with the Judicial Enforcement of Socio-economic Rights' (2004) 20 *SAJHR* 383, 390 .

majoritarian bodies address the fundamental interests of the poor, courts can contribute to democracy rather than undermining it.⁶⁸ Whilst courts are not representative institutions in South Africa, this is precisely their advantage. Socio-economic rights mandate judges precisely to correct for defects or blind-spots in representative democracy that lead to the systematic lack of adequate engagement with the interests of the poor. In this way, courts ensure that the poor are represented in the structures of power, and thus contribute towards a more complex democratic ideal.

Whether they are the institutions that are best placed to correct for the democratic deficit in relation to the poor, is a matter for debate. The doctrines employed by the judges can be better or worse at assisting the poor; similarly, procedural mechanisms can facilitate or hinder access to the judiciary. Judges have expertise in the field of protecting fundamental rights and their professional training should enable them to recognise failures of the other branches in protecting the most fundamental interests of the poor. However, there is also a distance between the experience of judges and that of poorer individuals: judges generally are reasonably well-off individuals whose life experiences may be far removed from those of the poor. Their class interests may also not be served well by too expansive a jurisprudence on socio-economic rights which could involve a greater tax burden on the middle classes. Whilst judges have, in some contexts, shown the ability to rise above these concerns, these reasons suggest that they too will not be the single panacea for addressing the representation gap.

3.2.2.3 *Chapter nine institutions*

Outside the traditional institutions of the legislature, executive and the judiciary, South Africa has established a number of institutions to support constitutional democracy. These institutions, too, can play an important role in ensuring that the socio-economic interests of the poor are adequately addressed. Two institutions are particularly important in this regard. The Public Protector is designed to investigate conduct of the government for any impropriety or

⁶⁸ T Roux 'Democracy' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS 07-06) 10-57 – 10-62. far-sightedly recognised this point.

prejudice.⁶⁹ This institution plays an important role in ensuring that the governmental sphere is free of corruption. It also assists where individuals are denied social benefits through inappropriate exercises of discretion or flaws in the administration system. It has proved effective as one of the mechanisms whereby those who are poor can address their grievances with state organs through being accessible and inexpensive.⁷⁰

In the *Grootboom* case, the Constitutional Court specifically mentioned the role of the South African Human rights Commission in monitoring and reporting on the extent to which the state had met its housing obligations to provide for those in desperate need.⁷¹ A body such as the human rights commission has a number of advantages over courts: it need not simply react to human rights violations but can also proactively investigate and report on the extent to which rights are being realised. The recognition that the interests of the poor and vulnerable are often not adequately addressed through the democratic process provides an important justification for the diligent exercise of their powers. They can conduct research and highlight where in fact there are shortcomings in state policy and the interests of the poor are not adequately being addressed. Whilst courts have stronger enforcement powers, ‘softer’ forms of power can also help improve the importance placed on the needs of the poor in the democratic system.

3.3 Conclusion: the Importance of Multiple Sites of Influence

I have not exhaustively considered the various institutions of government and civil society that can help remedy the representation gap. The media would also, for instance, be crucially important in determining the manner in which the interests of the poor are discussed and highlighted in society. The key issue I wish to emphasise is that the South African Constitution appears to have recognised the insufficiency of representative democracy alone for protecting the poor and has sought to adopt a more direct approach through placing constitutional obligations

⁶⁹ Section 182 of the Constitution.

⁷⁰ Section 182(1)(c)(4) of the Constitution mandates the Public Protector to ‘be accessible to all persons and communities.’ For a general discussion, see M Bishop and S Woolman ‘Public Protector’ in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS 07-06) 24A.

⁷¹ *Grootboom* (note 62above) para 97.

on a wide range of government bodies directly to address the interests of the poor. Importantly, there are multiple actors that are tasked with addressing this problem and a wide range of sites of enforcement. Those in powerful positions in society will usually lack an identity of interests with the poor and vulnerable. This is a problem facing a wide range of institutions including courts and chapter nine institutions. Having multiple actors can help correct for this problem: the actors in the multiple bodies will have divergent functional roles and also lack a direct identity of interests.⁷² Strong clear entitlements of the poor in a bill of rights can also help direct the attention of these institutions to ensuring that their interests are addressed them adequately through representative institutions.

4. The Political Dimension of Social Rights in the Constitutional Court

I now turn to focus on one of these institutional mechanisms, namely, the South African Constitutional Court and its role in correcting for defects in the majoritarian political system through its jurisprudence on social rights. My emphasis here is on demonstrating the manner in what I term the ‘political’ dimension of social rights has been explored, that is, the extent to which they have sought to correct for instances where representative and participatory democratic structures have failed adequately to address and prioritise the interests of the poor. I also seek to consider, in the second part of this section, shortcomings in the jurisprudence of the court and some procedural and substantive changes that could help render the judicial enforcement of socio-economic rights more effective in addressing the problems identified in this paper.

4.1 Addressing the Democratic Deficit

4.1.1 Constituting Vulnerable Groups

A number of the cases before the Constitutional Court have addressed questions of deep vulnerability in segments of society that do not naturally have a political voice. In the first part of

⁷² On the benefits of diffuse power, including in the framework of the separation of powers doctrine, see ME Magill ‘Beyond Powers and Branches in Separation of Powers Law’ (2001) 150 *University of Pennsylvania Law Review* 603, 605-606; and in a European context, MA Pollack ‘Representing Diffuse Interests in EU Policy-Making’ (1997) 4 *Journal of European Public Policy* 572.

the paper, we saw the difficulty of constituting poor people as a distinct political interest group, whose interests are clustered together and thus become political significant in the democratic sphere. Socio-economic rights have functioned to enable vulnerable individuals and groups to have a voice.

The *Grootboom* case dealt with a group of individuals whose circumstances were described as follows:

‘A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister’s family in a shack about twenty metres square.’⁷³

After moving to a different piece of land which was ear-marked for a private development, these people were evicted and landed up on a field with only plastic sheeting to protect them from the driving winds and rain of the Western Cape. The fact that this was a relatively small group of people and they were extremely vulnerable meant that it was difficult to render their plight an urgent matter for the government. Given the fact that homeless people are dispersed throughout South Africa attempting to cluster this group together to increase their political influence is extremely difficult.⁷⁴

The inclusion of a right to have access to adequate housing placed the protection of the interests of these people as a foundational matter of constitutional law. The Constitutional Court recognised that this right places an obligation upon the government to design and implement a reasonable programme that is designed to give effect to these housing rights. The existing state housing programme was declared to be unconstitutional in that it did not ‘provide for relief for

⁷³ *Grootboom* (note 62 above) para 7.

⁷⁴ This is not just a problem in developing countries but in developed countries too: it is often worse in the latter where homelessness is only something experienced by a small minority: see Bilchitz, 2007 (note 41 above) 248-251.

those in desperate need'.⁷⁵ The court held that the state was obliged to devise a programme that provided relief to those 'who have no access to land, have no roof over their heads, and who are living in intolerable conditions or crisis situations'.⁷⁶ The court here essentially creates a particular class: those who lack land and are homeless and requires the state to address their interests and needs.

A similar point can be made about the *Treatment Action Campaign* case.⁷⁷ The case concerned the availability in the public health system of a drug (known as nevirapine) which had been shown to reduce the transmission of HIV from mothers to their children at birth. The government had decided to restrict the availability of the drug to particular research and training sites in each province despite its being made available for free by the manufacturer. The problem with this approach was expressed by the court as follows: 'what is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?'⁷⁸ The court found that there was no good reason for the restriction of the drug to these particular sites and declared the government programme in this regard unconstitutional. It stated importantly for our present purposes that:

it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences⁷⁹.

This case allowed the interests of the most vulnerable in this context – those who could not access the drugs at the research and training sites – to become the focus of the attention of the court which highlighted the unjustifiability of current government policy in this regard. The

⁷⁵ *Grootboom* (note 62 above) para 66.

⁷⁶ *Ibid* para 99.

⁷⁷ *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

⁷⁸ *Ibid* para 17.

⁷⁹ *Ibid* para 70.

judgment also serves to highlight the vulnerability of those living with HIV. Given the power of the majority party in South Africa's one-party dominant democracy and the weakness of these vulnerable groups, purely political means had not succeeded in ensuring that government policy address the needs of those who already had HIV and those children at risk of contracting it. The court decision forced the issue and the order firmly required the government in a reasonable manner to address the health-care needs of HIV positive mothers and their children.

The last case I wish to consider in this regard is *Khosa*.⁸⁰ This case dealt with the entitlements of permanent residents to social grants such as old age pensions and child support grants.

Permanent residents were in a particularly vulnerable position within the democratic process in that they were not entitled to vote and political parties had no self-interested reason to address their needs as it would not affect their electoral support. The court stepped in and found that the exclusion of permanent residents from having access to these benefits was unjustifiable and unconstitutional. The impact of the denial of their right to social security was severe: the court accepts that the lack of such means of support entailed that they are 'relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution'.⁸¹ Interestingly, in relation to the remedy, the court did not leave it up to Parliament to amend the relevant statutes: instead, it reads the words 'or permanent residents' into the relevant statutory provisions, thus extending the reach of the relevant grants to this group. The court in this instance may be better placed than Parliament to address the rights of permanent residents given that they lack a say in the election of representative parties: non-majoritarian procedures are thus vital in addressing the interests of those who are vulnerable and are structurally excluded from the democratic system.

4.1.2 *Accountability and the Shifting of Policy*

The South African Constitutional Court has focused its approach to the adjudication of socio-economic rights firmly on two important prongs: first, the government is required to develop a

⁸⁰ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

⁸¹ *Ibid* para 77.

programme that addresses the rights in question and, secondly, such a programme must be reasonable.⁸² This approach importantly requires other branches of government to demonstrate what steps they have taken to realise meet the specific rights of the poor and to provide sound reasons for what they have done. Having to attend to the reasons for their approach can encourage self-reflection on the part of the government but also expose weaknesses in current approaches.⁸³ Two cases illustrate the manner in which there has been a policy shift in response to litigation on these questions.

In *Grootboom*, as we saw, the court found a fatal defect in the government's housing programme in that it did not provide for those, who in the shorter-term, needed temporary or emergency housing due to the desperation of their living conditions. Importantly, four years after the judgment, the government passed an emergency housing policy (known as Chapter 13 of the Housing code). The code itself, whilst not fully adequate, attempts to respond to the defect and identified in *Grootboom* and expressly references the decision as being a catalyst for the drafting of the new policy.⁸⁴

Similarly, in the *Mazibuko* case, the court had to consider the reasonableness of the amount of water provided for free by the Johannesburg municipality to individuals in a poor community – namely, 6 kl of water per household per month. The court characterised the reasonableness challenge as requiring ‘government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy’.⁸⁵ The court went on to say the following:

[i]f the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the

⁸² *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) paras 50, 161, 162.

⁸³ E Mureinik ‘Beyond a Charter of Luxuries: Economic Rights in the Constituitor’ (1992) 8 *SAJHR* 464, 471-473.

⁸⁴ See The City of Ekurhuleni ‘Policy: Housing Assistance in Urgent Housing Situations’ B-HD (52-2003) (14 August 2003) 6 <<http://ekurhuleni.gov.za/199-pol-119/file>>.

⁸⁵ *Mazibuko* (note 82above) para 71.

deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.⁸⁶

O'Regan here expressly recognises the relationship between important function socio-economic rights can play in holding the government to account for the policies it adopts. As a result, the litigation process may itself lead to the government becoming more responsive to the needs of the poor and vulnerable who are challenging its policies. In the *Mazibuko* case, the government's policy in relation to free basic water had evolved over time and became increasingly flexible to make provision for extremely poor households to acquire an additional allocation of water.

O'Regan J lauded this development:

'If one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation, then that goal will be served when a government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable, within the meaning of the Constitution.'⁸⁷

The *Mazibuko* case – although denying the relief the applicants sought - thus demonstrates the role litigation can play in enhancing the accountability and responsiveness of the government to the concerns of the poor.

4.1.3 Power and Participation

Traditional civil and political rights are often understood to protect individuals against a state that is very powerful. Socio-economic rights also play an important role in shifting the power balance in society: between the state and the individual as well as between powerful private actors - such as corporations and landowners - and those whose rights they affect. The Constitutional Court has developed a line of cases in the context of evictions which have required those in powerful positions to engage with individuals before taking action that harms their fundamental rights.

⁸⁶ Ibid para 71.

⁸⁷ Ibid para 79.

The first case to address this problem in some detail was *PE Municipality v Various Occupiers*.⁸⁸ The court in this case placed great emphasis in its finding that the eviction in question was not just and equitable on the failure of the municipality to listen to and consider the problems of the occupiers in this case. The court highlighted the need for there to be mediation between the municipality and the occupiers before they are evicted. It states further that ‘[w]here the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.’⁸⁹ The interests of the poor are not simply to be disregarded in any eviction context: it is necessary to enable them to participate in a process that seeks to resolve the matter amicably.⁹⁰ These ideas lead in the *Olivia Road*⁹¹ case to a fully-fledged doctrine that, prior to eviction, those seeking the order must engage meaningfully with the occupiers to try and reach a win-win solution. The court placed quite onerous obligations on the municipality to engage with the occupiers even if they are reluctant:

‘People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement’⁹²

At the same time, the court recognises that this process is designed to facilitate the democratic participation of the poor in matters that affect them. The court states that ‘[p]eople in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to

⁸⁸ 2005 (1) SA 217 (CC).

⁸⁹ Ibid para 56.

⁹⁰ The importance of information and participation in the context of the delivery of electricity services and administrative law was emphasised in *Joseph v City of Johannesburg* 2010 (3) BLCR 212 (CC) paras 43, 46.

⁹¹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

⁹² Ibid para 15.

be pro-active and not purely defensive. Civil society organisations that support the peoples' claims should preferably facilitate the engagement process in every possible way'.⁹³

The political branches in these cases operated in a heavy-handed manner without properly considering the interests of the poor. Socio-economic rights have been interpreted in these contexts to create processes that enable the poor and vulnerable to participate and represent their own interests in a process of engagement with the government. The courts have also sought to address the power imbalance by requiring that the government in such a process be responsive to the needs and interests of the poor.⁹⁴

4.1.4 Bureaucratic Inertia

At times, the harm that arises for individuals comes not through active and deliberate violations or neglect but through bureaucratic logjams that creates an inertia which seems almost impossible for the ordinary citizen to circumvent. The right to vote in an election every five years is powerless to assist in such a situation. Even a formalised participatory process of consultation can struggle with such inertia. The intervention of an external body like a court can be critical in dealing with such a problem. An issue of this nature arose in *Nokotyana v Ekurhuleni Municipality*.⁹⁵

The case dealt with an application for one ventilated pit latrine per household and high-mast lighting by people living in the Harry Gwala informal settlement in Gauteng. The municipality had initiated a process to upgrade the informal settlement to a formal township which would enable it to provide the services the occupants desired. It had sent a proposal to the provincial minister (MEC) who had failed to take a decision in this regard for three years. The case related to the obligations of the municipality to provide services in the interim period prior to a decision being made about the formal upgrading. The court did not find that the municipality was under

⁹³ Ibid para 20.

⁹⁴ Although largely concerned with other matters, B Ray 'Demosprudence in Comparative Perspective' (2011) 47 *Stanford J of Int Law* 111, 155 recognises that engagement 'protects against the bargaining disparity between poor citizens and the state'.

⁹⁵ 2010 (4) BCLR 312 (CC).

an obligation to provide temporary services but essentially found that the delay by the MEC was unacceptable. It stated:

The rights of residents under Chapter 13 are dependent on a decision being taken. The provincial government should take decisions for which it is constitutionally responsible, without delay. A delay of this length is unjustified and unacceptable.⁹⁶

In a rather unprecedented move, counsel for the MEC apologised to the court for the delay and then was prompted by the court to turn to members of the community in the gallery of the court and apologised again in their language, isiXhosa. The court attempted to break the bureaucratic logjam through ordering a decision to be made within 14 months. The case once again illustrates the difficulty for poor and vulnerable citizens to deal with a deadlock in complex governmental decision-making procedures. Legislative and constitutional frameworks that enable their interests to enter court can help compel a shift which in turn allows those very interests to be addressed.

4.2 Shortcomings and the Need for Reform

I have thus far highlighted several ways in which social rights can essentially act as forms of political rights: they can enable the interests of the poor to be better addressed in the decision-making of democratic branches. Courts, it has been argued through an analysis of the above examples, can help correct for failures in the democratic process adequately to represent the interests of poor. Despite some of the important possibilities these examples open up, it is also clear that court mechanisms could function even better in performing their role of dealing with the representation gap. In this last section, I briefly consider three issues which would assist in this regard: improved access, clearer entitlements and more robust remedies.

4.2.1 Access

One of the major difficulties for courts to act as vehicles for the interests of the poor lies in the barriers they face in having access to these institutions. Courts require a high level of education to navigate the structures and processes of the law and good quality legal representation is generally expensive and out of reach of the poor. There are a number of organisations offering

⁹⁶ Ibid at note 60.

pro bono services but these are often over-stretched and cannot deal with the wide range of cases that arise. There are often long delays in court processes which render them unattractive to those seeking short-term relief to address urgent needs. Some of these issues have played an important role in limiting the impact of the socio-economic rights in the South African constitution in the last 20 years.

There are, however, models that have been experimented with elsewhere which can assist in significantly improving the ability of the poor to reach courts. One particular mechanism stands out, namely, the ‘tutela’ action in Colombia. Under article 86 of the Colombian Constitution, 1991 an individual whose ‘fundamental constitutional rights’ are threatened or violated by an action or omission of a public authority may file a ‘writ of protection’ or *tutela* action with the courts, requesting the immediate protection of their right. The writ involves an expeditious procedure: judges have a deadline of ten days within which to reach a decision. Judges also have the discretion to fashion remedies necessary to protect these constitutional rights. This action has led to a large number of individuals being able to gain access to the courts as well as to speedy remedies being granted. Where systemic questions have been seen to arise, a large number of *tutelas* are grouped together and the court can declare an ‘unconstitutional state of affairs’. In this way, individual actions can lead to more systematic changes. The case dealing with internally displaced people illustrates the manner in which a very marginalised and weak political group could approach the courts in significant individual numbers and eventually lead to an order that sought to make systemic changes in their position.⁹⁷

4.2.2 Entitlements

A further difficulty for the poor in having their interests addressed adequately by the courts has been the doctrinal approach adopted by the South African Constitutional Court. The court has focused on the question of whether a government programme developed in relation to a particular right is reasonable. The court has developed a range of different factors that help determine reasonableness which involve wide-ranging enquiries that implicate a number of

⁹⁷ MJ Cepeda Espinosa ‘The Constitutional Protection of IDPs in Colombia’ in RA Rivadeneira (ed) *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (2009) 1, 18.

empirical and normative considerations. To succeed in an action based on socio-economic rights, poor people need to be able to show that the government programme supposed to cater to their needs is unreasonable. This requires the ability to make sophisticated arguments with adequate empirical support which often lies beyond the resources of poor people and their legal teams. Moreover, the complexity of the reasonableness enquiry renders it difficult for the poor ‘to predict in advance whether litigating positive rights obligations bears any prospect of success’.⁹⁸ The court’s approach could perhaps explain the relative paucity of litigation surrounding these issues (compared to India or Colombia, for instance) in a country faced by so much dire need.

For socio-economic rights to function adequately as a corrective for the failures of the democratic system in relation to the poor, courts need to be prepared to offer some understanding of the content to be attributed to these rights. That will enable poor and vulnerable people (as well as their legal teams) to have some certainty as to what these rights may offer them. It also will enable them to show in a clearer and more transparent way where they are being infringed. Attention also needs to be paid particularly to ensuring that socio-economic rights jurisprudence recognises the urgency and priority some needs should take over others in government policies and programmes.⁹⁹ As with the *tutela* action in Colombia, procedural issues are also vitally important and must be tailored to ensure accessibility to the courts. Courts, for instance, should only require the poor and vulnerable to demonstrate that their rights have been violated. The onus of proof should then fall upon the government to show that their programme is reasonable as they have the greater resources and capacity to do so.

4.2.3 Remedies

It is important that the purpose of ensuring the interests of the poor are adequately addressed by political branches is realised in the remedies granted by courts. We have seen how the Constitutional Court has constructed innovative remedies such as engagement orders which attempt to achieve this purpose. The court has in general, however, preferred weaker remedies

⁹⁸ S Wilson and J Dugard ‘Constitutional Jurisprudence: the First and Second Waves’ in M Langford et al (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 35, 60.

⁹⁹ On the importance of guaranteeing and prioritising a threshold of provision that guarantees the most urgent needs are met, see Bilchitz, 2007 (note 41 above) 187-94.

which encourage rather than compel political branches to pay more attention to the interests of the poor.¹⁰⁰

It is arguable that a stronger approach may often be called for and that the court should continue to experiment with different remedies that can give effect to the rights in question.¹⁰¹ The *Grootboom* remedy, for instance, was so weak that it was unclear what specific action the government would have to take to address the problem that was identified with its housing programme. Whilst the declaration of invalidity eventually did lead to a new emergency housing policy, even the latter policy arguably failed adequately to address the interests of those who are suffering from extreme homelessness.¹⁰² A clearer indication of what the government was required to do as well as some supervision of its actions in this regard would have been more effective in ensuring that these interests of the homeless were adequately addressed. The Constitutional Court does not regularly use structural interdicts, for instance, which would assist in ensuring that its orders are implemented in a manner that addresses the core democratic problems raised in this paper.

5. Conclusion: Social Rights as Political Rights

The argument of this paper has been that social rights should partially be conceived as a species of political right. I sought to explore the possibilities that justiciable socio-economic rights offer to ensure that the poor can participate and that their interests are adequately represented in the decisions of representative institutions. I sought to show how the constitutionalisation of these rights places the interests of the poor as an important priority within the political system; it was also argued that multiple institutions are necessary to ensure these rights are enforced and to address the problem of ensuring adequate representation of the interests of the poor. I sought to show, in the last part of the paper, how social rights have in fact already begun to function in this

¹⁰⁰ See B Ray 'Evictions, Aspiration and Avoidance' (2013) 5 *Constitutional Court Review* (forthcoming)

¹⁰¹ See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 278-279.

¹⁰² See K Mclean 'Housing' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS 07-06) 55-14 – 15-26.

manner through examining the role of courts specifically in adjudicating socio-economic rights. An attempt was made to re-read some of the Constitutional Court cases to highlight the political rights dimension of these social rights cases. I then sought to consider some changes in the court system and approach which would enable them to perform this function even better in the future.

This paper further contributes to breaking down the traditional division between civil and political rights and socio-economic rights. The literature has often addressed the socio-economic dimensions of civil and political rights;¹⁰³ yet, it is rarer to find a defence of social rights that connects them so intimately with the very core justification for political rights. This paper does not seek to contend that this is the only form of justification or their only dimension. Through highlighting the importance of this function of judicially enforceable social rights, however, it can be seen that far from harming democracy, they in fact contribute to maintaining its very integrity. The participation and representation of the poor is a difficult and fundamental problem that must be addressed in all democracies: the robust enforcement of socio-economic rights can be one prong in developing an adequate solution.

¹⁰³ S Holmes & C Sunstein *The Costs of Rights* (2000)